DANIAN v SECRETARY OF STATE FOR THE HOME DEPARTMENT

COURT OF APPEAL (CIVIL DIVISION)

[2000] Imm AR 96, The Times 13 October 1999, (Transcript: Smith Bernal)

HEARING-DATES: 28 OCTOBER 1999

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COUNSEL:

N Blake QC and S Harrison for the Appellant; S Kovats for the Respondent

PANEL: NOURSE, BROOKE, BUXTON LJJ

JUDGMENTBY-1: BROOKE LJ

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BROOKE LJ: This is an appeal by Thomas Danian against a determination of the Immigration Appeal Tribunal on 9 June 1998 when it dismissed his appeal from a decision of a special adjudicator dated 18 November 1997 who had dismissed his appeal against the refusal by the Secretary of State on 26 August 1997 to allow his claim for asylum.

The matter has a long history. Mr Danian is now 48. He was born in Bendel State, in Southern Nigeria, in May 1951. He has told the immigration authorities that in 1978 he had a job as a television producer in Lagos on a programme called 'Youth Forum' but because he was a southerner he lost that job and was demoted to being a scriptwriter. He has said that northerners regarded some of his writings as treasonable, and that in 1981 he was arrested and detained by soldiers, and that he was subsequently interrogated and ill-treated. He managed to escape, and was treated in hospital before seeking refuge with an uncle in another part of Nigeria. He then says he got a job with Nigerian External Communications, for whom he was involved in radio and TV programmes. He was unable to produce any of his scripts. He described how he had dramatised some of his poems in which he had tried to express the feelings of a man who was oppressed in his own country. He has said that in March 1985 he was arrested at his home and managed to escape. He arrived in this country on 15 April 1985, and save for one day in July 1997 he has remained here ever since.

As I will relate, in 1995 a special adjudicator was not willing to believe what Mr Danian told him about a later period of his history, and since Mr Danian produced no corroborative evidence, the adjudicator was not willing to accept what Mr Danian told him about his history in Nigeria or the reason why he left Nigeria.

When he arrived in this country, he was originally granted leave to enter for one month as a visitor, but thereafter he was granted permission to stay as a student, and this permission was extended from time to time until it finally expired on 3 March 1987.

On the previous day he had made a further application for leave to remain as a student. This application was never formally determined, and it was eventually withdrawn on 24 August 1993, more than six years later.

On 6 June 1989 he applied for exceptional leave to remain. On 18 September 1989 he was convicted at Tower Bridge Magistrates' Court of working in breach of the conditions of his leave to remain as a student and recommended for deportation. The following day he applied for leave to remain in order to establish a voluntary organisation. On 24 September 1990 he submitted an application for asylum, and in December 1990 he completed a questionnaire form in connection with this application.

There was then a two year gap in the history. This was ended on 6 April 1993 when he was interviewed in connection with his asylum claim. The basis of this claim was his opposition to the military regime in Nigeria which was dominated by people from Northern Nigeria.

It is worth mentioning at this stage that on 12 June 1993 the first presidential elections took place in Nigeria since 1981, and Chief Abiola, the leader of the Social Democratic Party, was considered to be the winner. 11 days later, however, this election was annulled, and in November 1993 military rule was reinstated in Nigeria. All democratic institutions were dissolved and political parties banned.

On 26 September 1994 Mr Danian's application for asylum was refused, and on 13 March 1995 a deportation order was signed. This was served on 9 May 1995, and on the same day his long-standing application for leave to remain to establish a voluntary association was also refused. The Secretary of State also refused his implied application to revoke the deportation order. Mr Danian appealed, but on 20 November 1995 a special adjudicator (Mr Yelloly) dismissed his appeal, and the following month the Immigration Appeal Tribunal refused leave to appeal.

Nothing daunted, on 10 April 1996 Mr Danian applied for indefinite leave to remain on account of his long period of residence in this country (now over 10 years) and his need to maintain contact with his seven-year old daughter, who lived with her mother pursuant to a court order to that effect. This application was refused on 28 June 1996.

On 4 July 1997 he was deported. He destroyed his airline ticket in flight, and when he landed in Amsterdam, the Dutch authorities returned him to London, where he claimed asylum on arrival. He was interviewed two days later, and his claim for asylum was refused on 26 August 1997. He appealed, and on 18 November 1997 a Special Adjudicator (Mr Chalkley) dismissed his appeal.

On 8 December 1997 a doctor (Dr Horder) examined him in Rochester Prison on behalf of the Medical Foundation for the Care of Victims of Torture. He gave her an account of the brutal treatment he said he had received in 1981. The doctor examined him and found a number of scars on different parts of his body, including a 3cm linear scar on his right scrotum, and expressed the opinion that from their appearance, orientation and siting they appeared to be non-accidental. She said the scars were compatible with his statement and his description of assault. She also said that a scar area on the sole of his right foot was likely to have been caused when he stepped on a sharp

object. Mr Danian had told her that during his escape from arrest in 1985 he had trodden on glass and cut his foot, for which he had received hospital treatment.

His efforts to seek leave to appeal against Mr Chalkley's decision ultimately proved successful in April 1998, after this court had given him leave to challenge an earlier refusal of leave to appeal. He appeared in person before the Immigration Appeal Tribunal on 11 May 1998. There is an unresolved mystery, to which I will refer later, as to whether he attempted to show the Tribunal Dr Horder's report. On 9 June 1998 the Tribunal promulgated its determination dismissing his appeal. He now appeals to this court by permission of Stuart-Smith LJ, granted on 19 November 1998. He has been on bail since that time.

After this outline sketch of the history, it is now necessary to look in rather more detail at the three judicial determinations which have been made in this case, and at some of the earlier events in the history.

The first of these events is the letter he wrote to the Home Office on 8 June 1989, which is headed "Exceptional Application for Leave to Remain in the United Kingdom . . .". He accepted at that time that he might not be qualified to apply for permission to remain in the United Kingdom because he did not fall under any of the categories of people who might be granted such permission. He went on to set out, however, the reasons why he believed that his country faced the catastrophe of a civil war. He said he wished to remain in self-exile until he had a plausible solution to offer to his country's plight. He said he believed in peace, and he had no intention of antagonising the military government in order to achieve political refugee status. In this context he named a magazine editor who had died from a letter bomb he had received at a time when he was regarded as a thorn in the flesh of the military government.

In this six-page letter he explained his reasons for believing that the federation of northern and southern Nigeria was a mistake. He described how northerners were displacing southerners in strategic government posts as part of a plan to establish northern hegemony throughout the country. He did not believe that the north would tolerate a southerner as executive president of Nigeria even though a programme for the return to civil rule had been set out. He mentioned, in passing, one personal experience he had had of the effect of a quota system which had prevented him from seeking a job in the Civil Service.

When he submitted his asylum application in September 1990 he referred back to this letter for his reasons for seeking asylum. These reasons were then bolstered by the responses he wrote on a Home Office form which he completed in December 1990.

He said now that some Northern Nigerian elements had interpreted some of his writings as public incitement to treason. This was why it was not just the persecution he had suffered in the past or to which he might be subjected in the future, it was also a question of his uncompromising political stance. He could not allow posterity to count him among the number of those who were too scared to speak out against hegemony and oppression when the only salvation for the people was by speaking out. He believed he had a divine mandate to speak out on behalf of the people, and he knew from experience that his position was untenable within Nigeria.

He said that the inaugural speech made by those who were plotting a coup against the Babangida military regime in April 1990 had echoed the points he had made in his June 1989 letter. Most of those plotters had come from his home state of Bendel, and with all the witch-hunting that

had gone on since the attempted coup d'etat, he was glad he was not in Nigeria, since he might have been linked with the writers of that fateful speech by those who knew his views.

He repeated that there was no way that the north would accept a southerner as head of state, because this might interrupt the process of northernisation which had been in progress since the 1960s. He did not believe that the united Nigerian federation would hold together. He wished, however, to play his role in strengthening the federation or in its dissolution into several autonomous states without bloodshed, if possible.

When he was interviewed in April 1993, he explained that he had originally hoped to seek asylum in the United States. His brother had paid for his ticket to England, but it had proved impossible to obtain a US visa in England, and he believed that it was by divine will that he found himself compelled to stay in England. He did not claim asylum on arrival, because he was still hoping to obtain a US visa.

He gave the interviewer examples, from his own experience, of the way in which southerners were suffering discrimination. He described in detail the incident in which he was interrogated and beaten in October 1981. He said that he still had the scars to prove it. He mentioned the whipping he had received, being hit on the head with a pistol, and the intense pain he felt on his scrotum when the soldiers had threatened to castrate him when he did not tell them about the organisation to which they believed he belonged. He described how he had escaped, obtained hospital treatment, and fled from Lagos to another state. He had then obtained a different job, but when he saw by chance one of the soldiers who had tortured him in October 1981 he realised that they knew where he was. After describing how he had been arrested and had escaped, he said that this was when he had decided to leave Nigeria and decide how he could help to change the status quo.

He had never given up hope of going to America, but after he had been in England for some years and had a child here, he had decided it was God's will that he should stay here.

He felt the situation in Nigeria had got worse, and that the country was slowly moving to disaster. He repeated his view that northerners would not accept the situation if a southerner won a presidential election. He wished to see a stable political situation in Nigeria, and if this came about, he would like to get involved in politics and argue his case in parliament. He would like to start a political group in this country, but he had been told that this would be incompatible with his asylum application.

He was still in regular contact with people in Nigeria. When postal charges from Nigeria increased from 1.30 Naira to 30 Naira overnight he was very angry with the people running his country, and he had had to hold himself back to prevent himself from organising a march in London.

The terms of the Home Office's refusal letter, which was dated 26 September 1994, are set out in Mr Yelloly's adjudication, which was issued in November 1995. The reasons for refusal were concerned partly with Mr Danian's own position, and partly with the Secretary of State's appraisal of the situation in Nigeria.

