Judgments - Regina v Secretary of State For The Home Department Ex p Thangarasa and Regina v Secretary of State for the Home Department, Ex p Yogathas

HOUSE OF LORDS

Lord Bingham of Cornhill Lord Hope of Craighead Lord Hutton Lord Millett Lord Scott of Foscote

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT

(RESPONDENT)

EX PARTE THANGARASA (APPELLANT)

AND ONE OTHER ACTION

REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT

(RESPONDENT)

EX PARTE YOGATHAS (FC)

(APPELLANT)

AND ONE OTHER ACTION (CONJOINED APPEALS)

ON 17 OCTOBER 2002

[2002] UKHL 36

LORD BINGHAM OF CORNHILL

My Lords,

1. The appellants (Mr Yogathas and Mr Thangarasa) are young Tamils from Sri Lanka. Both have applied for asylum in this country. Both challenge decisions by the Home Secretary which, if implemented, would lead to their removal to Germany in order that their claims for asylum may be resolved there. They resist such removal because they contend that their claims would not be as fully and favourably considered in Germany as they would here. While the thrust of their respective cases is thus similar, the legal basis is different because (for reasons of timing) they are subject to different statutory regimes in this country.

2. In Mr Yogathas' case the crucial question is whether the Home Secretary acted lawfully in certifying, as he did, under section 2(2)(c) of the Asylum and Immigration Act 1996 that the government of Germany would not send Mr Yogathas to Sri Lanka otherwise than in accordance with the 1951 Geneva Convention Relating to the Status of Refugees as amended by the 1967 Protocol to the Convention. In Mr Thangarasa's case the crucial question is whether the Home Secretary acted lawfully in certifying as manifestly unfounded, as he did under section 72(2)(a) of the Immigration and Asylum Act 1999, Mr Thangarasa's allegation that the Home Secretary, in making his removal decision, had acted in violation of Mr Thangarasa's human rights. These challenges to the Home Secretary's certificates were rejected at first instance by Richards J and Collins J respectively, and also by the Court of Appeal (Chadwick and Laws LJJ and Sir Anthony Evans), in a judgment in the two conjoined appeals given by Laws LJ.

3. Since the facts giving rise to these appeals, and the relevant legislation, are summarised in the opinions of my noble and learned friends Lord Hope of Craighead and Lord Scott of Foscote, whose summaries I gratefully adopt and need not repeat, I can go straight to the issues in the two appeals, which must be considered separately.

Mr Yogathas

4. This appellant contends that if he is removed to Germany his application for asylum will be prejudiced, as compared with its treatment in the United Kingdom, for four main reasons:

> (1) The German courts and authorities, unlike those in the UK and most other countries, do not recognise as a refugee one who is a victim of persecution by non-state agents which the state is powerless to prevent. Thus the victim of LTTE persecution in the north of Sri Lanka, where the government's writ does not run, is not regarded in Germany as a refugee.
> (2) The German courts and authorities apply a more stringent test than those in the UK when considering (if they do) whether it is reasonable to return an applicant for asylum to a part of his home country other than that in which he is liable to suffer persecution.
> (3) Applicants for asylum, whether successful or not, enjoy less ample rights in Germany than in the UK.
> (4) German courts and authorities, unlike those in the UK, will pay no attention to the ill-treatment meted out by police officers in Colombo to Tamils who are returned there.

5. The House had occasion to consider the first of these contentions in *R v Secretary of State for the Home Department Ex parte Adan; R v Secretary of State for the Home Department Ex parte Aitseguer* [2001] 2 AC 477 and found that a difference of interpretation existed. Since there could in principle be only one true interpretation of the Geneva Convention (page 516), since the true interpretation was that upheld by the House in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 (page 519F), since the true interpretation was not that accepted in Germany and France (page 508G), and since it was accepted that this difference of interpretation would probably lead to the return of the applicants to countries where they might face torture and death (page 512G), the House upheld the Court of Appeal's decision quashing the Home Secretary's certificates under section 2(2)(c) of the 1996 Act. Although a question was raised whether there might be alternative forms of protection available to protect the applicants in Germany and France, and this question was not ruled to be irrelevant, it was not discussed or resolved (pages 512G, 514H, 520F). In the present case this aspect was fully considered, both by the judge (particularly in paragraphs 14-19 of his judgment) and by the Court of Appeal (particularly in paragraphs 20-24). The conclusion reached was that even if, because of the different interpretation of the convention in Germany, the appellant would not be granted asylum under article 16a of the Basic Law and section 51 of the Aliens Act, he would be protected under section 53(6) of the Aliens Act.

6. The appellant's second contention relates to what has been called, not very happily, "internal flight". I agree with Lord Hope and Lord Scott that "internal relocation" is a better expression because it focuses attention on the real question, which is whether a person liable to persecution in one part of the country would be adequately protected by the state if relocated in another part to which he would in practice be returned. The judge concluded on the evidence that the German authorities would consider this aspect (paragraphs 30-36 of his judgment) and that while there were differences between the tests applied in Germany and the UK, the German test being more stringent than the British (paragraph 50(i)), the differences were not so great as to compel the conclusion that removal of the appellant to Germany would give rise to a real risk that he would be sent back to Sri Lanka or elsewhere otherwise than in accordance with the convention (paragraph 58). The Court of Appeal agreed with this conclusion (paragraphs 51-55).

7. The appellant's third contention was not accepted by the judge (paragraph 17) or the Court of Appeal (paragraphs 20-21): the thrust of the convention was to protect an applicant against the risk of return to a place of potential persecution, not to protect all his other economic, social and civil rights.

8. The appellant's fourth contention was rejected by the judge (paragraphs 21-23) and the Court of Appeal (paragraphs 25-29) on the ground that the evidence showed a general similarity of approach by the authorities in both countries.

9. Nothing in the careful and detailed judgments of the judge and the Court of Appeal throws doubt on the fundamental principle enunciated by the House in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 at 531F:

> "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may

> put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

The same is true of a decision which may expose the applicant to the risk of torture or serious ill-treatment. But the judge and the Court of Appeal were in my opinion right to give weight, consistently with that fundamental principle, to two important considerations. The first is that the Home Secretary and the courts should not readily infer that a friendly sovereign state which is party to the Geneva Convention will not perform the obligations it has solemnly undertaken. This consideration does not absolve the Home Secretary from his duty to inform himself of the facts and monitor the decisions made by a third country in order to satisfy himself that the third country will not send the applicant to another country otherwise than in accordance with the convention. Sometimes, as notably in *Adan and Aitseguer* [2001] 2 AC 477, he will be unable properly to satisfy himself. But the humane objective of the convention is to establish an orderly and internationally-agreed regime for handling asylum applications and that objective is liable to be defeated if anything other than significant differences between the law and practice of different countries are allowed to prevent the return of an applicant to the member state in which asylum was, or could have been, first claimed. The second consideration is that the convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it.

10. Despite the sustained argument of Mr Gill QC on behalf of this appellant, I am not persuaded that the judge or the Court of Appeal erred in their legal reasoning or in their assessment of the evidence before them. For these reasons I shared the conclusion, announced at the end of the hearing, that this appeal should be dismissed.

Mr Thangarasa

11. In challenging the Home Secretary's certificate given under section 72(2)(a) of the 1999 Act, this appellant faces certain initial problems, two factual and two legal. The first factual problem is that after leaving the north of Sri Lanka the appellant spent about a year in Colombo, which weakens his claim that he will be subject to ill-treatment if returned to Colombo. The second is that he was granted asylum in Germany in 1992, and lived in that country as a refugee for some seven years, which weakens his contention that his claim to asylum will not be properly considered by the German authorities. The first legal problem is that Parliament has enacted, in section 11(1)(b) of the 1999 Act, a statutory presumption that a member state (such as Germany) is to be regarded as a place from which he will not be sent to Sri Lanka otherwise than in accordance with the Geneva Convention. Thus the argument which succeeded in *Adan and Aitseguer* [2001] 2 AC 477 is effectively blocked. But this does not deprive the subject or proposed subject of a removal order of all redress. The possibility of a challenge on human rights grounds is preserved by section 65 of the 1999 Act, as was no doubt necessary if that Act was to be compatible with the obligations of the United Kingdom under the European Convention on Human Rights. The breach of human rights must, in this case, relate to the return (or the decision to

return) the appellant to Germany. Since it is not suggested that the appellant will be at risk of ill-treatment in Germany, he must in practice show that there are substantial grounds for believing that if he is sent back to Germany there is a real risk that he will be sent back to Sri Lanka in circumstances giving rise to a real risk of a breach of article 3 of the European Convention.

12. At this point the appellant confronts his second and most formidable legal problem: the permissibility, under the European Convention, of removing from the United Kingdom to Germany a Tamil asylum applicant seeking to resist return to Sri Lanka was the very issue in the European Court of Human Rights in *TI v United Kingdom* [2000] INLR 211, and it was decided against the applicant. The proposed removal was governed by the 1996 and not the 1999 Act, but the issue before the court was essentially the same as in the present case. The complaints of the applicant, summarised in the judgment of the court at pages 224-225, are similar to those of this appellant. He complained that, because of the view taken in Germany of acts by non-state agents, there was a gap in the protection available to him in Germany, which could lead to a real risk of ill-treatment if he were returned to Sri Lanka. The court received a number of reports and also received submissions by the applicant, the governments of the United Kingdom and Germany and the United Nations High Commissioner for Refugees. In the result, the court doubted whether the applicant's claim to asylum in Germany would be granted and doubted whether his claim under section 53(4) of the Aliens Act would be successful (page 230). But it concluded overall that the gap in the protection available to the applicant was more apparent than real (page 230) and concluded, having regard to the practical application of section 53(6), that no real risk had been established that Germany would expel the applicant to Sri Lanka in breach of article 3 (page 231). The German government accepted that if all else failed the applicant could apply to the European Court, and the government would scrupulously comply with any request by that court to suspend execution of a deportation order (page 227).

13. The European Court's decision in *TI* was available to the Home Secretary when he decided to direct the removal of the appellant and when he gave his certificate under section 72(2)(a). Unless there were grounds of substance for distinguishing that authority it justified his decision. Neither the judge nor the Court of Appeal found such grounds to distinguish it, and Mr Gill has not persuaded me that they were wrong.

