Case No: C/2001/0291

Neutral Citation Number: [2001] EWCA Civ 789
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon. Mr Justice Turner

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 17th May 2001

B e f o r e :

LORD PHILLIPS M.R.
LORD JUSTICE PETER GIBSON
and
LORD JUSTICE LATHAM

- -

Secretary of State for the Home Department	Appellant
- and -	
Asif Javed	First Respondent
and	
Zuifiqar Ali and Abid Ali	Second Respondents

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Nigel Pleming, QC and Steven Kovats (instructed by The Treasury Solicitor for the Appellants)
Richard Drabble, QC and Eric Fripp (instructed by Powell & Co for the First Respondent)
Nicholas Blake, QC and Edward Grieves (instructed by Bhogal & Lal for the Second Respondents)

- -

Judgment

LORD PHILLIPS, MR :

This is the judgment of the Court.

1. These appeals arise out of applications made by three citizens of Pakistan for judicial review of decisions by Special Adjudicators dismissing their appeals from removal directions made by the Secretary of State. The Removal Orders were consequent upon the refusal of the Secretary of State to accept that any of the three applicants was entitled to asylum on the basis that he had a well founded fear of persecution were he to be returned to Pakistan. Each challenged the decision of the Special Adjudicator in his case on the grounds that the decision was irrational. Turner J on the 19th January 2001 accepted, as had in the case of Abid Ali been conceded by the Secretary of State, that the decision of the Special Adjudicator in each case was irrational, and remitted each to be reconsidered by a fresh Special Adjudicator. But the applicants further challenged the procedure by which their appeals had been heard. The case of each had been certified by the Secretary of State under the provisions of paragraph 5 of Schedule 2 to the Asylum and Immigration Appeals Act 1993, as amended by the Asylum and Immigration Act 1996, ("the Act") and the Asylum (Designated Countries of Destination and Designated Safe Third Countries (Order 1996) ("the Order"). The effect of certification was to subject the applicants to an expedited procedure which, inter alia, deprived the applicants of any right of appeal from the Special Adjudicator. Turner J upheld the claim of each that, in so far as the Order designated Pakistan as a country return to which could justify certification, it was invalid. The Secretary of State appeals against that aspect of Turner J's judgment.

2. Paragraph 5 of Schedule 2 to the Act provides:

> "(1) This paragraph applies to an appeal by a person on any of the grounds mentioned in sub-sections (1) to (4) of Section 8 of this Act if the Secretary of State has certified that, in his opinion, the person's claim on the ground that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or be required to leave, the United Kingdom is one to which:
>
> (a) sub-paragraph (2), (3) or (4) below applies; and
>
> (b) sub-paragraph (5) below does not apply.
>
> (2) This sub-paragraph applies to a claim if the country or territory to which the appellant is to be sent is designated in an Order made by the Secretary of State by Statutory Instrument as a country or territory in which it appears to him that there is in general no serious risk of persecution. .....
>
> (5) This sub-paragraph applies to a claim if the evidence adduced in its support establishes a reasonable likelihood that the appellant has been tortured in the country or territory to which he is to be sent .....
>
> (8) The first Order under this paragraph shall not be made unless a draft of the Order has been laid before and approved by resolution of each House of Parliament."

3. The Order in question was the first Order made pursuant to paragraph 5(8) of Schedule 2 to the Act. It provides:

> "(2) The following countries are designated as ones in which it appears to the Secretary of State that there is in general no serious risk of persecution in:
>
> Bulgaria, Cyprus, Ghana, India, Pakistan, Poland, Romania ....."

This list of countries is known colloquially as 'the White List'.

4. The questions which we have to determine are:

> i) To what extent is it open to the Court to review the validity of the Order, having regard to the fact that it has been approved by the affirmative resolution of each House of Parliament?
>
> ii) In the light of the answer to (1), was Turner J. correct to hold that the Order was invalid?

5. In order that some flesh may be put on the bare bones of the legal argument, we propose to state shortly the factual basis of each applicants' case, although the particular facts are of no direct relevance to the issues that we have to determine.

6. Asif Javed is a member of the Ahmadi community. He claimed that he had been persecuted on that ground from the age of 15. His account was that he had first been expelled from school on the grounds that he had been attempting to explain his Ahmadi beliefs to fellow pupils. Thereafter he was harassed by former pupils from the school and later attacked and severely injured. His attackers informed the police that he had been the aggressor. He was told that if he wished to avoid arrest and imprisonment he should renounce his faith. He therefore left the area. Further allegations were then made that he had been preaching, as a result of which he felt afraid to return to his home. When he returned for the funeral of his sister, the police tried to arrest him, but he escaped. Back with his aunt, he was attacked and wounded by a man with a knife. He was eventually able to leave Pakistan with a passport obtained by his father. His claim for asylum was based on persecution by non-state agents which the authorities either tolerated, or against which they were unwilling or unable to offer protection.

7. The Secretary of State refused asylum and ordered his removal on the grounds that his account was not credible. He further stated that although he was aware that discrimination took place against Ahmadis, in general the judiciary remained independent and there was no systematic persecution of religious minorities. The Special Adjudicator hearing the appeal disbelieved Asif Javed's account. To support his account that he was wanted by the police he produced a report which purported to emanate from a named police station. The British High Commission, on inquiry, suggested that no such police station existed. The Special Adjudicator considered that this undermined Asif Javed's account. It was subsequently established that the police station does in fact exist. As already indicated the Secretary of State has accepted that, on its individual merits, the matter must be remitted to a fresh Special Adjudicator to reconsider the evidence.

8. Abid Ali is a Sunni Muslim. His case was that he was a member of the Pakistan Force of the Companions of the Prophet, a militant Sunni organisation. He also claimed membership of the Sipa-e-Sahaba which opposed the government of Benazir Bhutto. He had been involved in numerous demonstrations, processions and protests which resulted in his being convicted and sentenced on a number of occasions. He claimed that he had been beaten up several times in prison and feared being killed were he to be returned to Pakistan. The Special Adjudicator concluded, that so far as his arrest and imprisonment were concerned, this was the result of his violent and criminal activity, and that he had not received unreasonable sentences. He also rejected the submission that the Sunni Muslims, who are in the majority in Pakistan, were subjects of persecution by the minority Shia; further, he concluded that there was no evidence that the authorities were unable or unwilling to offer protection to the Sunni Muslims from any attacks by the Shia Muslims. The Special Adjudicator accepted Abid Ali's account of being beaten, but, despite this, rejected the submission that he had established a reasonable likelihood that he had been tortured in Pakistan so that sub-paragraph (5) of paragraph 5 of Schedule 2 to the Act applied. Turner J. concluded that neither the Secretary of State nor the Special Adjudicator had given any proper reasons for finding that sub-paragraph (5) did not apply and accordingly that the application should succeed. As in the case of Asif Javed, the Secretary of State does not seek to disturb the Judge's conclusion in this respect.