On the first point, Mr Danian's claim for asylum was regarded as vague and lacking in detail. In particular, it was said that he had given no details of the harassment he claimed to have suffered in his television or radio career, and it was noted that he had been unable to provide any evidence of the writings which had been interpreted as treasonable. This lack of detail was regarded as casting

serious doubts on the veracity of his claim and his credibility. The Secretary of State also noted that Mr Danian had given no details of any political activity or any membership or affiliation to any particular political groups within Nigeria which might bring him to the adverse attention of the authorities in Nigeria if he were to be returned there.

On the second point, the Secretary of State mentioned the way in which President Buhari had been replaced by President Ibrahaim Babangida in a bloodless coup on 27 August 1985, and how the latter had stepped down on 27 August 1992 and handed power over to the civilian-led Interim National Government ('ING'). ING had resigned in November 1992, and military rule had been reinstated under the leadership of General Sani Abacha, who had dissolved all democratically elected institutions and banned the two political parties (the SDP and the NRC). [In fact General Abacha seized power in November 1993].

The Secretary of State said that General Abacha had convened a National Constitutional Conference whose job it was to make recommendations by 27 October 1994 as to the country's political future including a new Constitution. It was at that time envisaged that a new Constitution would be in place by the end of the year, and that the ban on political activities would be lifted in January 1995. The Secretary of State also noted that General Abacha had included both military and civilian personnel in his government, and that the latter encompassed personalities from a broad spectrum of political wings and backgrounds.

Since Mr Danian had said [in June 1989] that he did not wish to antagonise the military government in order to achieve political refugee status, the Secretary of State did not consider that his political views would bring him to the adverse attention of the Nigerian authorities if he was to be returned there. Although Mr Danian was concerned about northern domination, the Secretary of State could find no evidence to suggest that there was government-sanctioned persecution of people in the south of Nigeria. Since Mr Danian had been in this country for five years at the time of the 1990 coup attempt, the Secretary of State was not satisfied that the Nigerian authorities would have any reason to believe that he was in any way involved.

In those circumstances Mr Danian's claim for asylum was refused, as was his claim for exceptional leave to remain.

Between September 1991 and February 1995 Mr Danian had been studying at London Guildhall University. He wrote a thesis entitled 'Nigeria - Stolen by Generals' which he produced to Mr Yelloly later that year. Mr Yelloly gives no indication in his determination as to whether he had read the whole or any part of this thesis.

When the refusal letter was served on him in May 1995 Mr Danian's notice of appeal was entered on the basis that:

The decision displays a total lack of understanding of the political situation in Nigeria. Decision based on irrelevant considerations and relevant facts ignored. Decision is subjective, shows inarticulate major premise . . ."

At the hearing of his appeal in October 1995 Mr Danian produced a number of documents which evidenced his involvement in political activity in London since the annulment of the election of Chief Abiola in June 1993. He explained to Mr Yelloly that between 1985 and 1993 he had been concerned to see how the problems in his country could be resolved without bloodshed. He had

been gathering information and finding out ways of resolving things in this way. He had not approved of the attempted coup in 1990.

His evidence showed how the different pro-democracy movements in the United Kingdom had been endeavouring to combine together since June 1993 under a single leadership. He was a member of the Association for Democratic Movement of Nigeria (UK) ('ADM') which had been in the forefront of this effort. In Nigeria there was an umbrella organisation called NALICON, which was trying to remove the present military government in Nigeria by all democratic means, and ADM was working closely with NALICON. In September 1995 NALICON (UK) was launched at a major rally, and Mr Danian produced the minutes of a pre-launch briefing meeting on 9 September 1995 at which he is reported as supporting a delegate who had criticised NALICON for only using dialogue in the struggle when the only language the Junta understood was violence. The minutes record that:

This view was strongly supported by Prince Thomas Daniel (sic) - who believes the only way forward is the use of violence in the struggle to end Military rule in Nigeria. Prince Daniel urged Nalicon to inform the world on the need to use violence to remove military rule as done in Haiti and currently being done in Bosnia. He claimed that there are numerous countries willing to aid Nigerians should they choose to resort to violence in their struggle to end Military rule in their country. Prince Daniel called for action not dialogue."

Mr Danian also produced an article in The Observer in May 1995 entitled 'Arms for Nigeria evade ban on exports'. This article contained the passage:

Exiled Nigerians accuse Britain of continuing to arm the regime, despite fears of a civil war. Thomas Danian, a Nigerian prince living in London, said:

'I have friends in the Nigerian intelligence and military and they say Britain will sell Nigeria whatever it wants'."

He told Mr Yelloly that this publicity formed part of his work for ADM as a director and member for media research. He was now working on a magazine which was going to be a major propaganda instrument for the movement in this country, whose lead story was on arms sales to Nigeria, on which he said he was one of the highest authorities here. He showed Mr Yelloly a picture of a tank with a person underneath it. The tank had the words 'Made in England' written on it.

He said that if he returned to Nigeria he was finished. The Nigerian High Commission had cameras at rallies, and they would know from the documents who the major players were. The article in The Observer would tell them and he was sure that his life was in danger. Even in this country he was frightened that the Nigerian Government might move against the freedom movement on a world-wide basis.

He said that it was incorrect to say that his acts were now self-serving in order to bolster his asylum claim. He had a well developed political mind, and he had predicted correctly what would happen at presidential elections if a southerner won.

He declined an invitation by Mr Yelloly to submit himself to examination by the Medical Foundation on the grounds that this was not necessary. He said he had scars and no doctor was needed to say that they were inflicted as he described, with a whip.

Mr Yelloly said that Mr Danian was clearly an intelligent man. He did not accept his explanation that he had been unaware until October 1990 he could claim asylum from April 1985. He attached considerable significance to the timing of Mr Danian's asylum application, which had followed his conviction in September 1989. He therefore attached a low rating to his credibility and did not accept Mr Danian's account of his experiences in Nigeria before leaving.

Nor did he accept that his membership of the Nigerian Pro-Democracy Movement in this country was reasonably likely to cause the Nigerian authorities to take an interest in him, or that his knowledge of the arms trade was reasonably likely to result in any such interest. He found that Mr Danian had not satisfied either of the prerequisites of a successful claim for asylum to the required standard.

Mr Chalkley made his adjudication just over two years later, following Mr Danian's return trip to Amsterdam and the subsequent refusal of his new application for asylum. Mr Danian had been detained since July 1997, but he said that before that time he had been involved in rallies, conferences and meetings, which were attended by top political leaders from Nigeria and recorded on video by the Nigerian High Commission.

On 1 April 1996 he had written a letter to the acting High Commissioner for Nigeria in which he had expressed concern about the issue of Nigerian political refugees in the United Kingdom. He suggested in his letter that the High Commission seemed to be burying its head in the sand on this issue. He made some constructive proposals, including the creation of a rehabilitation committee to look at the possibility of rehabilitating refugees who wished to return to the national fold, together with reassurance or amnesty for all pro-democracy activists who feared persecution if they returned to Nigeria. He wrote a follow-up letter seven weeks later, confirming a meeting with a representative of the High Commission the following week.

He said his idea had been to stop the pro-democracy campaign and initiate dialogue with the High Commission, but at the meeting it was made clear to him that the leaders of the pro-democracy groups were not welcome in Nigeria. He was invited to give information, and the people he met would not give him any promises or amnesty unless he was able to give them substantive information which he was not willing to give.

Mr Chalkley was willing to accept that Mr Danian had been involved in the pro-democracy movement in the United Kingdom, but he did not believe that he became involved in such activities until early 1995 and certainly not until after his first asylum application had been refused [on 9 May 1995]. He was satisfied that his involvement was not motivated by his desire to promote democracy in Nigeria, but rather was part of a calculated policy to enhance his claim for asylum. He did not think it plausible that someone who claimed that he had been a high level member of a Nigerian pro-democracy campaign in this country would seek to start negotiations with the Nigerian government for amnesty. He did not believe that he wrote naively to the Nigerian High Commission expecting to be offered some sort of amnesty. He was quite clearly a highly intelligent man and must have known that his actions would only have the effect of bringing him to the attention of the Nigerian authorities. Mr Chalkley believed that his actions were calculated and motivated by the desire to demonstrate to the UK immigration authorities that he was known to the Nigerian authorities.

Mr Danian's credibility was also found to be impaired because he had been unwilling to secure his brother's attendance at the hearing after his brother had sworn an affidavit which suggested that the Nigerian authorities were indeed interested in him.

In all the circumstances Mr Chalkley did not find him to be a credible witness. He concluded:

(1) that none of the Nigerian pro-democracy activities in which Mr Danian may have been involved prior to May 1995 had been such as would have brought him to the attention of the Nigerian authorities;

(2) that the campaign activities in which he had become involved from May 1995 onwards had been tailored solely with the intention of creating a false claim to refugee status;

(3) that Mr Danian's conduct had been wholly unreasonable and contrary to the spirit of the Geneva Convention.

The grounds of Mr Danian's appeal to the Tribunal were, in effect:

(1) that Mr Chalkley did not, because of the approach he had adopted, go on to consider whether or not at the date of the appeal Mr Danian would in fact be persecuted for a Convention reason if he was returned to Nigeria, and that he was wrong in this respect;

(2) that he was also wrong in law for refusing the appeal on the grounds that in his view Mr Danian's conduct had been unreasonable.

The Immigration Appeal Tribunal identified the relevant issue of law in these terms:

The case therefore raises an important point of law, which has been considered on two occasions by the Court of Appeal in this country; namely Gilgham [1995] Imm AR 129 and B [1989] Imm AR 166. It would seem that both these cases were identified by the Court of Appeal in the present proceedings as falling into a category of case where an asylum-seeker had involved himself in activity calculated potentially to bring himself to the attention of the authorities in the country in which he alleged to fear persecution in order to bolster his asylum claim but who had no well founded fear of persecution.

It remained open to consider whether an asylum-seeker who had similarly engaged in activity in the UK in bad faith but who nonetheless genuinely feared what would happen to him as a result of that activity if he was returned to the country in which he claimed to fear persecution. If this second category also falls outside the Geneva Convention then the appeal would be bound to be dismissed.

However, if this second category can fall within the terms of the Convention, then it would be necessary to consider the detailed additional evidence presented to us by Mr Danian, together with the documentary evidence which was before the adjudicator or which was presented to us for the first time."