14. Before certifying as "manifestly unfounded" an allegation that a person has acted in breach of the human rights of a proposed deportee the Home Secretary must carefully consider the allegation, the grounds on which it is made and any material relied on to support it. But his consideration does not involve a full-blown merits review. It is a screening process to decide whether the deportee should be sent to another country for a full review to be carried out there or whether there appear to be human rights arguments which merit full consideration in this country before any removal order is implemented. No matter what the volume of material submitted or the sophistication of the argument deployed to support the allegation, the Home Secretary is entitled to certify if, after reviewing this material, he is reasonably and conscientiously satisfied that the allegation must clearly fail.

15. For these reasons I shared the conclusion, announced at the end of the hearing, that this appeal also should be dismissed.

16. In both appeals I am in general agreement with the reasons given by Lord Hope, Lord Hutton and Lord Scott, but I share the reservation expressed by Lord Hutton in paragraph 75 of his opinion.

LORD HOPE OF CRAIGHEAD

My Lords,

17. The appellants are both Tamil asylum seekers from Sri Lanka. The first country in the European Union which they entered was Germany, where they both applied for asylum. The treatment which their cases received initially in Germany was different as they entered that country in different years. The years when they arrived in the United Kingdom and sought asylum here are also different, with the result that the legislation under which their cases have been dealt with is not the same. Although there is some common ground between them, it is important to keep in mind these differences. My noble and learned friend Lord Scott of Foscote has set out the facts, and I gratefully adopt his account of them. For convenience I wish to add only this brief summary.

18. Yogathas entered Germany in March 1999. His application for asylum was refused and an appeal against that decision was unsuccessful. In November 1999 he came to the United Kingdom, where he again applied for asylum. The legislation which relates to his case is to be found in section 2 of the Asylum and Immigration Act 1996 ("the 1996 Act"). This section, which has now been repealed, dealt with the removal of an asylum seeker to a safe third country. That could be done where the Secretary of State certified that in his opinion the three conditions mentioned in section 2(2) were fulfilled: non-nationality, safety and non-*refoulement*. The non-*refoulement* condition in section 2(2)(c) was designed to meet the United Kingdom's convention obligations under article 33 of the Convention relating to the Status of Refugees of 28 July 1951 ("the Geneva Convention"), as amended by the New York Protocol of 31 January 1967. It required him to certify that the government of the third country or territory would not send the applicant to another country or territory otherwise than in accordance with the Convention. Rule 345 of the Immigration Rules 1994 (HC 395) provides that , in a case where the Secretary of State is satisfied that the conditions set out in section 2(2) are fulfilled, he will normally refuse the asylum application and issue a certificate under section 2(1) of the 1996 Act without substantive consideration of the applicant's claim to refugee status. That is what happened in Yogathas's case. On 20 July 2000 the Secretary of State informed him that Germany had accepted responsibility for his case under the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (1997) (Cm 3806) ("the Dublin Convention"), which was entered into on 15 June 1990 and came into force on 1 September 1997. He also certified under section 2(1) of the 1996 Act that in his opinion the conditions set out in section 2(2) were fulfilled in his case. The question is whether, having regard to the condition about non-*refoulement*, the Secretary of State was entitled to issue that certificate.

19. Thangarasa entered Germany in 1992. His application for asylum was granted on appeal, but in 1999 it was decided that as he could be returned to Colombo he was no longer to be regarded as a refugee. He arrived in the United Kingdom in November 2000. The legislation that applies to his case is to be found in the Immigration and Asylum Act 1999 ("the 1999 Act"), the relevant parts of which came into force on 2 October 2000. Section 11(1) of that Act prevents the removal of an asylum seeker to another Member State under the Dublin Convention from being challenged on the basis that the other Member State does not meet the requirements of the Geneva Convention. Section 11(2) provides a person may be removed from the United Kingdom without a substantive consideration of his claim for asylum if the Secretary of State certifies that a Member State of the EU has accepted that, under standing arrangements, it is the responsible State in relation to the claimant's claim. The standing arrangements to which this subsection refers are currently those set out in the Dublin Convention. A right of appeal against the Secretary of State's certificate is provided by section 71 on the ground that the conditions applicable to it were not satisfied when it was issued. That right of appeal has not been invoked in this case. It cannot be exercised while the person is in this country: section 72(2)(b). In any event the conditions are of such a nature that cases worth taking to appeal on this ground are likely to be very rare. More important is the right of appeal to an adjudicator under section 65 on the ground that the decision as to the claimant's entitlement to remain in the United Kingdom was taken in breach of his human rights. But this right of appeal is excluded if the Secretary of State certifies under section 72(2)(a) that the allegation that a person has acted in breach of the claimant's human rights is manifestly unfounded. The Secretary of State has so certified in this case. The question is whether, having regard to article 3 of the ECHR, he was entitled to issue that certificate.

20. It can be seen from this summary that the certificates which are under challenge in each case are different. In Yogathas's case the decision which is under challenge is the decision to remove him under the Dublin Convention to Germany. The question to which the Secretary of State had to address his mind in his case was whether Germany could properly be regarded as a safe third country. In Thangarasa's case two decisions were taken. The first was the decision to remove him under the Dublin Convention to Germany. But the effect of section 11(1) of the 1999 Act is that this decision cannot be challenged on Geneva Convention grounds, so the question whether Germany can properly be regarded as a safe third country does not arise. The second decision was that the allegation that the decision to remove him to Germany was in breach of his human rights grounds was manifestly unfounded. It is the second decision, relating to issue of human rights, which is under challenge in his case.

Background

21. It may help to set the scene for an examination of the application of our own domestic legislation to these two cases if I were to outline the various international instruments which provide the background to these enactments.

22. The Geneva Convention, which is sometimes (and perhaps more accurately) referred to as "the Refugee Convention", was adopted in recognition of the profound social and humanitarian nature of the problem of refugees resulting from the Second World War. Its aim was to provide effective measures to deal with the problem of

refugees as defined by article 1A(2), to prevent it becoming a cause of tension between States and to assure refugees the widest possible exercise of the fundamental rights and freedoms affirmed by the Universal Declaration of Human Rights of 1948. But there were some significant gaps. It did not lay down any rules as to which State ought to provide protection, nor did it attempt to set out the procedures to be adopted by the Contracting States for granting and withdrawing refugee status. It appears to have been assumed that most refugees would be protected in neighbouring countries in the same region.

23. But the Geneva Convention did contain a prohibition against the expulsion or return ("*refoulement*") of a refugee. This is now firmly established as one of the fundamental principles of international refugee and asylum law. Article 33 states:

> "(1) 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.
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

24. Among the rights and freedoms declared by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") are the right to life declared by article 2, the right not to be subjected to torture or to inhuman or degrading treatment or punishment declared by article 3 and the right to liberty and security of the person declared by article 5. All the Member States in the European Union are signatories to the ECHR. They are obliged by article 1 to secure to everyone within their jurisdiction the rights and freedoms which it defines. It follows that every person seeking asylum in any of the Member States of the European Union is entitled to the protection of the ECHR. He is entitled to an effective remedy before a national authority if any of his rights and freedoms as set forth in it are violated: article 13.

25. If an effective remedy is not afforded to the asylum seeker in the domestic courts, he has the right of individual petition to the European Court of Human Rights. What this may involve is illustrated by *Vilvarajah v United Kingdom* [1991] EHRR 248. The European Court observed in that case at p 286, para 102 that the Contracting States had the right, as a matter of well-established international law and subject to their treaty obligations including article 3 of the ECHR, to control the entry, residence and expulsion of aliens, and that the right to political asylum was not contained in the Convention or its Protocols. On the other hand, as was noted in the same case in para 103, the expulsion of an asylum seeker by a Contracting State may give rise to an issue under article 3 where substantial grounds are shown for believing that the person concerned faces a real risk of being subjected to torture or degrading treatment or punishment in the country to which he is returned: *Soering v United Kingdom* (1989) 11 EHRR 439, 467-468, para 88; *Cruz Varas v Sweden* (1992) 14 EHRR 1, 33-34, paras 69-70.

26. By the end of the 1980s the Member States of the European Union were faced with a rising number of applications for asylum. The burden of dealing with these applications, many of which turned out after examination to be unfounded, was causing increasing concern to the national authorities. Among other problems was the fact that the large number of applications which were unfounded was delaying the recognition of refugees who were in genuine need of protection. In the United Kingdom applications for asylum, which had been in the low hundreds annually in the early 1970s, were already in the low thousands annually by the 1980s and were increasing year by year. The whole issue was also becoming increasingly politically sensitive, and various ad hoc arrangements were entered into with a view to increasing co-operation between the governments of the Member States in immigration and asylum law: see Elspeth Guild, *Towards an European asylum law: developments in the European Community* [1993] Imm and Nat L & P 88.

27. The creation of an internal market in which people could move freely within between member states created a further problem. It led to a concern that asylum seekers might seek to abuse the system by lodging applications for asylum in two or more member states. The Dublin Convention sought to address this problem by establishing a framework to ensure that a claim for asylum was heard only once in the EU. It established the principle that the State through which the applicant for asylum entered the EU is responsible for dealing with the application, even if it is lodged in another Member State. Under this system a State is responsible if it is the first point of entry into the EU of an asylum seeker who crossed the border into a Member state from a non-Member State without complying with its entry requirements

28. An important step towards the harmonisation of procedures was taken at a meeting in London on 30 November and 1 December 1992 of ministers of the Member States. The context for that meeting was provided by the Treaty on European Union which had been signed in Maastricht on 7 February 1992. Article K.1 in Title VI of the Maastricht Treaty provided that, for the purposes of achieving the objectives of the Union, Member states were to regard various areas in the fields of justice and home affairs as matters of common interest. These included asylum policy. At their meeting the ministers approved a resolution on manifestly unfounded applications for asylum: Council Press Release 10518/92; [1993] Imm and Nat L & P 31: ("the 1992 Resolution").