9. Zulfiqar Ali claimed to have been a former supporter of the Mohajir Quami Movement ("the MQM") which was opposed to the Pakistan People's Party. As a result of his association with the MQM, Zulfiqar Ali claimed that he had been detained and ill treated and was forced to join a breakaway group known as MQM-H which was used to persecute MQM members. He feared persecution because of his refusal to co-operate with the army in their clandestine use of MQM-H. In support of his account, he produced a First Investigation Report (FIR) naming him as a person against whom charges were to be brought. He further produced newspaper articles which identified a person bearing his name, as a person who was wanted in connection with the murders of eight members of the MQM. The murders had, however, been committed after Zulfiqar Ali had arrived in the United Kingdom. The Special Adjudicator accepted that the account could be correct, but rejected the claim that Zulfiqar Ali was the person wanted in connection with the murders, and was not satisfied that the FIR was a genuine document. He accepted that Zulfiqar Ali had been ill treated by the army and the police, having his nose broken and having been kept awake for two or three days at a time. Neither the Secretary of State nor the Special Adjudicator considered that this amounted to torture. Turner J held, as in the case of Abid Ali, that no proper reasons had been given to explain why sub-paragraph (5) did not apply. Again, the Secretary of State does not seek to challenge this part of the decision of Turner J.

10. The main issue, common to all three applications before Turner J, was whether or not the Order was valid insofar as it identified Pakistan as a country in respect of which there was 'in general no serious risk of persecution'. This is the only issue with which we are now concerned. The argument of the applicants, before Turner J, as before us, was that no reasonable Secretary of State, directing himself properly to the issues, could have come to the conclusion that there was in general no serious risk of persecution bearing in mind in particular (i) what was known about the position of women in Pakistan and (ii) what was known about the attitude of the Pakistan authorities towards Ahmadis. It was further submitted that, whatever might have been the position in 1996 when the Order was made, there was certainly no justification for retaining Pakistan in the Order after the decision of the House of Lords in *Islam -v- Secretary of State for the Home Department* and *R -v- Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629. We should record that

because of the political situation in Pakistan, the Secretary of State did not in fact certify any cases under the Order after October 1999, and that as a result of the Immigration and Asylum Act 1999, the power to designate countries on the ground here in question was repealed with effect from the 2nd October 2000.

11. Mr Pleming, QC, for the Secretary of State, has repeated the arguments that were urged on the Court below. He has placed at the forefront of his case the fact that the Order attacked has been approved by each House of Parliament under the affirmative resolution procedure. He has submitted that binding authority establishes that the Court can only review such an Order if it can be shown that the Secretary of State did not act in good faith, or 'had taken leave of his senses', in putting it before Parliament. He has further submitted that, whatever the test that falls to be applied when reviewing the making of the Order, the Secretary of State was entitled to come to the conclusion that there was in general no serious risk of persecution in Pakistan on the material that was available to him. Finally, he has submitted that nothing has occurred subsequent to the making of the Order during the period relevant to these applications which has required the Secretary of State to remove Pakistan from the Order.

12. Turner J held that the Court had the supervisory power and duty to examine the evidence available to the Secretary of State at the time that the Order was made, and subsequently, in order to determine whether or not the decision to make and maintain the designation of Pakistan in the Order was lawful. In so doing he embraced and adapted to the circumstances of the present case the observation of Simon Brown L.J. in *R v. Secretary of State for the Home Department Ex parte Turgut* [2001] 1 All ER 719 at p.729:

> "…the court is hardly less well placed than the Secretary of State to evaluate (the evidence for in-country assessments) once the relevant material is placed before it"

13. Having considered the evidence in relation to the position in Pakistan both of women and of Ahmadis, he concluded that:

> "I have been unable to see upon what basis the Secretary of State reached his initial decision .... The decision of Parliament was a political one, based on a factual proposition determined by the Secretary of State that Pakistan was a country which satisfied the requirements of paragraph 5(2). In that, he was, in my judgment plainly wrong."

14. Before turning to the argument in more detail, it is convenient to set out the evidence before the Court as to what material was taken into account by the Secretary of State at the time that he made the draft Order and laid it before Parliament and what criteria he applied. It is also necessary to outline the nature of the debate on the Order in each House of Parliament.

Material on Pakistan

15. In his first statement, dated the 15th December 1999, Michael Seeney, the Country Officer with particular responsibility for Pakistan, employed in the Country Information and Policy Unit at the Immigration and National Directorate of the Home Office, gave the following explanation:

"5. To deal with this and other matters, the then government produced an Asylum and Immigration Bill on 29th November 1995 ..... On the second reading of the Bill on 11th December 1995, the Secretary of State explained that he proposed to apply three criteria in deciding whether to designate a country or territory.

> (a) The country or territory should be one in which there was in general no serious risk of persecution.
>
> (b) The country or territory should be one from which a significant number of claims for asylum to the United Kingdom were made,
>
> (c) And a very high proportion of those claims were refused.

The Secretary of State also indicated on that occasion that at that time he proposed to designate Pakistan and other specified countries .....

6. The Asylum and Immigration Act 1996 received Royal assent on 24th July 1996. In August 1996 the Home Office published to Parliament an explanatory note to s.1 ..... The introduction listed the countries which the Secretary of State proposed to designate, including Pakistan. Paragraph 3 repeated the three criteria for designation. The note attached background country assessments for all of the countries which it was proposed to designate .... The publication was effected by the placing of copies of both the note and the background country assessment in the libraries of the House of Commons and of the House of Lords.

7. In deciding to designate Pakistan the Secretary of State took into account information from a wide range of bodies, including diplomatic missions, international and non-governmental organisations, including UNHCR and Amnesty International, and press reports.

8. The country assessment for Pakistan ... expressly referred to the position of both Ahmadis and women: paragraphs 7, 11. I can confirm that the Secretary of State did consider that the position of women in Pakistan was relevant to the question of designation. He did not consider that difficulties which women experience in Pakistan were irrelevant, whether because women in Pakistan were thought not to constitute a particular social group or for any other reason.

9. The country assessments produced at that time were relatively brief. The brevity of the documents should not be taken to indicate that the Secretary of State's consideration of the situation in Pakistan was equally brief. The Secretary of State gave very careful and detailed consideration to a large volume of material from a wide range of sources. .....

11. The Secretary of State also had regard to decisions of immigration appellate authorities and the courts. These had consistently held that Ahmadis are not persecuted per se but that certain individual Ahmadis may suffer persecution, depending on their particular circumstances. I refer by way of example to *Gulzar Ahmed -v- Home Secretary [1990]* IAR 61 (CA) and *Tahir -v- Home Secretary* [1994] (11032) (IAT) The Secretary of State was also aware of the decisions of the Immigration Appeal Tribunal in the cases of *Shah and Islam*, given on 9th August 1995 and 2nd October 1996 respectively."