In the event, the Tribunal decided that Mr Danian had acted in bad faith and that for that reason he fell outwith the Geneva Convention and was not a person to whom the Convention applied. It said that this would be its view regardless of whether his activities post-1995 might have brought him to the attention of the Nigerians and regardless of whether his fear of persecution might be well founded.

Mr Kovats accepted that in these circumstances the Tribunal did not in fact go on to consider the detailed additional evidence which Mr Danian had presented to it. This led to some difficulty in

this court, as there was some uncertainty about the evidence which Mr Danian had wished to present as part of his case. It is clear that the Tribunal did not read Dr Horder's report and that it was not lodged on the Tribunal's files, although Mr Danian maintains that he submitted it to the Tribunal at the hearing and that the Tribunal asked a clerk to photocopy it, along with other documents. The other important document to which uncertainty attaches is a letter from Mr Ojeaga, the President of ADM, to the Presiding Judge of the Immigration Appellate Authority written two days before the hearing, in which he described the services Mr Danian had rendered for his movement since he joined it. This letter is of significance in that it dated Mr Danian's first involvement in the movement back to June 1994, nearly a year before the refusal of his asylum application was served on him, attested to his 'exceptionally significant' contribution to ADM and stated why in the writer's opinion Mr Danian would have genuine grounds for fear about his treatment if he was to be returned to Nigeria. This letter, too, is not on the Tribunal's file, and we have been told that it did not consider it.

In its ten-page determination the Tribunal focused its attention on the issue of law it had identified and did not spend much time in analysing the facts. The only reference it made to the facts, after an introductory outline of the history, was in the following passage:

Mr Chalkley did not believe that any pro-democracy activities which the appellant may have been involved in prior to 1995 were such as to have brought him to the attention of the Nigerian authorities. We heard evidence from the appellant but we are drawn to the same conclusion as Mr Chalkley.

He was further satisfied that the Nigerian pro-democracy campaign activities which he did become involved in from May 1995 were tailored solely with the intention of creating a false claim. Mr Chalkley found that the appellant's actions were not motivated by genuine political opinions but by a desire to enhance his claim for asylum. His actions in deliberately trying to bring himself to the attention of the Nigerian authorities by writing to the Nigerian High Commission were in the Tribunal's view a blatant and cynical attempt to manipulate circumstances to his own advantage.

In the Tribunal's view this behaviour is wholly inconsistent with the behaviour of someone who has a genuine fear of persecution. On his own account the appellant has voluntarily exposed himself to a risk of persecution. In a letter dated 21 April 1998 the appellant said that he had decided to return to Nigeria rather than remain in detention in the United Kingdom pending the outcome of his appeal. In our view this is a further indication of the fact that the appellant is not in fear of returning to Nigeria. Further in our view there is no reason to believe that the Nigerian authorities would impute to him a political opinion. They may regard him with some justification as a liar or an opportunist but in our view there is no reasonable degree of likelihood that he would be at risk of persecution for a Convention reason. Mr Chalkley said that he believed his conduct had been wholly unreasonable. We would not ourselves have used this language, bearing in mind the approach taken in Gilgham. In our view, however, his activities fell within the broad category of a 'cynical tailoring . . . so as to create a false claim for refugee status'. Thus, the appellant fails within that category of person who is a refugee sur place, but who has acted in bad faith. As he has acted in bad faith, he fails out with the Geneva Convention. He is not a person to whom the Convention applies; this would be our view regardless of whether his activities post 1995 may have brought him to the attention of the Nigerians and regardless of whether his fear of persecution may be well founded."

The letter dated 21 April 1998 was a letter in which Mr Danian had written that he preferred to return to Nigeria and 'face my fate whatever it might be'. He said that the immigration authorities had told him that the Tribunal's determination might be subject to a further appeal, and that he could well remain in detention for another year. He withdrew this disclaimer letter a week later, and Mr Kovats did not seek to argue that the Tribunal had been justified in giving the earlier letter any weight at all, given the circumstances in which it was written.

Mr Kovats argued that it was unnecessary for us, for two reasons, to determine the point of law identified by the Tribunal. The first was that the Tribunal had made an unappealable finding of fact in his client's favour which was dispositive of this appeal. Alternatively, he said that the Tribunal had made a second set of findings of fact in his client's favour, and if we were to take the view that it was not entitled to make those findings, we should remit the case to the Tribunal to enable it to make the necessary findings before we resolved any disputed question of law.

I will consider each of these arguments in turn.

First, Mr Kovats relied on the Tribunal's finding to the effect that:

. . . there is no reason to believe that the Nigerian authorities would impute to him a political opinion. They may regard him with some justification as a liar or an opportunist but in our view there is no reasonable likelihood that he would be at risk of persecution for a Convention reason."

In my judgment, this finding is not sufficiently well-based on a careful analysis of the evidence to have the 'knock-out' qualities for which Mr Kovats contends. It is well-known that an asylum case requires the most anxious consideration of the evidence, and the Tribunal did not, at any rate on the face of its determination, afford it that consideration. The mention of Mr Danian in The Observer article, the opinion attributed to him at the September 1995 meeting (whose minutes, he said, had come to the attention of the Nigerian authorities) and the content of his discussions with representatives of the High Commission in May 1996 were all matters which called for careful evaluation before such a finding could safely be made. Because of the answer the Tribunal gave to the question of law which it identified, it did not apparently think it necessary to go on to consider the detailed documentary evidence which was before it.

There is the further problem that the status of the letter from the President of ADM was unresolved at the time we heard the appeal. This evidence went directly to the likely attitude of the Nigerian authorities, and if it had indeed arrived at the Tribunal (and it was contained in a letter addressed to the President) it ought to have been taken into account before a finding of this kind was made. There is a mystery surrounding this letter because the appellant, who was in detention when he appeared before the Tribunal, does not seem to have become aware of its existence until some months later. On the other hand it appears to have been addressed to the President of a body clearly identifiable as the Tribunal in advance of the hearing. The uncertainties about the evidence available on 11 May are very unsatisfactory in a matter of this importance to the appellant. For these reasons I would reject Mr Kovats's first point.

His second point was that the Tribunal had made the following findings:

(i) Mr Danian had not engaged in any political activities prior to his first asylum claim (ie until after he had arrived in the United Kingdom) which brought him to the attention of the Nigerian authorities;

(ii) Since 1995 Mr Danian had cynically tailored his activities so as to create a false claim for refugee status.

The problem about this argument is that for the purposes of Mr Kovats's later argument it called, once again, for a more careful examination of the factual evidence than that afforded in this case by the Tribunal, because it did not consider the detailed documentary evidence, for the reasons I have already given. Mr Kovats's later argument was founded on the premise that the whole of Mr Danian's political interest in Nigerian politics and his later active involvement was insincere. It was a charade, invented for the purpose of creating grounds for an asylum claim which he knew to be a sham. Mr Kovats appreciated that he had to put his case as high as this. If an appellate body was satisfied that Mr Danian genuinely held the political opinions he expressed in his writings from June 1989 onwards and that the only 'artificial' element of his conduct was the raised profile he gave to his political involvement after his asylum claim was refused on 9 May 1995 (as Mr Chalkley found) then Mr Kovats's legal arguments on the later part of the case would be seriously weakened.

In my judgment, Mr Chalkley made no clear finding that Mr Danian's political thinking (and earlier activity) was a charade from beginning to end. He concentrated his attention on Mr Danian's activities from May 1995 onwards. In relation to the earlier period he merely said that he did not believe that any Nigerian pro-democracy activities in which Mr Danian may have been involved in this country prior to May 1995 were such as would have been brought him to the attention of the Nigerian authorities. This is a far cry from saying that Mr Danian did not genuinely hold the political opinions he professed or that the sole reason why he involved himself in pro-democracy activities prior to May 1995 was to bolster an asylum claim which he did not know had been refused until that month.

If Mr Chalkley made no such finding, it was, in my judgment, not open to the Tribunal to make any such finding itself without a more careful analysis of the evidence about the development of Mr Danian's thinking and political involvement between June 1989 and May 1995, and more particularly after the cathartic events of June 1993 when Chief Abiola, who had apparently won a democratic election, was detained and imprisoned. This is also another issue on which the Tribunal would have had to consider the weight it should give to Mr Ojeaga's evidence (if it had arrived by 11 May), since part of it went directly to these matters.

The Tribunal found, as I have said, that since May 1995 Mr Danian had cynically tailored his activities so as to create a false claim for refugee status. Mr Kovats was, in my judgment, correct in his appreciation that he could not hope to uphold this finding in the absence of a finding that Mr Danian did not genuinely hold the political opinions he had expressed prior to that date. In my judgment, if the Tribunal did make such a prior finding, it failed to take into account relevant evidence or to give the evidence the careful analysis it deserved, and if findings on this question are necessary for the disposal of this appeal, it would have to be remitted to the Tribunal.

During the course of his oral submissions Mr Kovats contended that there was a further unappealable finding of fact in his favour, to the effect that Mr Danian did not genuinely fear that he would be persecuted if he was returned to Nigeria. I have already said why, in my judgment, the Tribunal was not entitled to place any weight at all on Mr Danian's letter of 21 April 1998. Another reason why I consider this finding, as it stands, to be unsafe, is that it is focused on Mr Danian's state of mind at the time when he wrote his letters to the Nigerian High Commission in April and May 1996 and not on his state of mind long after his meeting with representatives of the High Commission when the genuineness of his asylum claim fell to be evaluated as a matter of law, and

when the Nigerian authorities would no doubt be expected to have taken into account his conduct at the May 1996 meeting.

Another reason why I consider this finding to be unsafe is that the Tribunal does not seem to have appreciated the fact that Mr Danian had allowed himself to be deported in July 1997 without making any mention to the immigration authorities of his activities in April-May 1996 which were said to constitute a blatant and cynical attempt to manipulate circumstances to his own advantage. In other words, but for the destruction of his ticket and his return from Amsterdam to this country, he might have gone back to Nigeria without ever relying on these matters. It was only when he made his new asylum claim on his return from Amsterdam that he mentioned them for the first time.