29. The 1992 Resolution, which was endorsed at a meeting of the European Council in Edinburgh in December 1992, was one of the products of an ad hoc intergovernmental programme on asylum policy which had been established in 1986 under the UK Presidency of the Community: Guild, pp 89-90. The preamble stated stated that the Member States were determined, in keeping with their common humanitarian tradition, to guarantee adequate protection to refugees in accordance with the Geneva Convention, and it reaffirmed their commitment to the Dublin Convention. It also stated that the ministers were aware that a rising number of applicants for asylum in the Member States were not in genuine need of protection within the Member States within the terms of the Geneva Convention, and that they were concerned that such manifestly unfounded applications were overloading asylum determination procedures, delaying the recognition of refugees in genuine need of protection and jeopardising the integrity of the institution of asylum.

30. In paragraph 1(a) of the main text, under the heading "Manifestly unfounded applications", the 1992 Resolution declared:

> "An application for asylum shall be regarded as manifestly unfounded because it clearly raises no substantive issue under the Geneva Convention and the New York Protocol for one of the following reasons:
>
> - there is clearly no substance to the applicant's claim to fear persecution in his own country (paragraphs 6 to 8); or
> - the claim is based on deliberate deception or is an abuse of asylum procedures (paragraphs 9 and 10)."

In paragraph 2 it was stated that Member States might include applications which fell within paragraph 1 within an accelerated procedure which need not include full examination at every level and that they might also operate admissibility procedures under which applications might be rejected very quickly on objective grounds. Paragraphs 6 to 8 set out various circumstances in which Member States might consider that the terms of the application raised no question of refugee status within the terms of the Geneva Convention. In paragraph 12 it was stated that Ministers agreed to seek to ensure that their national laws were adapted, if need be, to incorporate the principles of the Resolution at the latest by 1 January 1995.

31. The 1992 Resolution had no legal force, as it was not reproduced in a Community instrument which was binding on Member States under article 189 of the EC Treaty (now article 249 EC). Nevertheless it was an important declaration of policy, and it forms part of the background against which the legislation with which these appeals are concerned was enacted.

"Manifestly unfounded"

32. The use of the expression "manifestly unfounded" in this context appears to have its origin in the work of the ad hoc intergovernmental programme which was endorsed by the 1992 Resolution. It was, of course, already familiar in the context of human rights, as article 35.3 of the ECHR provides that applications to the European Court of Human Rights which are manifestly ill-founded may be declared inadmissible. It is clear from the way in which the expression was used in the 1992 Resolution that it was intended to describe those applications which, because they were clearly without substance, were suitable for treatment by means of an accelerated procedure without compromising the obligations of Member States under the Geneva Convention.

33. This expression was not used in our own domestic legislation until it made its first appearance in section 72(2)(a) of the 1999 Act. It is used here for a purpose which is similar to that envisaged by the 1992 Resolution. The intention of the legislation which was introduced by the 1999 Act is that the removal of an asylum seeker to another Member State under the Dublin Convention should be effected without delay. Substantive consideration is to be given to his application for asylum in the other Member State and not in this country. Provision is made, in recognition of the obligations of the United Kingdom under the ECHR, for an appeal on human

rights grounds. The purpose of the legislation would be frustrated if the asylum seeker could ensure that he remained in this country pending a full review on the merits of an allegation of a breach of his human rights which was clearly without substance.

34. It is for this reason that the process which is envisaged is best described as a screening process, as my noble and learned friend Lord Bingham of Cornhill has observed. Nevertheless the test which section 72(2)(a) of the 1999 Act has laid down recognises the level of scrutiny that is required. By adopting the language of the international instruments Parliament has made it clear that the issue as to whether the allegation is manifestly unfounded must be approached in a way that gives full weight to the United Kingdom's obligations under the ECHR. The question to which the Secretary of State has to address his mind under section 72(2)(a) is whether the allegation is so clearly without substance that the appeal would be bound to fail.

The Dublin Convention

35. Although the two cases are different, at the heart of each of them is the Dublin Convention. Its purpose was to achieve an orderly system for dealing with asylum cases in the European Union. But it too is not to be regarded as having relieved Member States of their obligations under the Geneva Convention and the ECHR. Article 63 of the Consolidated Version of the Treaty establishing the European Community provides that the Council shall adopt various measures on asylum in accordance with the Geneva Convention. These are to include criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the member states. By article 2 of the Dublin Convention the Member States reaffirmed their obligations under the Geneva Convention, as amended by the New York Protocol, with no geographic restriction as to the scope of those instruments and their commitment to co-operating with the services of the United Nations High Commissioner for Refugees in applying those instruments.

36. It is worth noting that article 18 of the EU Charter of Fundamental Rights, which deals with the right to asylum, adopts the same approach. It provides:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

The Charter also restates the principle of non-*refoulement*, respect for which is essential if the guarantees provided by the Geneva Convention are to be preserved. Article 19(2) provides, in language which incorporates the wording of article 3 of the ECHR:

> "No one shall be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

37. The Dublin Convention is not without its critics. It has given rise to various problems in practice: Elspeth Guild, *Asylum and refugees in the EU. A practitioner's*

view of developments (European Information Service, Issue 215, December 2000). The principle that an asylum seeker should only be able to have his case considered in one Member State within the EU has not been questioned. But difficulty has been experienced in identifying the State which is to have the responsibility of dealing with the application. This in turn has made it more difficult for the authorities to enforce the return of asylum seekers to other Member States in the EU. These are the problems which the legislation at issue in these appeals was designed to address.

The 1996 Act: Yogathas's case

38. Yogathas's complaint is that his removal to Germany would be in breach of the principle of non-*refoulement*. He claims that he has a well-founded fear of persecution by both the state authorities and the LTTE if he were to be returned to Sri Lanka. His contention is that the German law relating to persecution differs from that of the United Kingdom, and that his claim for asylum will not be considered in accordance with the Geneva Convention if he is returned to that country.

39. It is not disputed that there is a divergence of state practice as to the interpretation of the Convention: see *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477, 512 per Lord Steyn. The majority of states, including the United Kingdom, do not limit persecution to conduct which can be attributed to a state. A minority of states, including Germany, do so limit it, with the result that a well founded fear of persecution by non-state agents is not regarded by them as engaging the Convention. The German approach was described by the European Court in *TI v United Kingdom* [2000] INLR 211, 222:

> "According to the constant case-law of the German Constitutional Court, recognition as a political refugee requires a risk of persecution emanating from a State- or quasi-State-like authority. Persecution by private organisations or persons qualifies only if it can be attributed to the State in that the State supports or passively tolerates the persecution by private groups or exceptionally if the State does not provide adequate protection due to its inability to act as a consequence of existing political or social structures."

40. The Secretary of State accepts that, as a matter of legal theory, a person who feared persecution from the LTTE in the north of Sri Lanka could be returned to that country by the German authorities on the basis that such a fear could not be attributed to the state. He relies instead on German practice in relation to the issue of what is known as "internal flight" (perhaps better described as "internal relocation": see *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449) - that is to say, whether the home state can afford a safe haven or an alternative place to which the applicant can go and stay without having a well-founded fear of persecution for a Convention reason.

41. The parameters within which the argument must be considered are these. The invariable practice of the German authorities is to return Sri Lankan Tamils to Colombo, not to the north where they would be most obviously at risk of persecution by the LTTE. Yogathas claims that this is of no help to him because he will be at risk in Colombo of ill-treatment by the army or by the police, of which he says he has a well founded fear. He also claims that conditions in Colombo will be unduly harsh for

him because he will be at a disadvantage in relation to his medical, housing and social needs. He says that this is not an alternative place to stay of which he can reasonably be expected to avail himself.

42. Under German law anybody persecuted on political grounds has a right of asylum: article 16a(1) of the Basic Law. Section 51 of the Aliens Act provides that a foreigner cannot be deported to a State in which his life or his liberty is threatened on grounds of his race, religion, nationality, his membership of a certain social group or because of his political convictions. But decisions of the German Constitutional Court have established that for these provisions to apply it must be shown that there is a risk of persecution which can be attributed to the State. If this requirement is not met, as is likely to be the position in this case, the next question is whether the applicant's deportation would be unlawful under section 53(4) of the Aliens Act. This enables an applicant to escape deportation if he faces a serious risk of treatment in the country to which he is to be removed which is contrary to article 3 of the ECHR. But the German Federal Administrative Court, declining to follow the decision of the European Court in *Ahmed v Austria* [1998] INLR 65, has held that here too it must be shown that there is a serious risk of inhuman or degrading treatment or punishment by the State or a State-like authority. This leaves section 53(6) of the Aliens Act, which provides that deportation of a foreigner to another State can be avoided if there exists for that foreigner "a considerable definite danger for body, life or liberty in that state."

43. The critical question is therefore whether in applying section 53(6) of the Aliens Act to his case the German authorities will, as Yogathas says, ignore his fear of persecution by non-state agents when considering the availability of internal relocation or whether, as the Secretary of State says, they will properly take account of it.

44. Mr Gill QC for Yogathas accepted that the question of internal relocation was capable of being considered under section 53(6) of the Aliens Act. But he maintained that the German authorities would decline to attribute to the State persecution which resulted from isolated acts by the police and other officials in excess of their functions. He also said that they applied a much harsher standard to this issue than was appropriate, as their approach did not properly reflect the test to be applied in considering whether there was an internal relocation alternative. There was therefore a real risk of a different outcome in Germany from that which could be expected if his claim were to be dealt with in the United Kingdom.

45. Both Richards J and the Court of Appeal rejected these arguments, and in my opinion they were right to do so for the reasons which they gave. I would take as my starting point the summary of German practice which is contained in *TI v United Kingdom* [2000] INLR 211 at pp 221-3. After describing the preconditions which must be met for the application of sections 51 and 53(4) of the Aliens Act, the European Court said this at p 222:

> "If the preconditions for the application of section 53(4) are not met, protection may be granted under section 53(6) of the Aliens Act, which grants a discretion to the authorities to suspend deportation in case of a substantial danger for life, personal integrity or liberty of an alien. This applies to concrete individual danger resulting from either State or private action. It does

> not require an intentional act, intervention or State measure and covers risks for life resulting from adverse living conditions, lack of necessary medical treatment etc (FAC 9 September 1997, InfAusIR 1998, 125)…
> In the first 6 months of 1999, [s 53(6)] was applied to 24 Sri Lankan nationals in respect of serious individual risks of ill-treatment which could not be attributed to the Sri Lankan State. This included the case of a Tamil whose scars placed him in a real danger of being apprehended by the security forces and submitted to renewed torture as a person suspected of LTTE involvement (Dresden Administrative Court decision of 16 November 1998, 5 K 30493/96)."