16. The country assessment for Pakistan referred to by Mr Seeney contained the following passages:

"7. Religious Freedom

Although Pakistan declared itself an Islamic Republic in 1956, successive constitutions have guaranteed the civil rights of religious minorities. Officially speaking, there is no systematic or government-led persecution of religious minorities in Pakistan, but discriminatory laws such as the Hudood ordinances introduced under previous regimes are still in place. There are two main religious minorities which apply for asylum in the United Kingdom. These are Christians and Ahmadis (an offshoot of the Muslim religion). However, not all people claiming to be followers of these religions are genuine. Further details follow under the general human rights situation. .....

11. General Human Rights Situation .....

Ahmadis

Presidential Ordinance XX of 26 April 1984 prohibited Ahmadis from declaring themselves to be Muslims. However, the discretionary provisions of the ordinance have not been rigorously or generally enforced. Ahmadis have also been subject to accusations under s. 295(c) of the Pakistan Penal Code, which stipulates a mandatory death penalty for blaspheming the Prophet Mohammed. Since the PPP came to power, approximately 21 Ahmadis have been accused of blasphemy under this section. However, under s. 298(c) (the law specifically preventing Ahmadis calling themselves Muslim or propagating their faith) approximately 645 cases (2432 people) have been registered. Of these 17 cases have been heard, with 6 convictions and 11 dismissed. The vast majority are still pending. Ahmadis are recognised as a minority religious group and rights are safeguarded under the constitution. Some members of the community have already benefited from the recent relief measures announced for prisoners. Applications for asylum from Ahmadis are given very careful scrutiny.

Women's Issues

> Pakistan's current constitution recognises the equality of men and women before the law, prohibits sexual discrimination within the civil service, and grants women the right to participate fully in all activities in the national arena.
>
> The 1979 Hudood Ordinances subordinated women's status to that of men. They brought together the laws relating to theft, prohibition of alcohol and narcotics, "Zina" (rape, abduction, adultery and fornication) and "Qazi" (false accusation of Zina). In 1992 it was estimated that 2,000 women were held in prison under the Hudood Ordinances.
>
> In October 1992, the Sharif government approved an amendment to the Code of Criminal Procedure that women should not be detained in police stations overnight and that they should only be interrogated in the presence of a close male relative. This amendment has yet to be passed by the National Assembly.
>
> Some organisations which aim to improve the status of women in Pakistan have emerged; various local groups offer legal and medical advice and assistance.
>
> In January 1994 Benazir Bhutto established the first police station for women, administered exclusively by women. It remains to be seen whether further measures to improve the situation of women in Pakistan will follow. .....
>
> Conclusion
>
> In general, although there are instances of violence towards various sections of the population there is no evidence of government led persecution of minorities. Where discrimination or harassment does occur, it emanates from the actions of individuals or groups at local level."

17. Also available to the Secretary of State at the time that he laid the Order before Parliament was a decision of the Immigration Appeal Tribunal, *Kaleem Ahmed -v- Secretary of State for the Home Department* which was determined on the 7th December 1995. HHJ Pearl, the Chairman of the Immigration Appeal Tribunal, considered with some care the material relating to the treatment of Ahmadis in Pakistan. He referred to reports, in particular a report from the Canadian Immigration and Refugee Board in January 1992 which concluded that the Ahmadi community continued to suffer from a policy of discrimination "supported by the Islamabad Government". Having considered all the material, HHJ Pearl said at page 13:

> "Each case involving Ahmadis must be looked at on an individual basis. It would in our view be wholly wrong to say that the discriminatory legislative provisions relating to Ahmadis means that all Ahmadis can claim asylum under the terms of the Convention. However, the evidence of the various reports referred to above which express an overall correct view of the position of Ahmadis, illustrates that Ahmadis live in Pakistan as a religious minority who are likely to

meet examples of intolerance, discrimination and sadly at times blatant persecution in their everyday lives."

18. After the applications in their cases had been made, solicitors acting for Abid Ali and Zulfiqar Ali formally asked the Secretary of State to reconsider certification of Pakistan in the light inter alia of the political situation in Pakistan, the information available to the Secretary of State about the treatment of Ahmadis, and the decision of the House of Lords in *Islam and Shah* [supra].

19. Mr Seeney replied on the 29th November 1999. He said, inter alia:

> "We have acknowledged in our assessment that members of the minority groups mentioned in your letter experience human rights problems, and suffer persecution at the hands of others. We are of the view however that this does not amount to State persecution. In general, members of those particular groups are not likely to face persecution from the present Pakistani government. Following the October Coup the country's new Chief Executive, General Musharraf, has openly advocated the need for religious tolerance and has endeavoured to curtail political exploitation of religion. We are therefore of the view that the Government of Pakistan does not actively or systematically persecute religious minorities."

20. If this had, indeed, the basis upon which the Secretary of State had approached the question whether or not there was relevant persecution in Pakistan, he would undoubtedly have seriously misdirected himself. This was recognised by Mr Seeney in a second statement dated the 25th September 2000, in which he said;

> "5. Having reconsidered the wording of my letter of 29 November 1999 to the representatives acting for Zulfiqar Ali and Abid Ali, I consider that the letter is misleading in that it might be taken to suggest that the Secretary of State does not recognise persecution by non-state agents as giving rise to a claim for protection under the 1951 Refugee Convention and that the Secretary of State did not regard persecution by non-state agents as relevant in considering the designation of Pakistan and in keeping such designation under review.
>
> 6. The Secretary of State recognises that persecutory acts committed by non-state agents may give rise to a claim for protection under the 1951 Convention. Attached to my statement ..... is a copy of the Instructions to Caseworkers which is circulated to Asylum Caseworkers to enable them to assess asylum claims and which I believe accurately reflects the Secretary of State's approach to none state agents from persecution (which itself is derived from the UNHCR Handbook). Paragraph 8.5 of the Instructions is entitled "Agents of Persecution" and states "..... where seriously discriminatory or other offensive acts are committed by the local populace they may constitute persecution if they are knowingly tolerated by the authorities or if the authorities refuse or prove unable to offer effective protection (Paragraph 65 of the UNHCR Handbook)." ….

> 7. My letter of 26 November 1999 had been intended to make clear that, although certain minority groups may be subjected to acts of ill treatment by members of the general populace, the Government of Pakistan does not itself engage in such acts and Pakistan is not regarded as a country where the State is in general unwilling or unable to offer effective protection to its citizens against such acts. For that reason it is considered to be a country where there is in general no serious risk of persecution either from the State itself or from members of the public, either acting with the State's sanction or encouragement, or against whose acts the State is in general unwilling or unable to protect."

21. Mr Seeney did not in his letter deal expressly with the import of the decision of the House of Lords in *Islam and Shah*. That is a matter to which we shall revert in due course.

Parliamentary Debate

22. We have been provided with copies of the Hansard Reports of the debates on the draft Order in both the House of Commons and the House of Lords.

23. The debate in the House of Commons on 15 October 1996 lasted for approximately an hour and a half. One speaker described it as "a highly charged and serious debate that concerns us all". Of the seven countries designated in the Order – the "White List" – Pakistan was the only one to receive particular attention in the debate. Reference was made by a number of speakers to the position of Ahmadis. No mention at all was made of the position of women. One speaker commented:

> "The most oppressed group in Pakistan is, by general agreement, the Ahmadis."