I have omitted all reference to Dr Horder's report from this analysis because the President of the Tribunal has said that the Tribunal did not read it and it is not on the Tribunal's files. If the matter is remitted to a new Tribunal, its effect will no doubt be evaluated then. On the other hand, I would reject Mr Kovats's submission that it was not relevant to any of the issues related to the genuineness of Mr Danian's fear of persecution. If he had indeed ever been treated in the appalling way he described (which appeared to be corroborated, on the face of it, by Dr Horder's report) this would surely have featured among the reasons why he feared that this kind of treatment might be meted out to him again if he were to return to Nigeria. It was not, in my judgment, simply an irrelevant feature of his past history, as Mr Kovats contended.

For the reasons I have given, I am of the opinion that this case must be sent back to a differently composed Tribunal to enable it to make all the relevant findings of fact, as at the date of the remitted hearing, following a careful analysis of all the material evidence on each issue. I have deliberately made this judgment longer than it otherwise might have been in order to assist the Tribunal in this regard. What remains for consideration at this stage of the case is whether this court should express its opinion on the question of law decided by the Tribunal (in a determination which has now been reported), or whether it should simply remit the matter for rehearing without expressing any view on the disputed questions of law.

In my judgment, it would be appropriate for us to express our views on the law now. As Mr Blake observed, this case has already been to the Court of Appeal twice, the parties are at odds about the law that has to be applied, and it would be absurd if a new Tribunal made findings which a third visit to this court showed to be based on an approach to the law which was mistaken.

I have had the opportunity of reading the judgment of Buxton LJ in draft. I, too, consider that one reason why the Tribunal's findings of fact cannot stand is that it appears to have excluded from its consideration the detailed documentary evidence which was before it because it reached a conclusion on the law which it believed rendered such consideration otiose.

I turn, therefore, to the point of law which is at the centre of the Tribunal's determination.

On the hearing of this appeal Mr Kovats did not seek to support the special adjudicator's view that it was open to him to dismiss an asylum appeal merely because he considered that the conduct of the asylum-seeker in this country had been wholly unreasonable. On the other hand, he contended that if an asylum-seeker acts in bad faith when he does acts which have a tendency to draw him to the attention of the authorities in his home country, his appeal may be rejected on this ground. By 'bad faith' in this context he referred to acts which were performed solely to bolster his asylum claim and for no other reason.

In order to consider the merits of this argument it is necessary to consider arts 1 and 33 of the Geneva Convention. Article 1 sets out the well-known definition of 'refugee'. It goes on to describe the circumstances in which the Convention may cease to apply to a person who satisfies that definition (art 1C). It then mentions the cases in which the Convention is not to apply at all (arts 1D-F), for example in the case of a person who has committed a crime against humanity (art 1F(a)). There is no reference in art 1 to a person who has acted in bad faith in relation to his asylum claim. In these circumstances Mr Blake QC submits that if the criteria set out in art 1A(2) are satisfied, then the person in question is a refugee, although he accepts that in such a case the question whether that person does indeed qualify for refugee status should be considered with particular care.

The other relevant provision is art 33, which contains the well-known protection against refoulement. The prohibition on refoulement is set out in blanket terms in art 33(1), subject only to the limitation contained in art 33(2):

The benefit of the present provision may not, however, be claimed by a refugee when 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."

Again, there is no express mention of the proposed limitation in relation to persons acting in bad faith in relation to their asylum claim of the type for which the Secretary of State now contends. For the origins of Mr Kovats's argument it is necessary to go further afield than the express words of the Convention.

The papers before the court show that in the course of the last 40 years this issue has exercised the minds of judges, immigration appellate authorities and academic writers in a number of different jurisdictions.

In The Law of Refugee Status (1991) Professor James Hathaway summarised the effect of the competing contentions at pp 35-39 in a section headed 'Claims Grounded in the Asylum Seeker's Activities Abroad'. He showed how both Canadian and American authorities had denied refugee status to those whose asylum claims were founded on political activity conducted in their host country against the authorities in their native country. In 1981 the Immigration Appeal Board of Canada, for instance, asserted that it was not reasonable that a person might place himself in jeopardy with the laws of his country and thereby claim special status, if it was that act alone which created the claim for refugee status. In 1978 an American writer described how, in relation to political refugees who claimed to fear persecution resulting from activities within the United States in opposition to their native regimes, US courts had consistently denied refugee status to claimants from non-communist countries. In 1982 the term 'bootstrap refugees' was used as a means of describing people who had had no problem in their home country before they left, but who left anyway, came to the United States and decided that they wanted to stay. In its most blatant form the term was said to cover those who, having decided they wished to stay in the United States, then issued a statement denouncing their home government, which they promptly used as the basis of their asylum application.

In his book, however, Professor Hathaway discussed how an absolutist preoccupation with the possibility of fraud might tend to conflict with basic human rights of self-expression and freedom of association, as well as with the right of human beings to pursue the development of their own personalities. He suggested that in the usual run of such cases the asylum claim was likely to fail

because the applicant would be unable to show that the political opinions he/she had expressed were genuinely held.

At the end of this section of his book, however, Professor Hathaway conceded that there might be people who were entitled to protection even though the political views they had expressed might not have been genuine, in the sense that they had been expressed for the sole reason of securing asylum. Whether or not their views were in fact genuine, there was a danger that the authorities in the home state might treat them as genuine, and subject the proponents of those views to persecution on their return. The professor concluded that since refugee law was fundamentally concerned with the provision of protection against unconscionable state action, an assessment must be made of any potential harm to be faced upon return because of the non-genuine political activity engaged in while abroad. [In the light of the recent decision of this court in Adan [1999] INLR 362, the description of the scope of the provision of protection would have to be widened to include protection in those countries whose governmental authorities are not able to provide the requisite protection, but the effect of this passage remains otherwise unchanged].

Although this passage reflects a thoughtful search for the relevant principles, Mr Kovats submits, quite simply, that Professor Hathaway has got things wrong. He urged us to interpret the Geneva Convention as if it contained an implied term to the effect that its protection would not be afforded to any person whose claim for asylum was founded on acts committed in bad faith. He accepted that this concept introduced difficult questions of causation, a notoriously elusive topic, but he argued that the likelihood of definitional disputes should not deter the court from being willing to imply a term which was based on sound principles of international public policy. For an English court's willingness to take into account questions of public policy when interpreting a UK statute we were referred to R v Secretary of State for the Home Department, ex parte Puttick [1981] QB 767, [1981] 1 All ER 776, at 773 of the former report; and R v Registrar-General, ex parte Smith [1990] 2 QB 253, [1990] 2 All ER 170, at 260-261 of the former report. I share, however, Buxton LJ's concern that the way in whichformulation of the implied term which Mr Kovats has suggested that the 'bad faith' exemption should be drafted, does not cover the situations posited by other proponents of this supposed exemption and does not represent any sort of international consensus as to its supposed scope.bears all the hallmarks of an insufficiency of precision when efforts are made to give it an international meaning.

One of the origins of Mr Kovats's argument appears to be a passage in Professor Grahl-Madsen's book, The Status of Refugees in International Law, Vol 1 (1966) at pp 247-8 and 251-2. Professor Grahl-Madsen thought that politically pertinent actions in exile might fall into one or other of three categories: actions undertaken out of genuine political motives; actions committed unwittingly or unwillingly, which might nevertheless lead to persecution for reason of (alleged or implied) political opinion; and actions undertaken for the sole purpose of creating a pretext for invoking fear of persecution. He suggested that those in the second category might claim good faith and those in the latter might not. He added:

The purpose of good faith implies that a Contracting State cannot be bound to grant refugee status to a person who is not a bona fide refugee."

This thinking not only illuminated the approach of the American and Canadian authorities mentioned by Professor Hathaway: it also reappeared in later academic writing. See K R Petrine, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981) 56 Notre Dame Law Review 719, 729:

Asylum law protects those who in good faith need to be sheltered from persecution. This protection was not meant to encompass those who make political statements for the sole purpose of becoming refugees."

It was against this historical background that it appears to have been common ground in R v Immigration Appeal Tribunal, ex parte B [1989] Imm AR 166 that activities plainly undertaken in bad faith could vitiate what would otherwise be recognised as a valid claim for political asylum. In those circumstances Simon Brown J was concerned to try and identify an additional guiding principle, and fastened on the concept of 'unreasonable conduct' as a useful yardstick. As I have said, Mr Kovats did not seek to uphold this approach.

In that case an Iranian national had been given leave to enter this country as a visitor. His political activities in Iran had been minimal, although he claimed that he had been a member of an anti-Khomeini group. In this country, however, he became the treasurer of an Iranian Monarchist society, and in this capacity he distributed pamphlets, attended anti-Khomeini demonstrations, and was photographed at them.

The Chief Adjudicator found that his overt participation in activities like these was part of a calculated policy to enhance his claim to asylum, and that it would be a travesty of justice if a person was permitted to qualify for asylum by deliberately placing himself in jeopardy for that purpose. He rejected the appeal on these grounds. The Immigration Appeal Tribunal adopted the same approach.

On the application for judicial review Simon Brown J approached the case on the basis that the appellate authorities had found that because of the appellant's conduct there was in fact a risk that he would suffer interrogation and persecution if he was to return to Iran. He said at p.171:

It will readily be apparent that there must exist some principle whereby an immigrant cannot become entitled to political asylum merely by choosing so to conduct himself in the host country as to create the very risk of persecution which then founds his claim to refugee status. But the precise limits of such a principle are not altogether easily determined."

He suggested that voluntary activity in the host country which enhanced the risk of persecution might take a number of different forms. He rejected a suggested blanket ban for asylum-seekers on all such activity (which he wrongly attributed to the European Commission on Human Rights: it was in fact the Swiss Federal Justice and Police Department which had applied such a test: see A v Switzerland (ECHR: Application 11933/86 (1986) 46 D and R 257 at p.267)). He said, however, that at one end of the spectrum:

. . . would fall a case where an asylum-seeker, with no history of antagonism towards his home country's regime, nevertheless on leaving it acts out a pretended hostility calculated to attract refugee status."