46. I agree with Richards J, at paragraph 23 of his judgment, that this summary does not reveal any material difference of approach from that in the United Kingdom. In *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 it was held that, in order to satisfy the fear test in a non-state agent case, the applicant must be able to show that the persecution which he fears consists of acts of violence or ill-treatment against which the State is unable or unwilling to provide protection according to a practical standard which takes proper account of the duty which it owes to its own nationals. The issue to which the Secretary of State would have had to direct his mind if he were dealing with the claim in this country is essentially a practical one, as to the outcome which was to be expected if the appellant were to be returned to his home State. The words "concrete individual danger", irrespective of whether it results from State or private action, which the German Federal Administrative Court has used reflect this approach. So too does the recognition by the Dresden Administrative Court that risks resulting from adverse living conditions and other such factors must be taken into account.

47. As Richards J said in paragraph 15, the focus in section 2(2)(c) of the 1996 Act is on the end result rather than the precise procedures by which the result was achieved. The question is whether the government of the third country "would not" send the person to another country or territory otherwise than in accordance with the Geneva Convention. The concern is essentially a practical one rather than one which is theoretical. In *R v Secretary of State for the Home Department, ex p Canbolat* [1997] 1 WLR 1569, 1577 Lord Woolf MR said that the statutory test must be subject to the implication that it is permissible to grant a certificate when there exists a system which will, if it operates as it usually does, provide the required standard of protection for the asylum seeker. The European Court's summary suggests that the Secretary of State was entitled to conclude that, as matter of practical reality, there was no real risk that the German authorities would send Yogathas back to Sri Lanka in breach of the Geneva Convention.

48. But the matter does not end there. The Secretary of State was also able to show that he based his decision on a state of knowledge resulting from his own inquiries as to the practice in Germany and from his experience of constantly monitoring the performance by Member States of their obligations in similar cases. Witness statements were lodged by one of his officials, Ian Taylor, who was able to say from his own knowledge that where the risk of persecution is alleged to come from non-state agents the German authorities consider, as a matter of practice, whether there is a viable internal relocation alternative. After conducting further inquiries in Germany he said that he had obtained confirmation from the German authorities that there was

normally no expulsion of rejected asylum seekers to Sri Lanka without considering the availability of internal relocation, that he had been told by an official of the Federal Office for the Recognition of Foreign Refugees that he was aware of no case where this had happened and that the information which he had obtained tended to confirm that in practice an asylum seeker would not be returned to Colombo without consideration of internal relocation whatever the source of persecution alleged.

49. For these reasons I would hold that it has not been shown that the Secretary of State was not entitled to issue a certificate under section 2(2) in Yogathas's case. The situation with which Yogathas would be faced in this case under section 53(6) of the Aliens Act is, of course, entirely different from that which arose in *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477. It was common ground in that case that, if the appellants were to be sent back to the countries from which they had entered the United Kingdom, they would probably be sent back to their countries of origin. This was simply because the conduct which gave rise to the fear of persecution would not be regarded as conduct for which the state was accountable. The House did not consider the question whether other forms of protection than the grant of asylum were available in the third countries.

The 1999 Act: Thangarasa's case

50. In response to the decision of the Secretary of State under section 11(2) of the 1999 Act that he should be removed from the United Kingdom to Germany, Thangarasa claimed that his removal would be a breach of his human rights. The Secretary of State certified under section 72(2)(a) that this allegation was manifestly unfounded. The question is whether he was entitled so to certify.

51. Guidance as to how the issue raised by article 3 of the ECHR should be approached has been provided by the European Court. In *Cruz Varas v Sweden* (1991) 14 EHRR 1, 37 para 82 it asked itself whether substantial grounds had been shown for believing that the person's expulsion would expose him to a real risk of being subjected to inhuman or degrading treatment or punishment on his return to his home country, and in paragraph 83 it set out the principles which were relevant to the assessment of the risk of ill-treatment. In *Vilvarajah v United Kingdom* [1991] 14 EHRR 248, 289, para 108 the Court said:

> "The Court's examination of the existence of a real risk of ill-treatment in breach of article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka in the light of the general situation there in February 1988 as well as on their personal circumstances."

The question for the Secretary of State was whether, bearing in mind these principles, the allegation by Thangarasa that there was a breach of his human rights was so clearly without substance that it was bound to fail.

52. It is hard to fault the decision of the Secretary of State to issue a certificate under section 72(2)(a) on this ground in the light of the decision of the European Court in *TI v United Kingdom* [2000] INLR 211 that the application which was made in that case was inadmissible. TI's case was not dealt with under the 1999 Act, but the issues which arose there are directly relevant to Thangarasa's case. TI too was a Tamil national of Sri Lanka. He arrived in the United Kingdom having previously been refused asylum in Germany. The Secretary of State issued a certificate under section 2 of the 1996 Act directing that he be returned to Germany. TI's argument was that he would be unable to obtain a rehearing of his claim to asylum in Germany, that he was at a real risk of torture and ill-treatment if he were to be returned to Sri Lanka and that his removal to Germany in these circumstances would amount to a violation of his rights under article 3 of the ECHR. His complaint was rejected under article 35(3) and (4) of the Convention as manifestly ill-founded by the European Court. The only material difference between Thangarasa's case and that of TI is that TI disclosed the grounds on which his initial application for asylum had been refused which included an adverse finding as to his credibility, whereas Thangarasa has not done so.

53. The European Court found at pp 230-231 that there was considerable doubt that TI would be granted a follow-up asylum hearing on his return to Germany or that his second claim to asylum would be granted. It also held that there was little likelihood of his claims under article 53(4) of the Aliens Act being successful. But it held that this apparent gap in protection resulting from the German approach to non-State agent risk was met, "at least to some extent", by the application by the German authorities of section 53(6). The critical passage in its judgment is at p 231, where the Court said:

> "It is true that the Government have not provided any example of section 53(6) being applied to a failed asylum-seeker in a second asylum procedure. The Court acknowledges that the previous court decision heavily impugning his credibility is a factor which would also weigh against a claim for protection in this context. However, on the basis of the assurances given by the German Government concerning its domestic law and practice, the court is satisfied that the applicant's claims, if accepted by the authorities, could fall within the scope of section 53(6) and attract its protection. While it may be that on any re-examination of the applicant's case the German authorities might still reject it, this is largely a matter of speculation and conjecture. There is, furthermore, no basis on which the Court could assume in this case that Germany would fail to fulfil its obligations under article 3 of the [Convention] to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country. To the extent, therefore, that there is the possibility of such a removal, it has not been shown in the circumstances of this case to be sufficiently concrete or determinate."

54. The Court then added this further comment at p 231:

> "Finally, as regards the applicant's arguments concerning the high burden of proof placed on asylum-seekers in Germany, the court is not persuaded that this has been substantiated as preventing meritorious claims in practice. It notes that this matter was considered by the English Court of Appeal and rejected. The record of Germany in granting large numbers of asylum claims

gives an indication that the threshold being applied in practice is not excessively high."

55. The fact that the European Court came to that conclusion in TI's case is not, of course, conclusive of the issue in Thangarasa's case. The passage which I have just quoted is carefully worded, and in any event each case must be approached by the Secretary of State on its own facts. So it does not follow inevitably from the fact that TI's complaint of a breach of his rights under article 3 of the ECHR was found to be manifestly unfounded that the Secretary of State was entitled to certify that Thangarasa's allegation that his human rights had been breached was manifestly unfounded in terms of section 72(2)(a) of the 1999 Act. But it goes a long way towards showing that this was so. It demonstrates that it is the result, rather than the route by which the decision is arrived at, that matters. It also shows that, even if the protection of section 53(6) of the Aliens Act was not available, this would still leave open the question whether the applicant was entitled to protection against removal to Sri Lanka under article 3 of the ECHR.

56. Although the German Government provided the European Court with assurances about its domestic law and practice and as to how TI's case would be dealt with if he were to be returned to Germany, it was not a party to the case. The jurisprudence of the German Constitutional Court indicates that the decision would not be regarded as binding on Germany in these circumstances. Nevertheless it is not in doubt that Thangarasa would have a right of individual petition to the European Court of Human Rights after he had exhausted all domestic remedies in Germany. Nor is it in doubt that Germany would scrupulously comply with any request by that court to suspend execution of any deportation order until his petition had been dealt with. Mr Gill did not suggest that the Court of Appeal was wrong to accept, in paragraph 65 of its judgment, the Secretary of State's submission that it is the universal practice of the German Courts and Executive to comply with judgments of the European court in proceedings to which it is a party and that there has been no case in which that court has found Germany to be in violation of article 3 in respect of the deportation of a rejected asylum seeker. These considerations seem to me to be conclusive of the issue as to whether his rights under article 3 would be at risk of being violated if he were to be returned to Germany.

57. In my opinion there are no grounds for doubting that the Secretary of State was entitled to issue a certificate under section 72(2)(a) in Thangarasa's case in these circumstances.

Conclusion

58. There is an obvious tension between the need to make use of accelerated procedures to remove those whose claims for asylum ought not to be substantively considered in this country and the protections to which genuine refugees are entitled under both the Geneva Convention and the ECHR. This places a special responsibility on the court in its examination of the decision making process. As Lord Bridge of Harwich said in *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] 1 AC 514, 531, the basis of the decision must surely call for the most anxious scrutiny.

59. The European Court has accepted that the process of judicial review, under which decisions of this kind are indeed given the most anxious scrutiny, is capable of providing an effective remedy: *Vilvarajah v United Kingdom* [1991] 14 EHRR 248, 292, para 126; *TI v United Kingdom* [2000] INLR 211, 233. In my opinion the scrutiny which the courts below gave to the decisions which are under challenge in these appeals fully measures up to this standard, and I agree with them as to the result. For these reasons, and those given by Lord Bingham and Lord Hutton with which I agree, I would dismiss the appeals.