24. It was resolved that the draft Order be approved.

25. In the House of Lords on the following day the debate took place on a motion to resolve that the House deplored the Government's proposal to designate certain countries as subject to the fast-track appeals procedure. The debate lasted for approximately two hours and twenty minutes. The motion attacked designation in principle, but discussion covered conditions in a number of the countries that were proposed to be included on the 'White List'. Of those, Pakistan received particular attention. There was discussion about the position of the Ahmadis and of the Mohajir Quami Movement, but no mention of the position of women. At the end of the debate the motion was withdrawn and a motion approving the draft Order was then passed.

Article 9 of the Bill of Rights 1689

26. Article 9 of the Bill of Rights, 1689 provides "that the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any Court or place out of Parlyament."

27. Mr Pleming's first submission was that to review the evidence in order to determine whether the Secretary of State had properly included Pakistan in the Order offended against Article 9. He referred us to a number of authorities in support of this submission.

28. In *Pepper v Hart* [1993] A.C. 593, the relevant issue was whether reference to ministerial statements in Parliament, as an aid to the construction of ambiguous legislation would contravene Article 9. The House of Lords held that it would not. In the leading speech, at p. 638, Lord Browne-Wilkinson said:-

> "In my judgment, the plain meaning of Article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil, or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the Courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to construe the words used by the Minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there."

29. Mr Pleming argued that in the present case the challenge of the propriety of the inclusion of Pakistan in the 'White List' did indeed involve criticising what was said in Parliament and questioning its debates. Each House of Parliament had concluded that Pakistan should be included in the Order after informed debate and it was constitutionally improper to challenge that conclusion.

30. Mr Pleming buttressed his submission by reference to the following passage in the advice of the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1A.C. 321, at p.337:

> "For these reasons (which are in substance those of the courts below) their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House."

31. Mr Pleming referred us to judicial observations about the effect of Article 9 that were made in the litigation between Mr Hamilton and Mr Al Fayed. In *Hamilton v Al Fayed* [1999] 1 WLR 1569 at p.1586, after referring to a passage from the judgment of the Privy Council in *Prebble*, the Court of Appeal observed:

> "In our view this confirms that the vice to which Article 9 is directed (so far as the courts are concerned) is the inhibition of freedom of speech and debate in Parliament that might flow from any condemnation by the Queen's Courts, being themselves an arm of government, of anything there said. The position is quite different when it comes to criticisms by other persons (especially the media) of what is said in Parliament. Lord Browne-Wilkinson himself drew this distinction in the passage we have cited from *Pepper v Hart* [1993] AC 593. The courts could only have legitimate occasion to criticise anything said or done in parliamentary proceedings if they were called on to pass judgment on any such proceedings; but that they clearly

cannot and must not do. Nor therefore should they issue such criticisms on any occasion, for to do so would be gratuitous."

32. Mr Pleming combined his submissions on Article 9 with reliance upon "the common law principle of respect by the Courts for decision making by Parliament." In so doing he was speaking of what the Privy Council referred to at p. 332 of *Prebble* as a 'wider principle':

> "In addition to Article 9 itself, there is a long line of authority which supports a wider principle, of which Article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot (1811) 14 East 1: Stockdale v Hansard (1839) 9 Ad. & E1. 1; Bradlaugh v Gossett (1884) 12 Q.B.D. 271; Pickin v British Railways Board [1974] A.C. 765; Pepper v Hart [1993] A.C. 593*. As Blackstone said in his commentaries on the Laws of England, 17th ed (1830), vol 1, p. 163:
>
> > "the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."

33. That citation, and the authorities cited within it, point to the vital, though sometimes difficult, task in a case such as the present of drawing a distinction between the functions of Parliament and the functions of the Court. Legislation is the function of Parliament, and an Act of Parliament is immune from scrutiny by the Courts, unless challenged on the ground of conflict with European law. Subordinate legislation derives its legality from the primary legislation under which it is made. Primary legislation that requires subordinate legislation to be approved by each House of Parliament does not thereby transfer from the Courts to the two Houses of Parliament, the role of determining the legality of the subordinate legislation. In the 8th Edition of Wade on Administrative Law, the authors summarise the position as follows at p.854:

> "In Britain the executive has no inherent legislative power. It cannot, as can the French government, resort to a constitutional pouvoir réglementaire when it is necessary to make regulations for purposes of public order or in emergencies. Statutory authority is indispensable, and it follows that rules and regulations not duly made under Act of Parliament are legally ineffective. Exceptions have been made, it is true, in the case of a number of non-statutory bodies. But they do not alter the fact that the Courts must determine the validity of delegated legislation by applying the test of ultra vires, just as they do in other contexts. It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the Courts, for there is a fundamental difference between a sovereign and a subordinate law-making power. Even where, as is often the case, a regulation is required to be approved by resolutions of both Houses of Parliament, it still falls on the 'subordinate' side of the line, so that

> the court may determine its validity. Only an Act of Queen, Lords and Commons is immune from judicial review."

34. This proposition is amply supported by authority. In *R v Electricity Commissioners, Ex parte London Electricity Joint Committee Co* [1924] 1K.B. 171 Atkin L.J. remarked at p.208:

> "I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament. The authorities are to the contrary."

35. Atkin L.J.was there considering proceedings prior to an Order being tabled for approval by the two Houses. Subsequent decisions, including *Reg v Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] A.C. 240; *Reg v Secretary of State for the Environment, Ex parte Hammersmith LBC* [1991] 1 A.C. 521, make it plain that the Court can review the legality of subordinate legislation, even where this has been approved by affirmative resolution of each House of Parliament.

36. In *Reg v Secretary of State for the Environment, Ex parte the Greater London Council and the Inner London Education Authority* (3 April 1985, unreported) Mustill L J recorded at p.26 with approval, the following concessions made on behalf of the Secretary of State:

> "…a court does have power to quash an Order on the ground that it is ultra vires in the strict sense that it goes beyond the powers conferred by the statute, even where both Houses have approved it; for otherwise the statute would be capable of amendment by something which is not an Act of Parliament. It was also accepted, again in our view correctly, that the court has power to intervene if a statutory precondition to the laying of the Order was not performed. Thus, an Order under the Act could be quashed if the Secretary of State had omitted one of the stages prescribed by sections 1 to 4; for the Secretary of State has no power to lay before the House an Order which is not the outcome of the procedure created by the Act. This concession was extended to a case where a purported compliance with the statutory procedure was no real compliance at all. Finally, it was conceded that there would be a power of review if the Secretary of State had misdirected himself as to his powers or as to the law to be applied to his decision, for he would in such a case have acted ultra vires the statute."