He concluded:

It is I think sufficient for the purposes of the instant application to conclude as I do, that not only bad faith will disqualify an applicant for asylum from relying upon post-arrival activities; so, too, on occasions will unreasonable conduct. How unreasonable must be left to be decided hereafter on a case by case basis.

The plain fact here is that the adjudicator and the Tribunal found this applicant's case to fall at the bad faith end of the spectrum. They have found that he deliberately conducted himself pursuant to:

'a calculated policy to enhance his claim to asylum . . . deliberately placing himself in jeopardy for this purpose.'

This finding is clearly one of bad faith, the cynical tailoring of the applicant's activities so as to create a false claim to refugee status. At the very least his conduct cannot but be viewed as totally unreasonable: a quite gratuitous exposure to risk."

The correctness of this approach was considered by this court in R v Secretary of State for the Home Department, ex parte Gilgham [1995] Imm AR 129. In the event the court did not have to make any ruling on the point because on the facts the adjudicator had been entitled to conclude that there was no reasonable degree of likelihood that the appellant in that case would be persecuted if he returned to Libya.

In those circumstances Leggatt LJ considered at p.139 that it was unnecessary to consider whether ex p B was correctly decided. Millett LJ expressed considerable doubts at p.139 whether Simon Brown J's dictum about unreasonable conduct correctly stated the law, but left the question open for decision in a later case.

Morritt LJ, for his part, understood Simon Brown J was referring to such unreasonable conduct as would persuade a Tribunal that the requisite conditions had not been established to justify a claim to refugee status, and as such he found the relevant passage in ex p B to be unexceptionable. He continued, however (see p.141):

If he went any further than that I would find very great difficulty in accepting that unreasonable conduct could debar a claimant from the status of a refugee, even though, notwithstanding that unreasonable conduct, the Tribunal was satisfied that the conditions expressed in the Convention had been established."

I agree with Morritt LJ. In my judgment, if in ex p B Simon Brown J was expressing any such view, this would be wrong and should not be followed. Mr Kovats did not attempt to argue the contrary. He placed reliance, however, on a passage in the judgment of Millett LJ in Gilgham at p.140 in which he said:

To establish a claim to asylum in this country as a political refugee an applicant must satisfy the Secretary of State that his political opinions are held out of genuine political conviction and have not been assumed for the purpose of founding the claim to political asylum. Whether he can satisfy the Secretary of State of the genuineness of his political opinions will largely depend on his credibility, Rule 180G of HC 251: [now Rule 4341(4) of HC 295] provides:

'In determining an asylum application the Secretary of State will have regard to matters which may damage an asylum applicant's credibility if no reasonable explanation is given. Among such matters are:

. . .

(d) that the applicant has undertaken any activities in the United Kingdom before or after lodging his application which are inconsistent with his previous beliefs and behaviour and calculated to create or substantially enhance his claim to refugee status.'

I read the word 'calculated' in that paragraph as meaning 'likely', and not as meaning 'deliberately intended'."

The first sentence of this passage might be taken as establishing the proposition for which Mr Kovats contends. Millett LJ went on, however, immediately to consider the test of credibility which is set out in the rule and did not in that passage, nor in the long paragraph of his judgment which followed, address the issue that has now been identified.

Mr Kovats submitted, variously, that we should interpret the Convention as it stands in the way for which he now contended, alternatively that we should be willing to write into the Convention an implied term of the type he suggests.

His arguments were mainly founded on the principles according to which treaties are interpreted as a matter of public international law.

He began by citing art 31.3 of the Vienna Convention on the Law of Treaties (1969):

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

He appeared to accept, however, that this provision was concerned only with the interpretation process and not with the question with which we are at present concerned.

He then referred us to passages in Oppenheim's International Law (9 Edition). On page 1271 the following footnote appears:

Akin to integration, but distinct from it, is the process of implying terms into treaties, such as that a treaty is only applicable in time of peace: on implied terms, see McNair, Treaties, ch 26. In connection with the interpretation of the Simonstown Agreement the Law Officers of the Crown considered the principle to be applied to be that:

'a term should only be implied in a treaty when it is necessary to do so in order to give effect to the intention of the parties. Applying this principle, it is necessary, to reach the conclusion, in the light of that treaty itself and other surrounding circumstances, that the parties must have intended to contract on the basis of the inclusion in the treaty of a provision whose effect can be stated with reasonable precision' (Cmnd 4589, para 55, February 1971)."

Mr Kovats argued that although arts 1C-1F and 33(2) of the Convention expressly excluded certain specified groups of people from its protection and did not expressly exclude those whose claims were made in bad faith, there were no doubt good reasons for this omission. The first reason he suggested was that the exclusion was obvious, and the other was that in 1951 the number of mala fide claims was small. Since that time, he said, the ease with which people can travel round the world has changed, and this has led to an increase in the number of fraudulent asylum claims.

Mr Kovats also showed us passages in textbooks which described how the principle of good faith is one of the most fundamental principles of public international law, in particular in the operation of treaties: see Oppenheim, op cit, pp 16-17, and Malcolm N Shaw, International Law (4 Edition) pp 81-82, 633. These texts, however, as Mr Kovats accepted, are concerned with the conduct of the parties who have bound themselves by international treaty. Thus Malcolm Shaw says at p.633 of his book:

The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith. This rule is known in legal terms as

pacta sunt servanda and is arguably the oldest principle of international law. It was reaffirmed in Article 26 of the 1969 Convention, and underlies every international agreement. It is not hard to see why this is so. In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other."

Mr Kovats showed us how the same principle can be relied on by individuals against states or international organisations. In this context he referred us to the recent judgment of the European Court of Justice in Opel Austria Gmbh v Council of the European Union [1997] ECR II-70 at paras 90-93. In that case the applicant had contended that the Council had infringed the principle of public international law according to which, pending the entry into force of an international agreement, the signatories to that agreement might not adopt measures which would defeat its object and purpose. The court upheld this complaint. It said at para 93:

. . . The principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case law, forms part of the Community legal order . . . Any economic operator to whom an institution has given justified hopes may rely on the principle of protection of legitimate expectations."

That case, like the passages in the text books, was concerned with the conduct of states, or of an international body like the European Community, which are parties to an international agreement. When we asked Mr Kovats if he had any authority he could show us which extends the relevant principle of public international law to deny protection to a private citizen who was not himself a party to the relevant Convention, he said he was not able to show us any.

He appreciated that the logical consequence of his contention was that if someone 'in bad faith' became prominently involved in political activities in this country for the sole purpose of bolstering his claim to asylum, the Secretary of State would be free to send that person home to be persecuted for his imputed political opinions even if he genuinely feared such persecution (as a result of his home state's reaction to his activities) and even if, objectively viewed, such persecution was likely to take place. When we asked Mr Kovats if his submission would be the same even if that person was likely to be tortured, he replied 'Yes'.

He rightly, in my judgment, recognised that he had to give that answer, notwithstanding the uncompromising terms of the European Court of Human Rights' judgment in Chahal (1996) 23 EHHR 413 at pp 456-457:

79. Article 3 [of the European Convention on Human Rights] enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment of punishment, irrespective of the victim's conduct . . .

80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstance, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3

is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees."

I would reject the contention made on behalf of the Secretary of State that the protection afforded by art 3 should be narrowed in the way Mr Kovats suggested, by the device of implying a term in the Convention which nobody seems to have thought of expressing.

In my judgment, the answer to the riddle we have been invited to solve is to be seen emerging in the judgment of Millett LJ in Mbanza [1996] Imm AR 136, where this court adopted the same approach as that suggested by Morritt LJ in Gilgham in a case in which a Zairean asylum-seeker had put forward a story which was held to be 'totally devoid of any credibility'. The court held that the putting forward of a baseless or fraudulent claim did not in itself exclude an applicant from the protection of the Convention, but it identified a number of pragmatic reasons why his claim would be unlikely to be successful in those circumstances. Millett LJ observed at p.142:

The solution . . . does not lie in propounding some broad principle of abuse of the system or attempting to pervert the course of justice in order to justify a breach of the United Kingdom's international obligations, but in bearing in mind the cardinal principle that it is for the applicant to satisfy the Secretary of State that he has a well-founded fear of persecution for a Convention reason. Whether he can do so or not will largely turn on his credibility, and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left."

In Australia the courts have recently focused, in cases of this kind, on the need to determine whether the alleged fear of persecution is a genuine one in the circumstances and whether objectively speaking there is indeed a risk of persecution if the applicant is returned to his home country. This is well illustrated by an extract from a recent judgment by Lee J, sitting in the Federal Court of Australia, in Mohammed v Minister for Immigration and Multicultural Affairs [1999] FCA 868 at paras 24-28:

24. Recognition that refugee status may be attracted by the conduct of a person outside his country of nationality presents the risk that the purpose of the Convention may be abused by persons purporting to rely upon it when not really in need of protection. Such applicants for refugee status have been described as 'bootstrap refugees' (J C Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1991) at 37).

25. To counter the perceived risk of abuse in such cases, claims of refugee status will attract close scrutiny. (See: Gummow J in Somaghi v Minister of Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100 at 118). The principle described by Gummow J adopts a discrimination [sic] suggested by A Grahl-Madsen in The Status of Refugees in International Law (Leyden: A W Sitjhoff, 1966) at 252:

'[W]e may have to draw a distinction . . . between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may not.'

26. As Gummow J stated in Somaghi, actions undertaken for the sole purpose of creating a pretext for claiming fear of persecution, do not make a well-founded fear of persecution. In Somaghi, Jenkinson J (at 109) and Gummow J (at 118) make it clear that actions undertaken to create the pretext of such a claim cannot support a conclusion that there is a genuine fear of persecution.

27. What is acknowledged in Somaghi is that actions designed to give colour, or plausibility, to a claim that is no more than a pretence, are to be disregarded in determining whether a fear of persecution exists and is properly based, having regard to subjective and objective elements. In other words, a fraudulent claim of fear cannot be a well-founded fear. (See Khan v Minister for Immigration and Multicultural Affairs and Refugee Review Tribunal (1997) 47 ALD 19).