LORD HUTTON

My Lords,

60. The background facts in these two cases and the grounds on which the two appellants bring these appeals to the House have been fully set out in the opinions of my noble and learned friends Lord Hope of Craighead and Lord Scott of Foscote and I gratefully adopt their accounts. As they have explained, the case advanced by the appellant Mr Yogathas arises under Section 2(2)(c) of the Asylum and Immigration Act 1996, ("the 1996 Act") which relates to the 1951 Convention relating to the Status of Refugees ("the Geneva Convention") and the case advanced by the appellant Mr Thangarasa arises under sections 65 and 72(2)(a) of the Immigration and Asylum Act 1999 ("the 1999 Act") which relates to the human rights declared in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and protected by section 6(1) of the Human Rights Act 1998. The issues in these appeals are whether the rights of Mr Yogathas under the Geneva Convention and the rights of Mr Thangarasa under the European Convention are violated by the decisions of the Secretary of State to direct the removal of each appellant to Germany.

61. In considering these issues it is relevant to state at the outset four principles which are established by the decision of the European Court of Human Rights ("the European Court") in *TI v United Kingdom* [2000] INLR 211. Whilst the decision in *TI v United* Kingdom relates to alleged breaches of the European Convention I consider that these principles were also of relevance in considering alleged breaches of Article 33.1 of the Geneva Convention, and as I state in paragraph 62 of this opinion I think that the obligations of the United Kingdom under Article 33.1 of the Geneva Convention when considering the removal to another country of those claiming asylum are broadly similar to its obligations under Article 3 of the European Convention. The principles established are these:

(1) The United Kingdom will be in breach of its obligations under Article 3 of the European Convention if it expels a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment contrary to Article 3 of the Convention (see page 228 A-B).

(2) The United Kingdom will also be in breach of Article 3 if it removes a person to a third country, where he will not be at risk of treatment contrary to Article 3, but where there is a real risk that he would be removed by that country to another country where he would be subjected to treatment contrary to Article 3 (see page 228 E-F).

But the United Kingdom will not be in breach of Article 3 if it sends a person to another European country where there is no real risk that that country will send him to a country where he will be subjected to Article 3 treatment. The Court stated at page 231G:

> "the court finds that it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Art 3 of the Convention. Consequently, the UK have not failed in their obligations under this provision by making the decision to remove the applicant to Germany".

Nor will the United Kingdom be in breach of Article 3 if it sends a person to another European country which will send him to a country where he would not be at real risk of being subjected to Article 3 treatment.

(3) The second principle is applicable and the United Kingdom can be in breach of Article 3 notwithstanding that the person is removed from the United Kingdom to another country pursuant to the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims (see page 228 F).

(4) The onus rests on the person alleging that his removal from the United Kingdom would constitute a breach of Article 3 by the United Kingdom to show substantial grounds for believing that he would face a real risk of being subjected to treatment contrary to Article 3 (see pages 228 B and 231 G-H).

62. I consider that the decisions of this House in *R v Secretary of State for the Home Department, Ex Parte Bugdaycay* [1987] AC 514 and *R v Secretary of State for the Home Department, Ex Parte Adan* [2001] 2 AC 477 have established broadly similar principles in respect of the United Kingdom's obligations under Article 33.1 of the Geneva Convention which provides:

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

In *Bugdaycay* at page 532D Lord Bridge of Harwich stated:

> "Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened'."

And in *Adan* at page 515C Lord Steyn stated:

> "It is accepted, and rightly accepted, by the Secretary of State that it is a long standing principle of English law that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution in the relevant sense, it would equally be unlawful to return him to a third country which it is known will return him to his country of origin."

The Appeal of Yogathas

63. The appellant, Mr Yogathas, challenges the validity of the Secretary of State's certificate under section 2(2)(c) of the 1996 Act that the government of Germany would not send him to another country or territory otherwise than in accordance with the Geneva Convention. The appellant's principal submission was that the persecution and ill-treatment to which he claims he would be subjected if he were returned to Sri Lanka would not be by authorised agents of the state but by the Tamil Tigers or by members of the security forces acting without the approval or sanction of the state. This House held in *Adan* that the only true and autonomous interpretation to be ascribed to Article 1A(2) of the Geneva Convention was that its protection extended to asylum seekers who feared persecution by those other than the state if, for whatever reason, the state in question was unable to protect them. This interpretation has been termed "the persecution theory", but the courts in Germany apply a different interpretation, termed "the accountability theory", which is that international protection under the Convention only applies if the country of the person claiming protection is responsible for, or complicit in, the persecution which the person fears. Therefore the appellant submits that as the persecution to which he claims he would be subjected in Sri Lanka does not emanate from the state a German court would rule that he is not entitled to protection under the Convention and that Article 33.1 does not apply to him. It follows that the United Kingdom would be in breach of Article 33.1 in removing him to Germany as this would result in him being removed from Germany to Sri Lanka.

64. The Attorney General on behalf of the Secretary of State submitted in reply to this argument that the reality is that, notwithstanding the application by the German courts of the accountability theory, a German court would not send the appellant to Sri Lanka if there was a real risk that he would suffer ill-treatment or persecution at the hands of the Tamil Tigers or of individual members of the security forces. The relevant provisions of German law are set out in Article 16(a)(1) of the German Basic Law and sections 51 and 53 of the German Aliens Act. Article 16(a)(1) provides:

> "Persons persecuted on political grounds enjoy the right of asylum."

Section 51(1) provides:

> "A foreigner cannot be deported to a state in which his life or his liberty is threatened on the grounds of his race, religion, nationality, his membership of a certain social group or because of his political convictions."

Section 53(4) provides:

> "A foreigner may not be deported should it appear from the application of the Convention on the Protection of Human Rights and Fundamental Liberties of 4 November 1950 (BGBI 1952 pp. 686) that the deportation is unlawful."

Section 53(6) provides:

> "Deportation of a foreigner to another state can be avoided if there exists for this foreigner a considerable definite danger for body, life, or liberty in that state."

65. In my opinion the argument advanced by the Attorney General is well founded. The judgment of the European Court in *TI v UK* gives clear guidance as to the extent of the protection afforded under German law. In the section of its judgment under the heading *German law concerning asylum-seekers and persons claiming protection,* the European Court states that because of the application by the German courts of the accountability theory an asylum seeker who claims that he will be subjected to ill treatment or persecution by persons who are not acting on behalf of the State cannot claim protection under Article 16(a) (1) or section 51 or section 53(4), but such a person can obtain protection under section 53(6). The Court stated at page 222 E:

> "If the preconditions for the application of s 53(4) are not met, protection may be granted under s 53(6) of the Aliens Act, which grants a discretion to the authorities to suspend deportation in case of a substantial danger for life, personal integrity or liberty of an alien. This applies to concrete individual danger resulting from either State or private action. It does not require an intentional act, intervention or State measure and covers risks for life resulting from adverse living conditions, lack of necessary medical treatment etc. (FAC 9 September 1997, InfAusIR 1998, 125). This provision has also been applied to civil war or war situations where the threat derived from a non-State source (Administrative Appeal Court of Baden-Württemberg decision of 11 May 1999, 6S 514/99)."

Later in its judgment the Court stated at pages 230H and 231:

> "the Court notes that the apparent gap in protection resulting from the German approach to non-State agent risk is met, to at least some extent, by the application by the German authorities of s 53(6). It appears that this provision has been applied to give protection to persons facing risk to life and limb from non-State agents, including groups acting in opposition to the Government, in addition to persons threatened by more general health and environmental risks. It has also been applied to a number of Tamils, including a young Tamil at risk of ill-treatment from security forces due to the presence of scars on his body".

66. A further submission advanced by Mr Gill QC on behalf of the appellant was that the United Kingdom would be in breach of its obligations under Article 33.1 of the Geneva Convention in removing the appellant to Germany because the German courts, applying the accountability theory, would not decide the issue of his removal to Sri Lanka on the basis of the protection to which he was entitled under the Convention and in accordance with the Convention but pursuant to the separate German domestic provision contained in section 53(6). I am unable to accept this

submission. If Germany would decide not to send the appellant to Sri Lanka because there would be a real risk that he would be persecuted or ill-treated in that country his rights under Article 33.1 are protected, notwithstanding that a German court does not directly apply Article 33.1 but applies a specific provision of German domestic law. Therefore I am in full agreement with the opinion of Richards J in paragraphs 18 and 19 of his judgment and the opinion of the Court of Appeal in paragraph 21 of its judgment that the Secretary of State is concerned under section 2(2)(c) of the 1996 Act with the practical question whether the government of the third country would send the claimant to another country in breach of the obligations imposed by the Geneva Convention and not with the legal reasoning by which, or the statutory provision under which, the court of the third country would give protection to the claimant. It is relevant to observe that in *Adan* the question before the House related only to the proper interpretation of the Geneva Convention and the protection given expressly pursuant to it and the issue of protection given under German domestic law which would, in its practical operation, provide the same safeguards as those provided by the Convention was not considered.

67. Mr Gill also submitted that when German courts considered the concept of "internal flight" (and I agree with Lord Hope and Lord Scott that "internal relocation" is a preferable term) they applied a standard which was stricter and less reasonable than that which United Kingdom courts considered was required under the Geneva Convention. Lord Scott has fully considered this submission in paragraphs 111 to 116 of his opinion and I am in full agreement with the reasons which he gives for rejecting the submission.

68. Mr Gill further submitted that the burden of proof required by the German courts appeared to be different and more strict than that required by the courts in the United Kingdom, but in my opinion this is not a material matter which can affect the outcome of these cases. In *TI v United Kingdom* the European Court stated at page 231:

> "Finally, as regards the applicant's arguments concerning the high burden of proof placed on asylum-seekers in Germany, the Court is not persuaded that this has been substantiated as preventing meritorious claims in practice. It notes that this matter was considered by the English Court of Appeal and rejected. The record of Germany in granting large numbers of asylum claims gives an indication that the threshold being applied in practice is not excessively high".

