Secretary of State For The Home Department, R v.; Ex Parte Zeqiri [2002] UKHL 3 (24th January, 2002)

HOUSE OF LORDS

Lord Slynn of Hadley Lord Mackay of Clashfern Lord Hoffmann Lord Millett Lord Rodger of Earlsferry

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT

(ORIGINAL APPELLANT AND CROSS-RESPONDENT

EX PARTE ZEQIRI (FC)

(ORIGINAL REPONDENT AND CROSS-APPELLANT)

ON 24 JANUARY 2002

[2002] UKHL 3

LORD SLYNN OF HADLEY

My Lords,

1. I have had the advantage of reading a draft of the speech of my noble and learned friend Lord Hoffmann. I gratefully adopt his statement of the facts and I agree with his conclusion for the reasons he gives. I add only a few brief observations.

2. It is important if the Secretary of State is to carry out the United Kingdom's obligations under the Dublin Convention that he should be satisfied that if the applicant for asylum has come from a country intermediary between the country where he has suffered and or fears persecution and the United Kingdom that that intermediary would not send him to another country otherwise than in accordance with the [Geneva] Convention. But in considering this matter from time to time the Secretary of State is entitled to have regard to circumstances existing at such time. In the present case, whatever the position in Germany as shown by the statistics of returns from Germany to Kosovo, when he arrived here it seems to me that it has not been shown that by 2nd November 2000 when the Secretary of State made his decision he could not reasonably have concluded (and certified) that the condition was fulfilled. Indeed it is accepted by the applicant's Counsel that circumstances had changed both in Kosovo and in the statistics of German returns to Kosovo.

3. Although there was some uncertainty and doubt as to the effect of the decision in *R v Secretary of State for the Home Department, Ex p Besnik Gashi* [1999] INLR 276 and as to what steps the Secretary of State might take I am satisfied on the facts as put to the House that the Secretary of State did not create a legitimate expectation on which Mr Zeqiri could rely, that following the decision of the Court of Appeal, his application for asylum would be considered on its merits. In particular, I do not consider that what was said by Buxton LJ could create a legitimate expectation enforceable against the Secretary of State.

4. The situation was very difficult for the Secretary of State with a large number of applicants, doubts being raised as to Germany's compliance with its obligations under the Convention and the legal challenges to his decision in other cases. It was very distressing for the applicant who had been obliged to leave home to travel across Europe and to wait for three years before knowing whether he would be returned to Germany and thereafter, as he feared, to Kosovo. I have great sympathy for him but it is not possible in my view to say that there are grounds which entitle the House to interfere. How far these matters weigh with the Secretary of State is another matter.

5. Finally, I agree with Lord Hoffmann that the fact that *Besnik Gashi's* case was looked at on the merits is entirely due to the special circumstances surrounding the legal proceedings and others cannot complain of discrimination which, if it existed in other cases, might provide a ground for challenge.

6. I would accordingly allow this appeal.

LORD MACKAY OF CLASHFERN

My Lords,

7. I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Hoffmann. Subject to the comment I am about to make on one aspect of the case, I agree that this appeal should be allowed and for the reasons that he has given.

8. The application in this case is to set aside the Secretary of State's decision of 16 November 1998 certifying that the conditions in section 2(2) of the Asylum and Immigration Act 1996 were satisfied in Mr Zeqiri's case and the consequent decision of 2 December 1998 to issue directions for his removal to Germany. It also seeks quashing of the decision on 2 November 2000 of the Secretary of State to maintain his certificate.

9. Before Moses J, the Secretary of State maintained that the certificate of 16 November 1998 should not be set aside. Moses J accepted this submission and dismissed Mr Zeqiri's application, in paragraph 86 for four reasons:

1.

The certificate dated 16 November 1998 was not quashed by reason of the Court of Appeal decision in *R v Secretary of State for the Home Department, Ex p Besnik Gashi* [1999] INLR 276.

2.

The applicant had no legitimate expectation that his case would be considered substantively in this country in consequence of the decision in *Ex p Besnik Gashi*. Nor was it unfair to decline such consideration once the appeal against the decision in *Ex p Besnik Gashi* was withdrawn.