28. At all times, however, the determination to be made is whether there is a genuine fear of persecution and whether that fear is well-founded. A person will have a well-founded fear of persecution if it may be shown that there is a real chance that the persecution feared may occur (see Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 per Mason CJ at 389, Dawson J at 398, Toohey J at 407 and McHugh J at 429). Consistent with the terms of the Convention, and the obligations undertaken by a contracting state thereunder, recognition of refugee status cannot be denied to a person whose voluntary acts have created a real risk that the person will suffer persecution occasioning serious harm if that person is returned to the country of nationality. In some cases, albeit extraordinary, fraudulent activity by an applicant for refugee status may, in itself, attract malevolent attention from authorities in the country of nationality, giving rise to a well-founded fear that serious harm will occur if that person is returned. In such cases, a determination must be made whether that person is to be accorded refugee status."

In those circumstances, even though the applicant was found to have been acting solely out of a desire to put himself in a position where he could claim to be endangered, Lee J held that the central question to be determined by the Tribunal was whether he held a genuine fear that he would be persecuted and whether, if he were returned to Sudan, there was a real risk that serious harm would befall him by acts of persecution. He therefore remitted the case to a differently composed Tribunal to enable it to make findings on that question.

Although we were not afforded a wide contemporary insight into rulings made on this issue in other jurisdictions, except in so far as the effect of a large number of decisions is summarised in the New Zealand case of Re HB (Refugee Appeal No 2254/94), I have noted that a similar conclusion was reached by the United States Court of Appeals, Seventh Circuit, in Bastanipour v INS 980 F 2d (1992). In that case the court held that the central question was not whether an Iranian national's conversion (while in prison) from Islam to Christianity was sincere or genuine: rather, it was a question of how the purported conversion would be viewed by the authorities in Iran.

In my judgment, the approach of Millett LJ in Mbanza and of Lee J in Mohammed correctly sets out the approach a court or appellate authority should adopt in the situation postulated by the Tribunal in its determination in the present case. I am fortified in my view that this is the correct approach by the terms of a letter written by Mr Peter van der Vaart, the Deputy Representative in this country of the United Nations High Commissioner for Refugees, to the appellant's solicitors. We were told by Mr Blake that both parties approached his office for an expression of UNHCR's views on this point and that Mr van der Vaart consulted his Head Office in Geneva before responding. Although a letter of this type cannot be more than of persuasive effect, it does represent a distillation of the collective wisdom of the Commission which has been concerned with supervising the operation of the Convention on a world wide basis since it first came into effect.

Mr van der Vaart writes, so far as is material:

We refer to your letter of 1 September 1999 requesting UNHCR's view on the issue whether a person who in bad faith, with the sole objective of obtaining refugee status in another country, acts

so as to put himself at risk of persecution in his country of nationality, for reason of race, religion, nationality, membership of a particular social group or political opinion is entitled to rely upon the 1951 Convention.

. . .

The question posed deals with the post-flight activities of the applicant, ie activities undertaken by the applicant after his departure from his country of origin. According to paragraph 96 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status:

'(a) person may become a refugee 'sur place' as a result of his own actions, such as associating with refugees already recognised, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.'

Nothing is said here about the good faith of the person, not is there any reference to a 'good faith' requirement in the refugee definition.

UNHCR is of the view that an asylum-seeker who can establish that he/she has a well-founded fear of persecution on Convention grounds should fall under the scope of the inclusion clauses, irrespective of whether the actions giving rise to such fear have been carried out in good or in bad faith. Accordingly, even if the applicant has created a claim to refugee status by resorting to opportunistic post-flight activities, it would not be right to deprive him of international protections and return him/her to his/her country of origin if it is established that the consequences of such return may result in persecution for one of the reasons enumerated in the 1951 Convention.

We realise that this may encourage the misuse of the asylum system by persons who, without having real protection needs, want to create a refugee claim for themselves through irresponsible/ opportunistic actions. This consideration is, no doubt, an important one, as the misuse of the asylum system may eventually be detrimental to the interests of bona fide asylum-seekers and genuine refugees. For this reason, UNHCR would not object to a more stringent evaluation of the well-foundedness of a person's fear of persecution in cases involving opportunistic claims.

In this connection, it should be borne in mind that opportunistic post-flight activities will not necessarily create a real risk of persecution in the claimant's home country, either because they will not come to the attention of the authorities of that country or because the opportunistic nature of such activities will be apparent to all, including to those authorities."

For the reasons set out in my judgment, I am of the opinion that this letter correctly sets out the guidance which should be followed by appellate authorities and courts which are faced with an issue of this kind.

I have considerable sympathy with the Tribunal in the task it faced when confronted with such a difficult issue by an applicant in person. It found its way to a different solution by placing very heavy reliance on the 1994 New Zealand decision in Re HB to which I have referred. That decision antedated both Gilgham and Mbanza in this country, and Mohammed in Australia, and placed heavy reliance on the approach adopted by academic writers and immigration authorities in the period before Professor Hathaway's seminal work clarified the issues in the way it did.

In any event, the long legal discursus by the Chairman of the Refugee Status Appeals Authority in Re HB was unnecessary for the authority's decision in that case. The Authority had found that an Iranian asylum-seeker's public utterances were all completely untrue, to his knowledge, and it made two robust findings of fact which should have been dispositive of the appeal:

(1) The appellant was not in subjective fear of persecution;

(2) There was no real chance of him being subject to persecution in Iran if he was returned there.

For all these reasons I do not accept the Tribunal's conclusion that a refugee sur place who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered.

For these reasons, I would allow this appeal and remit the case to a differently constituted tribunal for a complete rehearing. That tribunal will no doubt wish to receive up to date evidence about the situation in Nigeria before it reaches its decision on the remitted appeal.

I wish to end this judgment by saying that nothing in it should be read as giving any kind of green light to bogus asylum-seekers. If the UNHCR's guidance is followed, in the vast majority of cases of the type I have been considering the claim for asylum will be peremptorily dismissed without any real difficulty. It is only in what Lee J describes as an extraordinary case that a genuine entitlement to protection from refoulement may arise, and in such a case the claim should be tested on the principled basis I have set out in this judgment. It should not be rejected peremptorily on a basis that appears to have no sound foundation in international law.

JUDGMENTBY-2: BUXTON LJ

JUDGMENT-2:

BUXTON LJ: I gratefully adopt the account of the complex facts of this matter that is set out in the judgment of Brooke LJ. I agree that the appeal should be determined in the manner that he proposes, and for the reasons that he gives. Because of the importance, and difficulty, of the matter, I venture to add some words of my own.

The following propositions are elementary, but need to be restated to assist in identifying the issues in this case:

1. On any view, the Geneva Convention [the Convention] only applies in a case where the applicant has a well-founded fear of persecution in the country to which it is proposed to send him by reason of, inter alia, political opinion.

2. That political opinion may be one imputed to him by the authorities of the country in question, even if it is not in fact held by him.

3. If the authorities of the country in question will not in fact take action because of the applicant's political opinions, either actual or imputed, then of necessity he can have no well-founded fear of persecution on that ground.

4. The foregoing factual questions when addressed by a tribunal must be addressed according to the facts known at the date of the tribunal's enquiry.

The IAT found in terms that:

there is no reason to believe that the Nigerian authorities would impute to [Mr Danian] a political opinion . . . there is no reasonable degree of likelihood that he would be at risk of persecution for a Convention reason."

The IAT also held, though without encapsulating that finding in a single quotable sentence, that Mr Danian had no well-founded fear of persecution, irrespective of the IAT's finding just cited as to the future attitude of the Nigerian authorities. Mr Blake rightly agreed that either of those findings, if it stood, was fatal to Mr Danian's case irrespective of the correctness or otherwise of the IAT's conclusion on the point of law debated before them and before us: since if Mr Danian does not have the requisite well-founded fear of persecution, or alternatively will not in fact be persecuted for a Convention reason, he does not fall within the terms of the Convention in any event, whatever may be the law as to disqualification on grounds of lack of bona fides.

In my judgment, neither of those findings can stand, and must be reconsidered by the IAT. The IAT held that those two findings were irrelevant to the outcome of the case because:

As [Mr Danian] has acted in bad faith, he falls outwith the Geneva Convention. He is not a person to whom the Convention applies; this would be our view regardless of whether his activities post 1995 may have brought him to the attention of the Nigerians and regardless of whether his fear of persecution may be well founded."

If that view of the law as applied to this case were correct, then it would be right that the IAT's findings on the points listed above would not come into issue for the disposal of this appeal. However, since I venture to think that that view of the law is not correct, it is necessary to review the findings of fact.

Because of the view of the law adopted by it, the IAT held that it was not appropriate to consider what it called at page 5 of its ruling:

the detailed additional evidence presented to us by Mr Danian together with the documentary evidence which was before the adjudicator or which was presented to us for the first time."

Since the IAT was considering the matter afresh, including taking the direct testimony of Mr Danian, and not merely acting as a court of review, that failure to address evidence that might or might not prove relevant when scrutinised, and which might or might not assist them in assessing the reliability of the evidence given by Mr Danian, was an error of principle which engages the jurisdiction of this court. There are two further and more particular aspects of the IAT's fact-finding process that cause me concern. First, the IAT appears to have misunderstood the bearing of Mr Danian's letter of 21 April 1998, which in my view cannot be properly read as indicating a lack of fear of persecution in Nigeria on Mr Danian's part. I did not understand Mr Kovats for the Secretary of State to contend otherwise. Second, the main passage in which the IAT deals with the fear of persecution states that:

[Mr Danian's] actions in deliberately trying to bring himself to the attention of the Nigerian authorities by writing to the Nigerian High Commission were in the Tribunal's view a blatant and cynical attempt to manipulate circumstances to his own advantage. In the Tribunal's view this behaviour is wholly inconsistent with the behaviour of someone who has a genuine fear of persecution."

That however conceals what is the essential factual issue in the case, of whether at the time of the tribunal's assessment Mr Danian, having taken the steps referred to, was then at risk of persecution, whether by reason of those steps or otherwise. Particularly in the context of the legal issues asserted in this case that is a question that needed to be separately identified and answered.