The Appeal of Thangarasa

69. The issue which arises on Mr Thangarasa's appeal is whether the Secretary of State was entitled to certify under section 72(2)(a) of the 1999 Act that his allegation that his removal to Germany would constitute a breach of his human rights under Article 3 of the European Convention was manifestly unfounded. The submissions advanced on behalf of this appellant were in large measure the same as those advanced on behalf of Mr Yogathas, namely, that because of the acceptance in Germany of the accountability theory, the appellant would not be given protection in Germany under Article 3 of the European Convention against removal to Sri Lanka

where he would be at real risk of persecution and ill-treatment from Tamil Tigers and individual members of the security forces.

70. If the question to be decided by a court was the substantive one whether the removal of the appellant to Germany would breach his human rights under Article 3 I consider, for the reasons which I have given in considering the appeal of Mr Yogathas, that the judgment of the European Court in *TI v United Kingdom* makes it clear that the removal would not constitute such a breach. But that is not the exact question which was before Collins J and the Court of Appeal and is now before this House. The question is whether the Secretary of State was entitled to certify that the appellant's allegation was manifestly unfounded.

71. Mr Gill submitted that the Secretary of State was not entitled to give such a certificate because, notwithstanding the judgment in *TI v United Kingdom*, the appellant's allegation gave rise to complex and difficult issues which were worthy of consideration by an adjudicator on an appeal to him under section 65(1) of the 1999 Act. This submission was stated in the following terms in the appellant's case:

> "whilst the Secretary of State must of course have regard to the nature and volume of the case put to him, the overriding purpose of the relevant statutory provisions of the 1999 Act is to ensure that speedy decisions are made on a limited analysis of the material. Unless it is quite obvious from a quick scrutiny that the material submitted by the applicant is complete rubbish which does not even engage the human rights issues involved in the removal, then, so long as the material reveals something of concern which may mean that the removal might be a breach of the applicant's human rights, the Secretary of State cannot say that the claim is manifestly unfounded; even though on careful scrutiny which does justice to the volume and nature of the case put to him he ultimately concludes that there will be no breach of human rights if the removal takes place".

72. I am unable to accept this submission and I am in agreement with the opinion of the Court of Appeal set out in paragraphs 57-60 of its judgment that an allegation is manifestly unfounded if it is plain that there is nothing of substance in the allegation. I further agree with the reasons given by the Court of Appeal for rejecting the submission that the Secretary of State is only entitled to give a certificate if on an initial and cursory examination of the case it is plain that there is no substance in it. Whilst the process in which the Secretary of State engages in coming to his decision will not involve as detailed a consideration of the facts and issues as would be involved in a hearing by an adjudicator under section 65 or by a court, the extent of the consideration which the Secretary of State will give to the issue will depend on the nature and detail of the arguments and the factual background presented to him by the applicant. It is relevant to observe, as did Laws LJ, that the European Court on occasions considers a case in considerable detail before holding that the applicant's complaint is manifestly ill founded, and this was the practice it followed in the case of *TI v United Kingdom* itself.

73. In coming to his decision in Mr Thangarasa's case the Secretary of State took into account not only the judgment of the European Court in *TI v United Kingdom* but also the detailed knowledge possessed by the officials of his Department as to the way

in which the German authorities and the German courts considered and determined asylum claims by nationals of Sri Lanka. This knowledge is set out in statements which were filed before the House by Mr Ian Geoffrey Taylor, a senior executive officer of the United Kingdom Immigration Service, in which he states:

> "The German Federal Office for the Recognition of Foreign Refugees, the Bundesamt für die Anerkennung Ausländischer Flüchtlinge (BAFI) is the authority in Germany for processing asylum claims lodged in Germany. The Unit which deals with transfers to and from Germany under the provisions of the Dublin Convention is part of BAFI.
> My understanding of how Germany deals with asylum applications from nationals of Sri Lanka, at a practical operational level, has been informed by considerable previous contact, at a working level, with the officials of BAFI at liaison meetings and at various international fora. My understanding of the theoretical legal perspective in Germany has been informed both by contact with those responsible for asylum policy in Germany and as a result of advice commissioned from, in particular, Professor Dr Kay Hailbronner of the University of Konstanz, who is an internationally respected expert in asylum law."

74. Where an applicant challenges in the High Court the issue of a certificate by the Secretary of State under section 72(2)(a) the question arises as to the degree of scrutiny to which the High Court should subject the decision of the Secretary of State. It is apparent that there is a degree of tension between the need to make use of an accelerated procedure to enable the arrangements under the Dublin Convention to operate effectively and the duty to recognise the human rights of a person who, once he is in the United Kingdom, is entitled to the protection given by the European Convention. In a well known passage in his judgment in *Bugdaycay* at p 531E-G Lord Bridge of Harwich said that "the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines", and he then stated that where the administrative decision under challenge is one which may put the applicant's life at risk, the basis of the decision must call for "the most anxious scrutiny". I consider that in a case where there is a challenge to a certificate under section 72(2)(a) the court must subject the decision of the Secretary of State to a rigorous examination, but the examination must be on the basis and against the background that, as I have earlier stated, the extent of the consideration which the Secretary of State will have given to the issue will have depended on the nature and details of the argument and the factual background presented to him by the applicant. I further consider that in conducting this examination the court should, as stated by my noble and learned friend Lord Bingham of Cornhill in paragraph 9 of his opinion, take account of the need to ensure that insignificant differences between the law and practice of different countries and legal niceties and requirements should not be permitted to obscure the essential question which is, to use the words of Lord Templeman in *Bugdaycay* at page 538A, whether the Secretary of State had "adequately considered and resolved" the issue whether the applicant's claim that his human rights have been breached is manifestly unfounded. The court should also have regard to the onus which rests on the applicant to show that there are substantial grounds for believing that if he were removed from the United Kingdom he would face a real risk that he would be subjected to treatment contrary to Article 3. In the

case of Mr Thangarasa I am clearly of the opinion that the Secretary of State did adequately consider and resolve the issue which arose under section 72(2)(a).

75. Whilst I consider that there is considerable merit in the suggestion made by my noble and learned friend Lord Scott of Foscote in paragraph 125 of his opinion that a practice should be introduced under which an asylum applicant will be required to disclose the papers relating to his earlier application in another Member State, I do not wish to express a final opinion on this point or on whether the mere conduct of the appellants in bringing applications for asylum in the United Kingdom constituted an abuse of process after bringing such applications in another European country.

76. For the reasons which I have given, which are in general agreement with those given by Lord Bingham, Lord Hope and Lord Scott, I was of opinion that these two appeals should be dismissed.

LORD MILLETT

My Lords,

77. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hutton. The reasons they give are those which persuaded me, at the end of the hearing, to conclude that these two appeals should be dismissed. I would add only that I think that there is much to be said for the practice which my noble and learned friend Lord Scott of Foscote recommends in para 125 of his speech; but that I too would wish to leave open the difficult question whether the bringing of a fresh application for asylum in the United Kingdom after bringing an application for asylum in another European country constitutes a prima facie abuse of process.

LORD SCOTT OF FOSCOTE

My Lords,

The Three Treaties

78. These two appeals require the House to consider the interaction of three treaties, to each of which the United Kingdom is a signatory. First, there is the Convention relating to the Status of Refugees ("the Geneva Convention") of 1951 as amended by the New York Protocol of 1967. The Geneva Convention represented an international reaction to the plight of refugees fleeing from persecution in their countries of origin. Article 33.1 of the Geneva Convention provides that

> "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."

And Article 1A (2) defines "refugee" as including any person who

> "…. 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 …. "

79. The Geneva Convention is not part of our domestic law but its provisions and requirements constitute the background to the asylum legislation in this country and provide the essential context for assessing the Government's asylum policy and the individual decisions taken by the Secretary of State on asylum applications. A decision by the Secretary of State to reject an asylum application and return the applicant to the country of his nationality that appears inconsistent with the requirements of Article 33.1 is a decision liable, on a challenge in the courts, to be declared unlawful (see *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477).

80. Second, there is the European Convention of Human Rights ("the ECHR") to which the United Kingdom has been a signatory since 1950 but which now, under the Human Rights Act 1998, has become part of our domestic law. Every person within the jurisdiction of a signatory state is entitled to require that State to secure to him the rights and freedoms provided for in the Convention. These rights and freedoms are broader than the refugee's right to life and to freedom protected under Article 33 of the Geneva Convention. And a person need not be a Geneva Convention refugee in order to claim entitlement to the ECHR rights and freedoms.

81. The third Convention is the Dublin Convention, signed in June 1990 by each member of the European Union. The purpose of the Dublin Convention was to identify which of the Member States of the European Union ought to take the responsibility of dealing with an asylum application. The recitals to the Convention refer to the need

> "…. to ensure that applicants for asylum are not referred successively from one Member State to another without any of these states acknowledging itself to be competent to examine the application for asylum."

82. The Convention recitals might have referred also to the need to ensure that asylum applicants did not abuse the asylum application system by making applications in successive Member States without disclosing in the later application that the earlier one had failed and without indicating in what respect it was contended that the earlier failure had failed to give effect to the applicant's Geneva Convention rights or ECHR rights, as the case might be.

83. The Dublin Convention is expected to be soon replaced by a Dublin Regulation intended to cure some of the perceived shortcomings of the Convention but nothing, for the purposes of these appeals, turns on those shortcomings or the proposed changes.

84. The Dublin Convention sets out criteria to be applied for the purpose of identifying the Member State which should take responsibility for dealing with an asylum application. A Member State which is the recipient of an asylum application, but which is not the state with the responsibility, according to the Convention criteria,

of dealing with the application, can, if it wishes, deal with it but, if it does not wish to do so, can require the responsible Member State to take charge of the applicant. It can, without going into the merits of the application, send the applicant to the responsible Member State.