37. We consider that these concessions were rightly made, and Mr Pleming did not suggest that they were not. It follows, so it seems to us, that the effect of Article 9 of the bill of Rights and the 'wider principle' of common law must accommodate the right and the duty of the Court to review the legality of subordinate legislation. The fact that, in the course of debate, the Secretary of State or others make statements of fact that support the legitimacy of the subordinate legislation, and that the House thereafter approves the subordinate legislation, cannot render it unconstitutional for the Court to review the material facts and form its own judgment, even if the result is discordant with statements made in parliamentary debate.

38. Mr Pleming did not go so far as to submit that the affirmative resolution of the two Houses precluded judicial review of the Order. His submission was that the critical common issue raised by the three applicants was one pre-eminently for the Secretary of State and for Parliament rather than for the Court. That issue was whether Pakistan was a country in which there was in general no serious risk of persecution.

39. It was of the essence of Mr Pleming's submission that the issue in question was not an issue of primary fact that went directly to the question of whether the description of Pakistan as a 'White List' country was permitted under paragraph 5(2) of Schedule 2 to the Act. Rather it was an issue that required evaluation of a mass of evidence in order to reach a value judgment. That evaluation had been carried out by the Secretary of State and affirmed by the two Houses of Parliament, the members of which brought their own knowledge and experience to bear. In the circumstances he submitted that it was not proper or appropriate for the Court to examine the evidence in order to perform its own evaluation.

The Authorities

40. Mr Pleming relied upon two decisions of the House of Lords which, he submitted marked the limit of judicial intervention where the Order of a Minister had been considered and affirmed by one or both Houses of Parliament. They demonstrated, so he submitted, that provided the Order fell within the terms of the enabling legislation, intervention was only permissible where the Minister had acted in bad faith, or had acted so irrationally as to appear to have taken leave of his senses.

41. Mr Drabble QC for Mr Javed and Mr Blake QC for Mr Abid Ali and Mr Zulfiqar Ali argued that the statements made in those decisions turned on their particular facts and did not preclude the courses adopted in the present case. We turn to consider these authorities.

42. In issue in *Notts C.C. v Secretary of State for the Environment* [1986] AC 240 was the validity of expenditure guidance issued to local authorities by the Secretary of State under power confirmed by S.59 of the Local Government, Planning and Land Act 1980 ("the 1980 Act"). This guidance was attacked on two grounds. First it was alleged that it was not, as the 1980 Act required, "framed by reference to principles applicable to all local authorities". Secondly it was alleged that the guidance was "Wednesbury unreasonable" in that it has an effect that was so disproportionately disadvantageous to some authorities as to be a perversely unreasonable exercise of power. This guidance had, in accordance with the requirement of the Act, been approved by resolution of the House of Commons.

43. The House of Lords considered the first ground of attack and concluded that the guidance complied with the express requirements of the Act. As to the second ground, the other members of the Committee endorsed the approach set out in the following passages of the speech of Lord Scarman:

> "The submission raises an important question as to the limits of judicial review. We are in the field of public financial administration and we are being asked to review the exercise by the Secretary of State of an administrative discretion which inevitably requires a political judgment on his part and which cannot lead to action by him against a local authority unless that action is first approved by the House of Commons." (p.247B-C)

"My Lords, I think that the Courts below were absolutely right to decline the invitation to intervene. I can understand that there may well arise a justiciable issue as to the true construction of the words of the statute and that, if the Secretary of State has issued guidance which fails to comply with the requirement of subsection (11A) of section 59 of the Act of 1980 the guidance can be quashed. But I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the Courts to intervene on the ground of "unreasonableness" to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships' House in its judicial capacity." (p.247D-G)

"The present case raises in acute form the constitutional problem of the separation of powers between Parliament, the executive, and the Courts. In this case, Parliament has enacted that an executive power is not to be exercised save with the consent and approval of one of its Houses. It is true that the framing of the guidance is for the Secretary of State alone after consultation with local authorities; but he cannot act on the guidance so as to discriminate between local authorities without reporting to, and obtaining the approval of, the House of Commons. That House has, therefore, a role and a responsibility not only at the legislative stage when the Act was passed but in the action to be taken by the Secretary of State in the exercise of the power conferred upon him by the legislation.

To sum it up, the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and within Parliament, especially for the House of Commons. If Parliament legislates, the Courts have their interpretative role; they must, if called upon to do so, construe the statute. If a minister exercises a power conferred on him by the legislation, the Courts can investigate whether he has abused his power. But if, as in this case, effect cannot be given to the Secretary of State's determination without the consent of the House of Commons and the House of Commons has consented, it is not open to the courts to intervene unless the minister and the House must have misconstrued the statute or the minister has – to put it bluntly – deceived the House. The courts can properly rule that a minister has acted unlawfully if he has erred in law as to the limits of his power even when his action has the approval of the House of Commons, itself acting not legislatively but within the limits set by a statute. But, if a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute (as your Lordships, I understand, are convinced that it does in the present case), it is not for the judges to say that the action has such

> unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained; for Parliament has enacted that one of its Houses is responsible. Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power." (pp.250B-251A)

44. These passages were referred to with approval by Lord Bridge in *Reg v Secretary for the Environment, Ex parte Hammersmith LBC* [1991] 1 AC 521. That appeal also concerned local government finance – in this instance local authorities were attacking decisions of the Secretary of State that they should be designated for 'community charge-capping'. The decisions were taken pursuant to general proposals embodied in reports which had been placed before and approved by the House of Commons. Furthermore the Order embodying the individual decisions also required to be approved by resolution of the House of Commons.

45. The Orders were attacked on the grounds that the principles applied by the Secretary of State in reaching his decisions contravened the provisions of the enabling statute. These attacks failed. The decisions were also attacked on the grounds that, having regard to their economic consequences, they were irrational. In relation to this attack Lord Bridge, having quoted the passages in Lord Scarman's speech to which we have referred above, proceeded at pp.596-7 to make comments upon them which have formed the foundation of the Secretary of State's appeal in the present case:

> "Lord Scarman's speech commanded the agreement of all members of the Appellate Committee participating in the decision, of whom I was one. I regard the opinions expressed in the passages quoted as an accurate formulation of an important restriction on the scope of judicial review which is precisely in point in the instant case. There is here no suggestion that the Secretary of State acted in bad faith or for an improper motive or that his decisions to designate the appellant authorities or the maximum amounts to which he decided to limit their budgets were so absurd that he must have taken leave of his senses. Short of such an extreme challenge, and provided always that the Secretary of State has acted within the four corners of the Act, I do not believe there is any room for an attack on the rationality of the Secretary of State's exercise of his powers under Part VII of the Act."
>
> "The restriction which the *Nottinghamshire* case [1986] A.C. 240 imposes on the scope of judicial review operates only when the court has first determined that the ministerial action in question does not contravene the requirements of the statute, whether express or implied, and only then declares that, since the statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy and which can only

> take effect with the approval of the House of Commons, it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity. Both the constitutional propriety and the good sense of this restriction seem to me to be clear enough. The formulation and the implementation of national economic policy are matters depending essentially on political judgment. The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable."