I would therefore remit the matter to the IAT. I should make it clear, as does Brooke LJ in his judgment, that the IAT will have to consider the matter as it stands at the date of the further hearing, and thus it will be open to either party to adduce further evidence as to the current situation in Nigeria and its bearing on the particular case of Mr Danian. I also agree with Brooke LJ that in these circumstances it is incumbent on this court to determine the law that the IAT should apply, more particularly on the issue of 'bad faith'.

The Secretary of State's contention was that, even if an applicant otherwise fell within the terms of the Convention, by reason of having a well-founded fear of persecution for a Convention reason, nevertheless if he had acted in bad faith he was not a Convention 'refugee', and therefore the state where he found himself was not bound by the prohibition of refoulement in art 33 of the Convention in respect of him. Mr Kovats contended that this outcome was achieved either by reading an implied term into art 1 of the Convention, or by concluding more broadly that the field of operation of the Convention simply excluded such a case.

The general term 'bad faith' is susceptible of a range of meanings and applications, a matter to which I shall have to return. Conscious of that, Mr Kovats said that at least in the present context it meant that the applicant's only material motive for acting had been to create a claim for asylum. Mr Danian fell within that category, because it was only after the rejection of his original asylum claim that he had deliberately drawn the attention of the Nigerian authorities to his case, with the objective of causing them to mark him down, or at least enabling him to claim that he might be marked down, for persecution on his return to Nigeria. That submission immediately excites two comments.

First, the IAT did not approach the matter, or at least did not clearly approach the matter, in those limited terms, but spoke of bad faith more generally, with the consequent danger of the imprecision from which Mr Kovats' formulation sought to save the case: see for instance the IAT's adoption at page 7 of its ruling of the formulation in the New Zealand case of HB that:

The Refugee Convention was intended to afford protection only to the bona fide individual who is unable or unwilling to avail him or herself of the protection of the country of nationality."

Second, where there is, as Brooke LJ has demonstrated in this case, a long history of opposition to the regime of a particular country, albeit expressed privately and without bringing it to the attention of the authorities, it is very difficult to decide what, if any, part of that history should be excluded from the 'acting' of the applicant for the purpose of applying the exclusive motive test; and very difficult to say that the only motive for the later and more demonstrative expression of opinion was to create a case under the Convention.

Even if, therefore, I thought that the test espoused by the Secretary of State was correct as a matter of law, the case would still have to return to the IAT for careful consideration of whether Mr Danian fell within that test. In the event, however, I am of opinion that the Secretary of State is wrong to contend for any 'bad faith' term or limitation in the application of the Convention. To explain why that is so requires consideration of a number of elements in the jurisprudence of the Convention, which in the first instance it will be necessary to set out separately and without indicating their relationship to each other.

1. This Court has recently held, in R v Secretary of State, ex parte Adan [1999] INLR 362, at p.381F, that in adjudicating upon acts of national authorities in cases that engage the Convention a national court must distinguish between the interpretation of the Convention and its application (Transcript, p.20). It seems plain that, within that categorisation, the question before us is manifestly one of interpretation, not of application. It concerns the meaning of the word 'refugee' in art 1 of the Convention, as the Secretary of State recognised by formulating his argument as requiring the insertion of an implied term in the text of that article. That term must have a single meaning, what the Master of the Rolls in Iyadurai [1998] INLR 472 called its 'international meaning'. This Court accordingly said of the word 'refugee' as used in the Convention in Adan at p.383E-F:

The essence of the Convention's protective measures is to be found in Art 1A(2), which defines 'refugee' (and in the prohibition of refoulement in Art 33). The scope of the definition . . . must be a matter of law, not fact. Otherwise the protection offered by the Convention would in effect be reduced to a discretionary exercise by the signatory States. But the Convention's very purpose is plainly to afford international protection to persons falling within objectively defined classes."

2. The task of the national court in finding that international meaning is a formidable one. This court in Adan cited with approval a passage from the speech of Lord Lloyd in an earlier but different case with the same name, Adan v Secretary of State for the Home Department [1999] 1 AC 293, [1998] 2 All ER 453 at p.305C-D of the former report:

Inevitably the final text will have been the product of a long period of negotiation and compromise . . . It follows that one is more likely to arrive at the true construction of article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach. But having said that, the starting-point must be the language itself."

In that spirit, this court referred to the Vienna Convention on the Law of Treaties, arts 31 and 32 of which do indeed start from the presumption that it is the terms of the treaty that have to be interpreted, but which contemplate the use, as a common law exercise in statutory interpretation would not, of subsequent agreements or practices between the parties and, in cases of ambiguity, obscurity and manifest unreasonableness, recourse to the travaux preparatoires.

3. Brooke LJ has set out the material potentially relevant to the process referred to in para 2 above that was put before us. As his judgment demonstrates, we were shown no material that suggested any sort of international consensus or agreement supporting the interpretation contended for by the Secretary of State. The learned commentaries, to the extent that they have addressed the issue, do not speak with one voice. And such case-law as exists, both in this jurisdiction and abroad, to which I shall return in more detail below, again does not point in a single direction.

4. As to the actual wording of the Convention, it has to be remarked that certain exceptions are provided from the broad definition of 'refugee', but that they do not include the case contended for by the Secretary of State. The Secretary of State said that exclusion of a case such as Mr Danian's would have been assumed or obvious had it been thought of as possible when the Convention was formulated. We were shown nothing in the travaux preparatoires to indicate that the case had been assumed to be excluded; and in terms of art 32 of the Vienna Convention it does not seem to me necessarily manifestly absurd or unreasonable that the bare wording of the Convention should extend protection to a person in Mr Danian's position, provided that he does indeed have a well-founded fear of persecution.

5. Allegations of 'bad faith' applications for refugee status necessarily cover a range of possible factual situations. The most extreme is what is called a 'bootstrap' application, where a refugee has had no problems in his home country, and then enters into oppositional activity from abroad in the hope of being allowed to stay where he is. Discussion of this particular phenomenon is to be found, for instance, in Hathaway, The Law of Refugee Status, at p.37. It was agreed by the Secretary of State that that was not Mr Danian's case, at least if the facts as to his previous activity in Nigeria were to be reviewed, but the phenomenon referred to has played a large part in earlier discussion of the bad faith exception.

6. Not all of that discussion has borne in mind that in any event an actual well-founded fear of persecution has to be established before issues of bad faith arise at all. That was however clearly in mind in a case that the IAT held to express its own view on the law, the decision of the Refugee Status Appeals Authority of New Zealand in Re HB (1994). We were shown a copy of that long and detailed ruling, which contains a valuable survey, more extensive than anything else put before us, of the international material. The Authority adopted, as did the IAT, a formulation of the exclusionary condition from the category of refugee sur place put forward by Professor Grahl-Madsen in The Status of Refugees in International Law (1966), p.248:

Actions undertaken for the sole purpose of creating a pretext for invoking fear of persecution."

Whilst the word 'pretext' in the original text may carry some ambiguity, the Authority made it plain, at page 54 of its ruling, that it read Professor Grahl-Madsen's formulation, and the international consensus that the Authority thought to have identified, as applying even to cases where the fear of persecution was established.

7. Some jurisdictions, while not granting asylum to persons whose fear of persecution stems from activities in the receiving state, nonetheless see themselves as inhibited by art 33 of the Convention from refoulement in such cases. That appears to be the position in Switzerland, at least from the account given at pages 42-43 of the ruling in Re HB. It may also be the position in Germany, again from an account in Re HB at page 41 of that ruling.

8. It appears from a lengthy extract to be found in Re HB that the same view as was adopted in that case was also taken by a full bench of the Federal Court of Australia in Somaghi v Minister for Immigration (1991) 31 FCR 100. We should however also have regard to the subsequent decision in that court of Lee J in Mohammad v Minister for Immigration [1999] FCA 868 at para 26, in which his Honour interpreted Somaghi as:

[making] it clear that actions undertaken to create the pretext of such a claim [of refugeehood] cannot support a conclusion that there is a genuine fear of persecution. What is acknowledged in Somaghi is that actions designed to give colour, or plausibility, to a claim that is no more than a

pretence, are to be disregarded in determining whether a fear of persecution exists and is properly based, having regard to the subjective and objective elements. In other words, a fraudulent claim of fear cannot be a well-founded fear . . . A person will have a well-founded fear of persecution if it may be shown that there is a real chance that the persecution feared may occur . . . Consistent with the terms of the Convention, and the obligations undertaken by a contracting state thereunder, recognition of refugee status cannot be denied to a person whose voluntary acts have created a real risk that the person will suffer persecution occasioning serious harm if that person is returned to the country of nationality. In some cases, albeit extraordinary, fraudulent activity by an applicant for refugee status may, in itself, attract malevolent attention form authorities in the country of nationality, giving rise to a well-founded fear that serious harm will occur is that person is returned."

I venture respectfully to think that the Full Court in Somaghi may not in fact have intended to express itself as Lee J inferred. The force of Gummow J's judgment is much more in line with the interpretation adopted in Re HB and by the IAT in our case, that bad faith will deprive of protection from refoulement even a person who does have a well-founded fear of persecution. Nonetheless, like Brooke LJ, I consider that Lee J's analysis indicates that the approach of the Authority in Re HB does not follow of necessity from the terms of the Convention.

9. A number of the cases in which the good faith of the applicant have been discussed have concerned cases in which it has been claimed that the very act of making an application for asylum, or alternatively being found by the host country to have made a false application for asylum, will expose the applicant to persecution in his native country. Such cases are often of little assistance, because persecution on those grounds, were it to arise, would not be for a Convention reason: see per Millett LJ in Mbanza [1996] Imm AR 136 at p.143.

10. Like the authorities from other jurisdictions, the English authorities, such as they are, give no clear answer to this problem, and certainly no answser that binds this court. That is principally because the precise question that is before us has never previously been directly confronted.