85. The Member State which originally received the asylum application must, however, if it wishes to avail itself of its Dublin Convention right to require some other Member State to deal with the application, satisfy itself that that Member State will deal with the applicant in a manner consistent with the Geneva Convention and with the ECHR. This should ordinarily present no difficulty since every Member State is a signatory to the Geneva Convention and to the ECHR and can be expected to deal with asylum applicants in a manner consistent with the two Conventions. But special circumstances in particular cases may raise doubts. And, in particular, Germany takes a different view about what constitutes "persecution" for Geneva Convention purposes from the view taken in the United Kingdom and most other states. The German view is that Geneva Convention persecution is persecution emanating from a State or from a quasi-State authority or, at least, persecution that is tolerated or encouraged by the State. If the persecution feared by the asylum applicant emanates from a non-State entity, neither tolerated nor encouraged by the State but from which the State is for some reason unable to offer effective protection, the applicant is not, in the German view, a Geneva Convention refugee. Or, at least, that has appeared in the past to be the German view (see *Ex parte Adan* [2001] 2 AC 477).

86. The United Kingdom view, however, shared by a majority of the signatory States (see ibid. at p 519) is that refugee status is established if the applicant can satisfy the "fear" test and the "protection" test. If the fear test is satisfied and "…. the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete". (*Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 306 per Lord Lloyd of Berwick).

The United Kingdom asylum legislation

87. Section 6 of the Asylum and Immigration Appeals Act 1993 prohibits the removal from the United Kingdom of an asylum applicant until the Secretary of State has given him notice of the decision on his asylum claim. But section 2(1) of the Asylum and Immigration Act 1996 qualifies that prohibition. It provides that section 6 of the 1993 Act does not prevent the removal of an asylum applicant if the Secretary of State has given a certificate certifying that the conditions mentioned in sub-section (2) are fulfilled, unless the certificate is under appeal. The sub-section (2) conditions are

> "(a) that the person is not a national or citizen of the country or territory to which he is to be sent;
> (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
> (c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention."

88. It is plain enough that these statutory provisions were designed to accommodate the Dublin Convention and to enable an asylum applicant to be sent to the responsible Member State without the need for his application to be dealt with on its merits in this country. But the Secretary of State has to be satisfied that the applicant would not be at risk in the responsible Member State (condition (b)) and that the responsible Member State would not send him back to his country of origin otherwise than in accordance with the Convention (condition (c)). The effect of these provisions is underlined by rule 345 of the Immigration Rules (made by the Secretary of State pursuant to section 3(2) of the Immigration Act 1971).

89. Rule 345(1) repeats the 1996 Act section 2(2) conditions. Rule 345(2) says that

> "The Secretary of State shall not remove an asylum applicant without substantive consideration of his claim unless:
> (i) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or
> (ii) there is other clear evidence of his admissibility to a third country or territory.
> …."

90. These are the statutory provisions that apply to Mr Yogathas. The Secretary of State certified that the 1996 Act section 2(2) conditions were satisfied and directed Mr Yogathas' removal to Germany, the responsible Member State under the Dublin Convention criteria. Mr Yogathas sought judicial review of the Secretary of State's decision to certify. He lost before Richards J and before the Court of Appeal. The issue is whether the Secretary of State was entitled to form the view that if Mr Yogathas were sent to Germany for his application to be dealt with there, Germany would not send him back to his country of origin otherwise than in accordance with the Geneva Convention.

91. The 1996 Act regime that applies to Mr Yogathas' asylum application has been replaced by provisions in the Immigration and Asylum Act 1999. The 1999 Act regime applies to Mr Thangarasa's asylum application.

92. Section 11 of the 1999 Act provides that—

> "(1) In determining whether a person in relation to whom a certificate has been issued under subsection (2) may be removed from the United Kingdom, a Member State [of the European Union] is to be regarded as—
> (a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
> (b) a place from which a person will not be sent to another country otherwise than in accordance with the [Geneva] Convention.
> (2) Nothing in section 15 prevents a person who has made a claim for asylum ('the claimant') from being removed from the United Kingdom to a Member State if—
> (a) the Secretary of State has certified that—

(i) the Member State has certified that, under standing arrangements, it is the responsible State in relation to the claimant's claim for asylum; and
(ii) in his opinion, the claimant is not a national or citizen of the Member State to which he is to be sent;
(b) the certificate has not been set aside on an appeal under section 65."

Section 15 (referred to in subsection (2) above) has replaced and is to the same effect as section 6 of the 1993 Act.

93. It follows from section 11(1) of the 1999 Act that a challenge to the Secretary of State's decision to send an asylum applicant to the Member State responsible under the Dublin Convention criteria for dealing with the application cannot be based on the allegation that that Member State would, or might, send the applicant back to his country of origin otherwise than in accordance with Article 33 of the Geneva Convention.

94. Under section 65 of the 1999 Act, however, the applicant can challenge the decision on the ground that the decision is in contravention of the applicant's rights under the ECHR (see section 65(1) and (2)). But this right of challenge is limited by section 72(2) of the Act. Section 72(2) provides that—

"A person who has been, or is to be, sent to a Member State …. is not, while he is in the United Kingdom, entitled to appeal—
(a) under section 65 if the Secretary of State certifies that his allegation that a person acted in breach of his human rights is manifestly unfounded; or
(b) …. "

95. The Secretary of State directed the removal of Mr Thangarasa to Germany, the Member State responsible for dealing with his asylum application. Mr Thangarasa alleged that the decision to send him to Germany was in breach of his human rights. The Secretary of State certified that the allegation was manifestly unfounded. Accordingly Mr Thangarasa's ability to appeal under section 65 was blocked (see section 72(2)).

96. Mr Thangarasa applied for judicial review of the Secretary of State's section 72(2) certificate. He contended that the Secretary of State had erred in law in concluding that his allegation that his removal to Germany would be in breach of his human rights was manifestly unfounded. He lost before Collins J and before the Court of Appeal. The issue is whether it is clear that sending him to Germany would not constitute a breach of his human rights. That depends on whether a decision by Germany to refuse his asylum application and to send him back to his country of origin would be a breach of his human rights.

The Facts

Mr Yogathas

97. Mr Yogathas is a Tamil citizen of Sri Lanka. He was born in 1979 and lived in Point Pedro in the north of Sri Lanka. In 1996 the Sri Lankan army captured Point Pedro from the LTTE (the Tamil Tigers) and Mr Yogathas was arrested by the army

on suspicion of involvement with the LTTE. He says he was detained and tortured and bears scars from the torture. In fear of the Sri Lankan army he moved to an area under LTTE control but then came under pressure from the LTTE to join them as a fighter. Unwilling to do so and fearing LTTE reprisals he left Sri Lanka, via Colombo, and on 1 March 1999 arrived in Germany where he claimed asylum as a Geneva Convention refugee.

98. His application for asylum was refused. He was asked to leave Germany but was allowed to remain until 12 November 1999. He then entered the United Kingdom clandestinely on 27 November 1999 at Dover. He applied for asylum here, falsely stating that he had not previously applied for asylum in any other European Union State.

99. The United Kingdom Immigration authorities ascertained, by means of the Eurodac computer system, that Mr Yogathas had entered Germany on 1 March 1999 and had unsuccessfully applied for asylum there. Germany was the country responsible, under the Dublin Convention criteria, for dealing with Mr Yogathas' asylum application, the German authorities agreed that that was so and that he was readmissible to Germany under the Dublin Convention provisions.

100. Accordingly by letter dated 20 July 2000 from the UK Immigration Service Mr Yogathas was informed that he would be sent to Germany for his application to be dealt with there. The letter contained, also, the Secretary of State's certificate under section 2(2) of the 1996 Act certifying, in particular, that Germany would not send him to another country or territory otherwise than in accordance with the Geneva Convention.

101. Mr Yogathas' judicial review proceedings were commenced on 4 August 2000. The ground relied on was that Mr Yogathas feared persecution by non-state actors, namely, the LTTE, and that since Germany's approach to the risk of persecution from non-state actors was not in accordance with the Geneva Convention, there was a real risk that the German authorities would return him to Sri Lanka in breach of the Convention.

102. A letter dated 18 September 2000 to Mr Yogathas' solicitors from the UK Immigration Service set out in full the Secretary of State's reasons for deciding to send Mr Yogathas back to Germany. The letter is a lengthy one and the reasons are summarised in paragraph 11 of Richards J's judgment. It is not necessary to repeat them. The reasons were further explained in a witness statement by Mr Taylor, a senior executive officer in the Immigration Service, dated 31 January 2001.

103. The Secretary of State had become aware, via the Eurodac computer system, that Mr Yogathas had made an unsuccessful asylum application in Germany before coming to the United Kingdom. But the details of the application and the way in which it had been dealt with in Germany were confidential. So by letter dated 21 January 2001 the Secretary of State asked Mr Yogathas to agree to the Secretary of State approaching the German authorities for information about the application. By letter dated 1 March 2001 Mr Yogathas' solicitors replied that

"Our client does not give his authority for the Secretary of State to approach the German authorities for information about his asylum claim."

104. Mr Yogathas was, of course, within his rights in declining to agree to information about his German asylum application being disclosed to the Secretary of State. But the position reached is an odd one. Mr Yogathas is resisting his removal from this country to Germany on the ground that Germany cannot be relied on to deal with his current asylum application in accordance with the Geneva Convention. He has already made an asylum application in Germany. It might have been thought that the manner in which the German authorities had dealt with that application and their reasons for refusing it would give a good indication of how they would be likely to deal with the current application. But Mr Yogathas has refused to allow the relevant information to be disclosed. I shall return to this oddity when considering whether Mr Yogathas' current application is an abuse of the asylum procedure.

Mr Thangarasa

105. Mr Thangarasa, too, is a Tamil Sri Lankan. He was born in 1974 in northern Sri Lanka. In 1989 he was detained and ill-treated by the Indian Peacekeeping Forces. He bears scars from the ill-treatment. After the departure from Sri Lanka of the Indian troops he was harassed by the LTTE. He was unwilling to join the LTTE and in 1991 to escape their harassment he fled to Colombo where he lived for about a year. However in September 1992 he was arrested and detained in Colombo for about a week during which period he was beaten and questioned about his links with the LTTE. So he fled from Colombo to Germany, where he arrived on 29 September 1992 and applied for asylum.