46. Mr Pleming argued that the Courts were required to adopt the same approach to the question of whether a country should be designated for the 'White List' as Lord Salmon and Lord Bridge had held should be adapted to the questions of national economic policy with which they were concerned.

47. We have already referred to the unreported judgment of Mustill L J in *Reg v Secretary of State for the Environment, Ex parte the GLC and ILEA*, which preceded the decision of the House of Lords in *Notts C C*, but which was not referred to in argument or speeches in that case or in *ex parte Hammersmith*. Mustill L J considered whether it was constitutionally permissible judicially to review an Order which has been approved by Parliament on grounds of (i) illegality, (ii) procedural impropriety and (iii) Wednesbury unreasonableness, adopting the three grounds for judicial review identified by Lord Diplock in *Council of Civil Services Unions v Minister for the Civil Services* [1985] AC 374. He held that review was permissible on each of the three grounds. Dealing with Wednesbury unreasonableness, he said at p.31:

> "In this rather uncertain state of affairs, we think it preferable to tackle the problem from another angle, by asking this question: Can it be inferred that Parliament, by making an affirmative resolution a condition precedent to the exercise of the power, has intended to make the House of Commons the sole judge of whether the decision expressed in the draft Order is too unreasonable to be allowed to stand? After careful consideration, we have come to the conclusion that the answer, in theory, is No. In our judgment, the right of veto, created by section 4(5) is a safeguard addition to and not a substitution for the power to judicial review. The debate in the House on affirmative resolution and the investigation by the Court of a Wednesbury complaint are of a quite different character and are directed towards different ends; the two are complementary.
>
> Having stated this answer in point of theory, we continue at once to say that in practice the grant of judicial review on the grounds of unreasonableness is likely to be rare, and probably very rare, when the decision is subject to affirmative resolution, particularly in a field such as the present, where the decision is a matter of judgment and not of mechanical reasoning and is founded on political and economic premises which are implicit in the enabling legislation. Nevertheless,

> we do not find it possible to say that every application for such relief must be dismissed out of hand for want of jurisdiction."

48. Subsequently, at p.89, Mustill L J added the following commentary:

> "(3) The test for Wednesbury unreasonableness is hard to satisfy. The decision must be outrageous or absurd before the Court can intervene. The "target area" is large. (4) The target area is particularly large where the weight to be given to the conflicting factors is primarily a matter of "political" and economic judgment and where a particular political and economic policy is implicit in the enabling statute itself. The Court must be particularly cautious about intervening in such a case, lest it usurps the proper functions of the decision maker, the more so when Parliament has entrusted to one of its Houses an additional supervisory role."

49. Mr Pleming submitted that the conclusions of principle of Mustill L J could not stand with the subsequent decisions of the House of Lords and must be disregarded. Counsel for the Respondents did not accept this and nor do we. The question that Lord Salmon and Lord Bridge were focusing upon was that of justiciability rather than jurisdiction. The extent to which the exercise of a statutory power is in practice open to judicial review on the ground of irrationality will depend critically on the nature and purpose of the enabling legislation. The subject matter of the legislation and the power in both the *Nottinghamshire* and the *Hammersmith* cases was at an extreme end of the spectrum. In each case the decisions on how to exercise the statutory power turned on political and economic considerations to be evaluated by the Minister and Parliament, whose rationality could not be measured by any yardstick available to the Court. In such circumstances the statement that there was no scope for an attack on the exercise of the Secretary of State's powers on grounds of rationality in the absence of bad faith or manifest absurdity was no more than a statement of practical reality. It cannot be treated as a proposition of law applicable to any Order subject to affirmative resolution.

50. We would endorse the comments made in respect of the decisions in question by Auld L J in *O'Connor v Chief Adjudication Officer and Secretary of State for Social Security* [1999] ELR 209 at p.221:

> "Irrationality is a separate ground for challenging subsidiary legislation, and is not characterised by or confined to a minister's deceit of Parliament or having otherwise acted in bad faith. That means irrationality in the *Wednesbury* sense. Counsel have referred to the difficult notion of 'extreme' irrationality sometimes suggested as necessary before a Court can strike down subsidiary legislation subject to parliamentary scrutiny, citing Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment; Bradford Metropolitan City Council v Same* [1986] AC 240. He spoke, at p.247G, of '…the consequences….[being] so absurd that….[the Secretary of State] must have taken leave of his senses', a form of words with which the other members of the appellate committee agreed. They also referred to Lord Bridge's reference in *P v Secretary of State for the Environment ex parte Hammersmith and Fulham London Borough Council* [1991] AC 521, at p.597F-G, to 'manifest absurdity'.

> It is wrong to deduce from those dicta a notion of 'extreme' irrationality. Good old *Wednesbury* irrationality is about as an extreme form of irrationality as there is. Perhaps the thinking prompting the notion is that in cases where the Minister has acted after reference to Parliament, usually by way of the affirmative or negative resolution procedure, there is a heavy evidential onus on a claimant for judicial review to establish the irrationality of a decision which may owe much to political, social and economic considerations in the underlying enabling legislation. Often the claimant will not be in a position to put before the Court all the relevant material bearing on legislative and executive policy behind an instrument which would enable it with confidence to stigmatise the policy as irrational. Often too, the Court, however well informed in a factual way, may be reluctant to form a view on the rationality of a policy based on political, social and/or economic considerations outside its normal competence. That seems to have been the approach of Mustill L J. [in *R v Secretary of State for the Environment, Ex parte GLC and ILEA*]."

51. For these reasons we reject Mr Pleming's submission that there is a principle of law which circumscribes the extent to which the Court can review an Order that has been approved by both Houses of Parliament under the affirmative resolution procedure. There remains, however, a lesser issue as to the manner in which the Court should approach the review in the circumstances of this case.

52. In *R v Ministry of Defence, Ex parte Smith* [1996] Q.B. 517 Sir Thomas Bingham MR gave guidance, since often invoked, on the approach of the Court to judicial review where human rights were in play. At p. 554 he approved the following proposition advanced by David Pannick QC in argument:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

53. In *Turgut*, where Article 3 of the European Convention Human Rights was in play, Simon Brown L.J. referred to the Master of Rolls' guidance in *Smith*, and to Strasbourg jurisprudence. In a passage, cited and applied by Turner J in the present case, he explained his approach to reviewing the evidence at p.729:

> "I therefore conclude that the domestic court's obligation on an irrationality challenge in an art 3 case is to subject the Secretary of State's decision to rigorous examination, and this it does by considering the underlying factual material for itself to see whether or not it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed.

> All that said, however, this is not an area in which the court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here- the right not to be exposed to a real risk of art 3 ill-treatment – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the 'discretionary area of judgment'- the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal (see Lord Hope of Craighead's speech in *R v DPP ex p Kebilene* [1999] 4 All ER 801 at 843-844, [1999] 3WLR at 993-994) is a decidedly narrow one."

54. Mr Pleming submitted that there was no justification in the present case for subjecting the Secretary of State's decision to particularly rigorous scrutiny in the manner adopted in *Smith* and *Turgut*. With this submission we agree. Human rights were not put in issue by the accelerated procedure that was adopted in relation to applicants from countries on the 'White List'. Nor, as we shall explain, do we consider the 'discretionary area of judgment' to be a particularly narrow one.