11. In R v IAT, ex parte B [1989] Imm AR 166 the adjudicator and the IAT had dismissed the asylum claim of the applicant, an Iranian whose anti-government activities in Iran had been minimal, but who on arrival in the United Kingdom joined prominent opposition groups, on the basis of a supposed holding by the European Commission on Human Rights in A v Switzerland (1986) 46 D&R 257 that political activities in the host country could not be relied on because:

any asylum seeker must restrict his political activities in his own interest, otherwise he must bear the consequences."

Simon Brown J considered that that formulation was too harsh, since it excluded persons who felt genuinely obliged to campaign against a repressive regime from outside its borders; and it now appears from the full report of A v Switzerland that we were shown that the passage cited was not the conclusion of the Commission but a report of a ruling by the Swiss authorities. Simon Brown J however concluded that bad faith would disqualify an applicant from relying on post-arrival activities; and that in some circumstances so would unreasonable behaviour. It appears however that the applicant in B conceded the exclusion of his claim on grounds of bad faith, and indeed asserted such an exclusion as the limit of the power of the state a refuse asylum in a case where danger of persecution on return had been found; and Mr Kovats expressly disclaimed any reliance on a criterion expressed in terms of 'unreasonable' behaviour. Mr Kovats was in my view right to

make that disclaimer. To subject the applicant's conduct to a test of reasonableness comes far too near to conferring on the states signatory to the Convention a discretionary power of the type against which this court warned in Adan. One has to say about B, therefore, that whilst there is no doubt that Simon Brown J did conclude that a person with a well-founded fear of persecution could be excluded from refugee status on grounds of bad faith, the issues do not appear to have been ventilated before him in the terms in which they have been addressed before us.

12. The court in B obtained some assistance from the judgment of Balcombe LJ in Mendis v IAT [1989] IAT 6, in which the Lord Justice held that a claim for asylum could not be based on a threat or inclination to speak out against the government of the applicant's native country were he to be returned there. However, the other members of the court in Mendis reserved the point; and in any event the case did not require the court to address the different and conceptually more difficult question of the relevance of future conduct to a claim to be a refugee sur place.

13. In Gilgham [1995] Imm AR 129 this court concluded that since the applicant had not made out any well-founded fear of persecution, his claim must fail in any event. It went on, however, to consider a further argument on the part of the Secretary of State, based on the approach in B. Leggatt LJ reached no conclusion on that point. Morritt LJ, whilst expressing himself in relation to the criterion of unreasonable conduct (which, it will be recalled was the only issue left open in B), appears nonetheless to have been concerned generally at the prospect of an applicant being denied protection even if he fulfilled the express conditions laid down in the Convention. Millett LJ did however address the issue of bad faith, and said in terms that:

To establish a claim to asylum in this country as a political refugee an applicant must satisfy the Secretary of State that his political opinions are held out of genuine political conviction and have not been assumed for the purpose of founding the claim to political asylum."

14. This formulation of Millett LJ appears to contain a general requirement of good faith. However, the statement was made in the context of the case, in which there had been no political activity until arrival in the host country (and thus the case was a pure 'bootstrap' application: see para 5 above); and the Lord Justice also stressed the bearing of in-country activities to the applicant's credibility, and approved in that connexion the relevance of r 180G of HC 251, which spoke of credibility being undermined when activities were undertaken which were inconsistent with the applicant's previous beliefs.

15. Further, in Mbanza [1996] Imm AR 136 Millett LJ addressed the different issue of whether the making of a fraudulent and baseless claim necessarily put the applicant outside the provisions of the Convention when he made a further claim by saying that on each application the tribunal must apply the Convention test of the applicant's well-founded fear, having in mind that it would be:

a breach of the United Kingdom's international obligations under the Convention to return him to face possible death or loss of freedom"

ibid at p.142. That analysis was not addressed to the particular question that arises in our case; and it should be noted that in Mbanza Butler-Sloss LJ held in general terms that an application could be rejected as 'self-serving': ibid at p.140. Nevertheless, it is not immediately obvious why that fact-based analysis of the application of the basic terms of the Convention should not apply in our case also.

Against that regrettably lengthy background I now indicate my conclusions on this part of the case.

(i) The basic principle of arts 1 and 33 of the Convention is the protection of persons who have well-founded fears of persecution for a Convention reason.

(ii) Since the Convention is concerned with protection against what may be extreme forms of danger, injury or even loss of life, that protection should be witheld only in specific and extreme cases.

(iii) The Convention itself having provided specific exceptions, their number should not be added to unless there is a clear international consensus to that effect, or the exception is required by international practice. Neither of these criteria are fulfilled in the case of 'bad faith': or, at least, not fulfilled to the extent that a national court can assume that the 'international meaning' of the Convention includes a bad faith exception.

(iv) A further difficulty in the way of adopting a 'bad faith' exception is the problem of formulating that exception with sufficient precision. The formula contended for by the Secretary of State in our case is properly limited: albeit, as I have suggested above, at the expense of almost no case ever falling under it. It is, however, different from other formulations that have been essayed, such as 'pretext' for invoking fear of persecution (differently interpreted in two cases in the Federal Court of Australia: see paras 6-8 above); genuineness of political opinion (see para 13 above); and that the applicant's activities must not be 'self-serving' (see para 15 above). These differences underline the elusiveness of the necessary international meaning that must be found before the exception can be recognised. They also strongly indicate that any claim of a more general exclusion of unmeritorious cases would amount to a claim to an impermissibly vague and discretionary power to dispense from the international requirements of the Convention.

(v) The considerations set out in paragraphs (i)-(iv) above are sufficient to preclude the courts of this country from establishing a 'bad faith' exception to the plain wording of the Convention. However, although it is very doubtfully open to a national court to take into account policy considerations when interpreting an international treaty, I will nonetheless indicate why I consider misplaced the alarm that has been expressed in some of the authorities as to the implications of the absence of a good faith requirement.

(vi) Any applicant will still have to establish that he has a well-founded fear of persecution. As has been frequently pointed out, someone who changes his position, or makes allegations inconsistent with the attitude that he adopted in his home country, may not find that burden easy to discharge. When the United Nations High Commission for Refugees acknowledged, in the letter written in connexion with this case that Brooke LJ has set out, that a more stringent evaluation of the applicant's claim was likely in such a case, it was not formulating any new theory, but simply acknowledging reality.

(vii) The persecution feared must be persecution for a Convention reason. The applicant may find it difficult to establish that: see para 9 above.

(viii) For the reasons stated in sub-paragraphs (vi) and (vii) above, I cannot agree with the courts in Somaghi and HB, which considered that a bad faith exception was necessary to prevent what amounted to refugee status on demand, thereby giving mala fide applicants an advantage over bona fide applicants. This complaint entirely overlooks the stringent evaluation of the claim that the host

country is likely to and entitled to engage in. It also, in HB at page 57, wrongly assumes that mere assertion of an intention to engage in unwelcome (to the native country) activities in the host country will suffice to ground a successful claim. True it is that that possibility was raised by Balcombe LJ in Mendis (see para 12 above); but it is notable that in that case the applicant's assertions were held not to suffice to establish a well-founded fear of persecution. I would also venture to think that if the native country regime is such that it can be established that, even without any actual activity on the applicant's part, there is a sufficient chance of his being persecuted should he engage in certain political activities in his native country, then serious questions arise as to whether it is compatible with this country's international obligations to return him there.

I would add three further points. First, the present problem is not soluble by recourse to general principles such as that a person cannot take advantage of his own wrong. It is indeed very difficult to state what is the 'wrong', in terms of fraud or breach of the law, committed by a person such as Mr Danian; and it was in any event established in Mbanza that the Convention does not incorporate a judgemental or disciplinary element, so as to deprive a person who has once behaved fraudulently from any further protection.

Second, the IAT must examine the position of Mr Danian in relation to art 3 of the European Convention on Human Rights. I agree with Brooke LJ that this aspect of the case is of the first importance, and on the evidence potentially available must be confronted. If there is a real risk of Mr Danian, on his return to Nigeria, being subjected to treatment that is contrary to art 3, then there is clear authority in Chahal (1996) 23 EHRR 413 that he cannot be returned there. That rule was said by the Strasbourg Court to obtain 'irrespective of the victim's conduct': ibid at p.457 [79]. While great caution must be exercised before treating any such statement as laying down a general rule, nonetheless it would be very surprising, as Mr Blake pointed out, if a person accused of terrorism, such as Chahal, was protected by the European Convention on the basis that he was likely to be tortured in his home country, whilst someone accused only of gratuitously associating himself with an unpopular cause was not. Further, art 3 having been potentially engaged, I consider that in the events that have occurred the IAT's obligations with regard to human rights oblige it to consider the evidence now to hand with regard to Mr Danian's alleged torture in 1981. That event, if it did occur, may or may not be thought relevant to the issue of whether Mr Danian is likely to be tortured or otherwise be treated inhumanely if returned to Nigeria in 1999; but in a human rights context the alleged event and the evidence in relation to it cannot simply be ignored.

Third, I strongly underline what is said by Brooke LJ at the end of his judgment, that this approach to this appeal does not give a green light to bogus asylum seekers, or threaten to undermine the proper work of the immigration authorities. As I have endeavoured to demonstrate in paragraphs (v)-(viii) above, such fears, though initially understandable, prove to be misplaced when seen against the background of the general requirements of asylum law.

I accordingly agree with Brooke LJ that appeal should be allowed and the case be remitted to a differently constituted tribunal of the IAT.

JUDGMENTBY-3: NOURSE LJ

JUDGMENT-3:

NOURSE LJ: For the reasons given by Lords Justices Brooke and Buxton I agree that the appeal must be allowed and the matter remitted to a differently constituted Immigration Appeal Tribunal.

The sole question to be decided by the tribunal will be whether Mr Danian has, at the date of the hearing, a well-founded fear of persecution for a Convention reason if he were to be returned to Nigeria, thus entitling him to the protection of art 33. The tribunal will wish to give directions for further evidence, which should be limited only by the requirement of relevance, and no doubt for skeleton arguments as well. In the light of the past history of the matter it is clearly desirable both that the main points each side wishes to make should be identified ahead of the hearing and that the hearing should take place as soon as is reasonably practicable.

DISPOSITION:

Appeal allowed.

SOLICITORS:

Tyndallwoods; Treasury Solicitor