106. Although initially unsuccessful, Mr Thangarasa's asylum application in Germany succeeded on appeal and he was granted refugee status. But in December 1999, after several years in Germany, he was informed by the German authorities that in their view it would be safe for him to return to Sri Lanka and that his refugee status would be withdrawn. There is nothing necessarily inconsistent with the Geneva Convention in such a decision. Refugee status is a temporary status for as long as the risk of persecution remains. Mr Thangarasa appealed against the decision that he should return to Sri Lanka but his appeal failed and he was asked to make arrangements to return.

107. Mr Thangarasa is fearful that in Sri Lanka he would be identified as a member of a family some of whose members support the LTTE and that he would for that reason still be at risk of persecution by the Sri Lanka authorities who had detained and beaten him in the past. He fears also that even in Colombo he may be at risk of reprisals from the LTTE on account of his failure to join them.

108. So, in order to avoid return to Sri Lanka, Mr Thangarasa left Germany and travelled to the United Kingdom, arriving on 25 November 2000. He claimed asylum in this country.

109. At his interview with Immigration Service officials after his arrival, the so-called Dublin screening interview, it became apparent that Germany was the responsible state under the Dublin Convention criteria. The German authorities agreed

that that was so. Accordingly, on 12 December 2000 the Secretary of State gave a certificate under section 11(2) of the 1999 Act and directed Mr Thangarasa's removal to Germany. Mr Thangarasa indicated an intention to appeal under section 65 of the 1999 Act, alleging that the decision to send him back to Germany was in breach of his human rights under the ECHR. But the Secretary of State certified under section 72(2) that the allegation was "manifestly unfounded", thereby barring the section 65 appeal. Mr Thangarasa's judicial review application challenges the "manifestly unfounded" certificate.

110. Mr Thangarasa did not disclose any details of the proceedings in Germany resulting from the decision of the German authorities to withdraw the refugee status that he had initially succeeded in obtaining. He has not disclosed why it was that the German authorities thought, if they did, that it had become safe for him to return to Sri Lanka. He has not disclosed his grounds of appeal against that decision nor the grounds on which his appeal was dismissed. To be fair to him, there is nothing in the papers before your Lordships to indicate that he was ever asked to do so.

The "internal relocation" alternative

111. Both appeals raise issue about the "internal relocation" alternative (I respectfully agree with my noble and learned friend Lord Hope of Craighead that "internal relocation" is a more apt description than the expression "internal flight" used in the courts below). The internal relocation alternative arises where an asylum applicant has a well-founded fear of persecution in one part of the country of his nationality but would be safe in other parts of the country. The possibility that internal relocation may be an answer to a claim for asylum is implicit in the requirement in the Article 1A (2) definition of 'refugee' that the person with the well-founded fear of persecution "…. is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country".

112. The evidence before the court on the Yogathas case led Richards J to conclude that there were differences between the United Kingdom approach and the German approach to the internal relocation alternative (see para 50 of his judgment). In the United Kingdom the question would be whether it would be unreasonable or unduly harsh to return the applicant to the area of relocation, whereas in Germany the question would be whether the return of the applicant to the area of relocation would be in breach of section 53(6) of the Aliens Act.

The Aliens Act is a German statute. Section 53(6) says that—

> "Deportation of a foreigner to another state can be avoided if there exists for this foreigner a considerable definite danger for body, life, or liberty in that state …

113. Richards J said that

> "In practice essentially the same social and economic issues are considered in each country, in each case looking at the individual circumstances of the applicant; but in Germany the test of economic survival is such that more

> extreme social and/or economic difficulties are required in order to avoid a finding that the internal flight alternative applies."

and that

> "The applicant's civil and political rights do not appear to be taken into account in Germany, save to the extent that political rights are considered under the safety limb of the internal flight alternative, ie whether there would be a sufficiency of protection from the state in the area of relocation. Such matters may, however, be taken into account in the United Kingdom in considering the reasonableness of relocating …. "

114. Laws LJ in the Court of Appeal referred to these passages (and others) and commented:

> "As it seems to me, if Germany applied the same interpretation of refugee as the United Kingdom does in relation to non-state agents, and therefore in a case like the present were to consider the question of internal flight in the context of the Convention rather than that of section 53(6), these differences in approach would not debar the Secretary of State from certifying under section 2(2)(c). If that is right, I see no reason why he should be so debarred by virtue of the fact that Germany in truth considers the matter in the context of section 53(6) …. " (para 51 of the Court of Appeal judgment).

115. My Lords, I think Laws LJ's approach is the right one. The question whether an asylum applicant is excluded from refugee status because of his unwillingness to avail himself of the protection of his country by relocating in some other part of that country is not a question of interpretation of the Convention. It requires a judgment as to the reasonableness in all the circumstances of the unwillingness. In different countries, all being signatories to the Convention, different weight may be attached to different elements of the social and economic circumstances pertaining in the area of relocation. The fact that country A applies a stricter test of reasonableness than country B does not mean that one country is acting otherwise than in compliance with the Convention. No doubt there may come a point at which a country's refusal to regard as reasonable a person's unwillingness to re-locate may itself appear so unreasonable as to be outwith the Convention. But Germany's approach to re-location, via section 53(6) of the Aliens Act, requiring attention to be paid to potential "danger for body, life, or liberty" cannot, in my opinion, possibly be regarded as outwith the Convention. Moreover, the standards required for compliance with the Convention are minimum standards. A country's approach to internal relocation may be more liberal than is strictly required for compliance with the Convention. It is arguable that the United Kingdom approach is of that character.

116. For these reasons I would reject the appellants' contention that because Germany approaches the question of internal relocation in the context of section 53(6) of the Aliens Act rather than in the context of the Convention, its approach is not in accordance with the Convention. And I would reject also the contention that because the United Kingdom's approach to internal relocation may be more liberal than that of Germany, the German approach, when considering these appellants' asylum applications, will not be in accordance with the Convention.

117. It follows that, in my opinion, the challenge to the section 2(2) certificate given by the Secretary of State in the Yogathas case fails. But there remains the question whether it is arguable that the decision to send the two appellants back to Germany is in breach of their ECHR rights. In the case of Mr Thangarasa this is the critical issue to be addressed.

118. The case of breach is based on the proposition that if sent back to Colombo, these Tamil Sri Lankans will face harassment from the Sri Lankan police because of their Tamil associations and danger from the LTTE because of their refusal to join the LTTE and fight with them. There is evidence to suggest that both these dangers might be present. The question is whether it is permissible, from an ECHR viewpoint, for the Secretary of State to send the appellants back to Germany so that the German authorities can assess the weight of the evidence and decide whether to send them to Sri Lanka would be in breach of their human rights.

119. This issue has, in a very similar case, been considered by the European Court of Human Rights at Strasbourg. The case is *TI v United Kingdom* [2000] INLR 211. The case is fully discussed in paragraphs 52 and 53 of the opinion of my noble and learned friend Lord Hope of Craighead and it suffices for me to refer to the court's conclusion that—

> "…. on the basis of the assurances given by the German Government concerning its domestic law and practice, the court is satisfied that the applicant's claims, if accepted by the authorities, could fall within the scope of section 53(6) and attract its protection."

and that

> "There is … no basis on which the Court could assume in this case that Germany would fail to fulfil its obligations under article 3 of the [ECHR] to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country." (p 231).

120. Similarly, in the present cases, no evidence has been adduced that justifies the assumption that Germany would send these appellants back to Sri Lanka to face torture or ill-treatment.

121. For these reasons, and for those contained in Lord Hope's opinion, and in the opinions of Lord Bingham of Cornhill and Lord Hutton, with all of which I am in full agreement, the courts below came, in my opinion, to the correct conclusions and these appeals should be dismissed.

The original asylum proceedings in Germany

122. I want to add a few words on the implications of the original asylum proceedings in Germany. One of the purposes of the Dublin Convention, as it will be a purpose of the Dublin Regulation when it replaces the Convention, is to identify the Member State that should take responsibility for dealing with an asylum application, and thereby avoid multiple successive applications in different Member States.

123. In Mr Yogathas' case Germany was the responsible state under the Dublin criteria. He made his initial application in Germany but it was refused. There is no indication that he appealed. In these circumstances it was, in my opinion, *prima facie*, an abuse of the asylum application procedure for him to come to the United Kingdom and try again. If there had been a change of circumstances after the refusal of the application in Germany and before the application in this country, or if new evidence had become available after the refusal of the first application, a new application might have been justifiable. But in the absence of any such justification, and in the absence of any appeal in Germany, the new application in the United Kingdom was, in my opinion, as much an abuse of procedure as it would have been if made in Germany after the initial application had been refused. The indications of abuse are reinforced by the circumstance that Mr Yogathas has refused to allow details of his German application to be disclosed to the UK Immigration authorities.

124. In Mr Thangarasa's case, his application for asylum in the United Kingdom was made more or less immediately after his appeal against the German authorities' decision to withdraw his refugee status had failed. Germany was the responsible state under the Dublin Convention criteria and no details of the proceedings have been given so as to support an allegation that in withdrawing his refugee status and deciding that he should return to Colombo the German authorities acted in breach of Mr Thangarasa's human rights.

125. In my opinion there would be much to be said for the introduction of a practice under which an asylum applicant whose asylum application had been refused by the state responsible under the Dublin criteria and who then made a second application in another Member State would be required

(1) to disclose, or authorise disclosure of, the papers relating to the original application; and

(2) to provide reasons why a second application should be entertained.

The reasons might be a change of circumstances, or the emergence of new evidence, or some Geneva Convention or ECHR objection to the manner in which the first application was dealt with. In the absence of any of these things, the second application would, in my opinion, be as much an abuse of process as a second action started by any other disappointed litigant.

126. In the present cases, the courts have had to entertain complaints about the manner in which the German authorities are said to be likely to deal with the appellants' current asylum applications without knowing anything, other than the eventual result, about the manner in which the German authorities actually did deal with their initial applications in Germany. This seems to me thoroughly unsatisfactory and to expose both appellants to a charge of abuse of process. But nothing has been made of this aspect of the appeals in the course of the hearing before your Lordships and it would not be right, therefore, to dismiss the appeals on this ground.