The approach to judicial review

55. The relevant provisions of the Act, set out in paragraph 2 above, empowered the Secretary of State to apply the accelerated procedure in relation to applicants resisting being sent to a country or territory designated in an Order as one "in which it appears to him that there is in general no serious risk of persecution". The Secretary of State did not argue that the words "it appears to him that" empowered him to apply a purely subjective approach to designation; such an argument would have been untenable; see *Secretary of State v Tameside* MBC [1977] AC p.1014 per Lord Wilberforce at p.1047. The act only entitled the Home Secretary to designate countries or territories in respect of which the evidence available to him was such as to enable him rationally to conclude that there was "in general no serious risk of persecution".

56. Although rational judgment or evaluation was called for from the Secretary of State, what had to be evaluated was the existence of a state of affairs. Whether that state of affairs pertained was a question of fact. If he concluded that Pakistan was a country in which there was in general no serious risk of persecution, the Secretary of State then had to consider a further question which was essentially one of policy: should he designate Pakistan?

57. Thus on analysis, the challenge made by the applicants to the inclusion of Pakistan in the Order was to its legality rather than to its rationality. However, the language defining the state of affairs that had to exist before a country could be designated was imprecise.

Whether there was *in general* a *serious* risk of persecution was a question which might give rise to a genuine difference of opinion on the part of two rational observers of the same evidence. A judicial review of the Secretary of State's conclusion needed to have regard to that considerable margin of appreciation. There was no question here of conducting a rigorous examination that required the Secretary of State to justify his conclusion. If the applicants were to succeed in showing that the designation of Pakistan was illegal, they had to demonstrate that the evidence clearly established that there was a serious risk of persecution in Pakistan and that this was a state of affairs that was a general feature in that country. For a risk to be serious it would have to affect a significant number of the populace.

58. It would not be right to conclude that, by approving the Order, each House of Parliament verified that Pakistan and the other countries named in that Order were countries in which there was, in general, no serious risk of persecution. The decision for each House was simply whether or not to approve the Order; the House was not required to rule on its legality. Neither House could amend the Order. It was for the Secretary of State, not for either House, to satisfy himself as to the legality of that Order. It cannot credibly be suggested that, in short debates in which no mention at all was made of the position of women, there was an evaluation which led to the conclusion that Pakistan was a country which the Secretary of State could legally include in the Order. The arguments advanced by the applicants and the conclusions of Turner J did not, in the event, controvert the proceedings of either House of Parliament. Thus the Secretary of State's contention that Article 9 of the Bill of Rights, was contravened fails both in law and on the facts.

59. It is time to turn to the evidence to see whether Turner J was correct in holding that it was not capable of leading to a rational conclusion that Pakistan was a country in which there was, in general, no serious risk of persecution.

Evidence of persecution in Pakistan

The position of women

60. Article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees, as supplemented by the 1967 Convention ("the Convention"), defines a refugee as a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

61. An immigrant, to the United Kingdom who falls within that definition is entitled to challenge an administrative decision requiring him or her to leave the United Kingdom on the ground that this is contrary to the United Kingdom's obligation under the Convention.

62. The appeals to the House of Lords in *Islam and Shah* raised the question of whether the two appellants, who were both married women who had come to England from Pakistan to seek asylum, fell within the Convention definition of a refugee. Each claimed that, having been abandoned by her husband, she would, if she returned to Pakistan, suffer persecution in the form of accusations of sexual misconduct leading to physical abuse, and possibly even stoning to death under Sharifa law, and that the authorities would do nothing to protect them. The Secretary of State contended that they did not fall within the definition of a refugee under the Convention because their fear of being persecuted was not "for reasons of race,

religion, nationality, membership of a Particular Social Group or political opinion". The majority in the House of Lords held that in Pakistan women constituted a 'particular social group', that women were discriminated against as a group in matters of fundamental human rights because the state gave them no protection as they were perceived as not being entitled to the same human rights as men and that the applicants' well founded fear of persecution which was sanctioned or tolerated by the state was for reasons of membership of a particular social group, i.e. women, so that they were entitled to asylum under the Convention.

63. The Secretary of State now accepts, as he is bound to, that women in Pakistan form a 'particular social group' for the purposes of the Convention. He has also accepted in these proceedings the accuracy of the findings of fact that formed the basis of the House of Lords' decision in *Islam and Shah*. This is an appropriate concession as the evidence before the House of Lords about conditions in Pakistan was evidence that was available to inform the Secretary of State when deciding whether or not he could properly include Pakistan on the White List in the Order; and the Secretary of State made no challenge to that evidence.

64. It is the Secretary of State's submission that in *Islam and Shah* the House of Lords found that there was, in general, discrimination against women in Pakistan but did not find that there was, in general, a serious risk of the persecution of women. The two are not, of course, the same thing. The appeal to the House of Lords concerned two women, each of whom alleged that she had a well-founded fear of persecution if she returned to Pakistan by reason of her particular personal circumstances. The majority of the House found that the persecution fell within the terms of the Convention because, as members of a particular social group, namely women, they were subject to discrimination on the part of the state which meant that they would not be protected against persecution. It did not necessarily follow that the risk faced by the two women of persecution reflected a general risk of persecution of women in Pakistan even if discrimination against women in Pakistan was a general feature. We are, however, in no doubt that the evidence which led the House of Lords to find that there was, in general, discrimination against women in Pakistan also led them to find that there was in general a risk of persecution of women in Pakistan. Nor are we in any doubt that this was a serious risk. The evidence that founded the conclusion that women were, in general, subject to discrimination in Pakistan was, in large measure evidence of failure to protect them against persecution. The position was illustrative of a statement by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 A.L.J.R. 381 at p.402, which was quoted by Lord Steyn at p.645 of his speech:

> "Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."

A few quotations from the speeches in *Islam and Shah* will demonstrate the point:

> "Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case. On the findings of fact and unchallenged evidence in the present case, the position of women in Pakistan is as follows.

> Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. *Domestic abuse of women and violence towards women is prevalent in Pakistan.* That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women, who have been forced to leave the matrimonial home or have simply decided to leave. *Husbands and others frequently bring charges of adultery against such wives.* Faced with such a charge the woman is in a perilous position. Similarly, a woman who makes an accusation of rape is at great risk. Even Pakistan statute law discriminates against such women."

65. The emphasis in this passage from the speech of Lord Steyn at p.635 is ours. Lord Steyn then quoted evidence in a report of Amnesty International dated 6 December 1995 which stated that women in Pakistan were *often* held under the Zina Ordinance for many years although no evidence was ever produced that they had committed any offence, that men *frequently* brought groundless charges against their former wives, their daughters and their sisters and that *most women* remained in jail for two to three years before their cases were decided, often on the basis of no evidence of any offence.

66. Lord Hoffmann began his speech as follows at p.647:

> "My Lords, in Pakistan there is widespread discrimination against women. Despite the fact that the constitution prohibits discrimination on grounds of sex, an investigation by Amnesty International at the end of 1995 reported that government attempts to improve the position of women had made little headway against strongly entrenched cultural and religious attitudes. *Woman who were victims of rape or domestic violence often found it difficult to obtain protection from the police or a fair hearing in the courts.* In matters of sexual conduct, laws which discriminated against women and carried severe penalties remained upon the statute book. The International Bar Association reported in December 1998 that its mission to Pakistan earlier in the year heard and saw much evidence that women in Pakistan are discriminated against and have particular problems in gaining access to justice; (*Report on Aspects of the Rule of Law and Human Rights in the Legal System of Pakistan, p.29).*"

Later, at p.653, he added:

> "I turn, therefore, to the question of causation. What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These

two elements have to be combined to constitute persecution within the meaning of the Convention. As the Gender Guidelines for the Determination of Asylum Claims in the U.K. (published by the Refugee Women's Legal Group in July 1998) succinctly puts it (at p.5): "Persecution = Serious Harm + The Failure of State Protection."

67. At p.658 Lord Hope stated:-

> "The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women. In the context of that society I would regard women as a particular social group within the meaning of article 1A(2) of the Convention."

68. Earlier in his speech, Lord Hope made it plain that persecution was not synonymous with discrimination. It is equally plain, however, that the evidence to which he referred when speaking of the nature and scale of discrimination against women in Pakistan was evidence of a failure to protect women against persecution.

69. The speeches in *Islam and Shah* provide a convenient summary of the effect of a substantial body of evidence that was before the House of Lords and which, it is reasonable to assume, was available to the Secretary of State. We have noted that Mr Seeney in his witness statement of 15 December 1999 stated:

> "The country assessments produced at that time were relatively brief. The brevity of the documents should not be taken to indicate that the Secretary of State's consideration of the situation in Pakistan was equally brief. The Secretary of State gave very careful and detailed consideration to a large volume of material from a wide range of sources."

70. Earlier in his statement, Mr Seeney commented:

> "I can confirm that the Secretary of State did consider that the position of women in Pakistan was relevant to the question of designation. He did not consider that difficulties which women experience in Pakistan were irrelevant, whether because women in Pakistan were thought not to constitute a particular social group or for any other reason."

71. While it is true that the House of Lords was not directly concerned with the question of whether women in Pakistan were in general at serious risk of persecution, we are in no doubt that their findings demonstrated that among women in Pakistan there was in general a serious risk of persecution. That risk was highlighted by much more detailed accounts of violence to women in respect of which the state provided no protection or redress in subsequent updated assessments of the position in Pakistan by the Country Information and Policy Unit.

72. Mr Seeney states in his witness statement:

> "The Secretary of State has also given careful consideration to the implications of the decision of the House of Lords in *R v Immigration Appeal Tribunal ex p Shah* [1999] 2WLR 1015. The Secretary of State regards that case as establishing that, on the evidence presented by the two appellants, women in Pakistan constituted a particular social group for the purposes of the Convention. The Secretary of State does not regard their Lordships' judgments as being concerned with the question whether women in Pakistan were in general at serious risk of persecution."

73. No more detailed explanation is provided of the consideration given by the Secretary of State to the position of women in Pakistan. There is no explanation as to how he was able to conclude, on the material before him, that there was in general no serious risk of persecution in Pakistan. Had he applied the correct test to that evidence we do not consider that he could reasonably have reached this conclusion.

Ahmadis

74. We have referred to the short summary of the position of Ahmadis in Pakistan in the country assessment referred to by Mr Seeney. Mr Seeney stated that the Secretary of State also had regard to decisions of the immigration appellate authorities and the Courts:

> "These had consistently held that Ahmadis are not persecuted per se but that certain individual Ahmadis may suffer persecution, depending on their particular circumstances."

This is not entirely accurate.

75. In *Kaleem Ahmed v Secretary of State for the Home Department* Judge Pearl gave a detailed judgment in which he referred to a number of contemporary reports about the position of Ahmadis in Pakistan.

76. We have set out the most material part of that judgment at paragraph 17 above - it paints a bleaker picture than Mr Seeney's summary, but had the evidence in relation to Ahmadis stood on its own, we would not have found it incompatible with the Secretary of State's conclusion that there was in general no serious risk of persecution in Pakistan. It is, however, a factor that, when considered together with the position of women, adds weight to our conclusion that the Secretary of State's inclusion of Pakistan in the White List was irrational.

Relief, delay and good administration

77. For the reasons that we have given, Turner J was correct to rule that the inclusion of Pakistan in the countries designated in the Order was unlawful. The relief granted by Turner J included the following:

> 1. A declaration that the Secretary of State for the Home Department erred in law in including Pakistan on the list of countries designated as ones in which it appears to the Secretary of State that there is in general no serious risk of persecution under para 2 of the Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996 SI 1996 No 2671.

2. A declaration that the Secretary of State erred in law in –

a) certifying pursuant to Asylum and Immigration Act 1993 Schedule 2 para 5(1) and as amended by the Asylum and Immigration Act 1996 in each of the cases before the Court that para 5(2) applied to the claim ….

b) maintaining such certification up to and beyond the date of the determination by the special adjudicator of the asylum appeal of each claimant.

3. An Order quashing the certificate referred to in para 2 above in the case of each claimant."

78. The Secretary of State has submitted that we should not, regardless of our decision on the merits of the appeal, confirm the Order of this relief. There was technical delay on the part of the respondents in applying for judicial review. The Designation Order was made on 19 October 1996. Asif Javed's asylum claim was certified on 22 February 1998 and his application for judicial review was made in or after June 1989. Zulfiqar Ali's asylum claim was certified on 17 February 1998 and Abid Ali's on 15 April 1999. Their applications for judicial review were made in or after November 1999. We have described the failure to apply for judicial review within the three month time limit prescribed by the rules as technical because the applicants sensibly first pursued appeals to Special Adjudicators - see the judgment of Moses J in relation to Mr Javed's application for permission (unreported - 24 September 1999). Nonetheless the delay opens the door to the Secretary of State's submission that relief should not be granted because it would be likely to be detrimental to good administration.

79. We are told that about 6,000 Pakistani asylum claims were certified and dealt with under the accelerated procedure. Of these some 13 are subject to applications for judicial review, which are awaiting the result of this hearing. Those do not prove a significant administration burden. It is suggested that, if relief is granted to the three respondents, this may stimulate some of the other 6,000, who are, on any footing, long out of time to make applications for permission to apply for judicial reviews, thereby delaying other immigration cases. This submission is speculative and we do not consider it to afford a good reason for refusing the respondents the relief to which they would otherwise be entitled.

80. Accordingly we shall dismiss this appeal and hear Counsel as to the precise form of our Order.

ORDER: Appeal dismissed; appellant to pay respondents costs; full community legal services assessment; leave to appeal refused.

(Order does not form part of approved Judgment)