3.

The Secretary of State was entitled to decide to maintain the certificate of 16 November 1998 on 2 November 2000. It was not unfair or inconsistent to make that decision on 2 November 2000.

4.

Sections 2 and 3 of the 1996 Act do not preclude the maintenance of a certificate, notwithstanding that at the time of the original decision it was made unlawfully.

10. In this House counsel for the Secretary of State accepted that, since *Besnik Gashi* was a test case, the decision to quash the certificate in that case carried with it the implication that the certificate in Mr Zeqiri's case should also be quashed, and accordingly that the direction for removal, which was made following that certificate, should also be quashed. It follows that a decision of the Secretary of State of 2

November 2000, if it was a decision to maintain that certificate, could not be effective.

11. My noble and learned friend Lord Hoffmann, agreeing with Lord Phillips of Worth Matravers MR, has held that in truth the decision of 2 November 2000 was a new certificate of the Secretary of State certifying that the conditions in section 2(2) of the Act of 1996 was satisfied in respect of Mr Zeqiri on 2 November 2000. As the letter of 2 November 2000 clearly refers to the changed situation for Kosovan Albanians, both in Europe and in Kosovo, I consider that the decision of 2 November 2000 was intended to indicate the Secretary of State's satisfaction that the condition, particularly in section 2(2)(c), was satisfied at that date. The conditions in sub-sections (a) and (b) were satisfied in November 1998 (there was no challenge to that in the *Besnik Gashi* case) and, of course, remained satisfied on 2 November 2000. Since it is now not in dispute that the Secretary of State could recertify, in my opinion it is right to treat the decision of 2 November 2000 as a decision to certify, as at that date, that the conditions in section 2(2) were satisfied in respect of Mr Zeqiri. The form of the letter of 2 November 2000 did, however, as I have indicated, form an important part of the approach taken by the Secretary of State in this case before Moses J.

12. It having been accepted that *Besnik Gashi* was a test case, the next question is whether it decided only that the certificate in that case should be quashed, or also decided that the Secretary of State was therefore obliged to give substantive consideration to the application for asylum in the United Kingdom. From the argument before your Lordships, I gathered that there was a dispute between the parties as to what had been said by counsel for the Secretary of State in that case but, in my opinion, the question is whether the judgment itself, properly read, regarded the action the Secretary of State was to take following the quashing of the certificate as a matter on which the court had given judgment or in respect of which the court had merely expressed its understanding of what should happen. In cases affecting the Secretary of State, the court frequently adopts the view that the Secretary of State will be guided by its opinion without the necessity of a formal order of mandamus or declaration and, indeed, an example of the second is to be found in the judgment of Collins J in *R v Secretary of State for the Home Department, Ex p Shefki Gashi* (unreported) 15 June 2000 referred to by my noble and learned friend Lord Hoffmann. The absence of an order of mandamus in the Court of Appeal's decision in *Ex p Besnik Gashi* is not therefore conclusive of the matter. There is no sign in the opinions delivered by the Court of Appeal in that case of any substantive discussion of the legal consequences of quashing the certificate there in issue, and this leads me to the conclusion, although not without some difficulty, that Buxton LJ's reference to what follows was his understanding at the time of what would follow, although not a decision upon that matter. On all other aspects of the case I agree with the reasoning of my noble and learned friend, but I would allow the appeal, set aside the certificate of 16 November 1998 and the direction for removal of 2 December 1998, and refuse the application in respect of the letter of 2 November, treating it as a certificate that the conditions of section 2(2) were satisfied in respect of Mr Zeqiri on 2 November 2000.

LORD HOFFMANN

My Lords,

13. At the beginning of March 1998 the violence between the Serb authorities and ethnic Albanians in Kosovo, which had been gradually increasing over the previous months, flared up alarmingly. On 9 March the United States, United Kingdom and other countries agreed to impose diplomatic and economic sanctions on the Federal Republic of Yugoslavia because of President Slobodan Milosevic's "unacceptable use of force" against the ethnic Albanian majority. The violence continued unabated. Many thousands of Albanian Kosovars fled their homes and country. A year later, at the end of March 1999, Nato commenced a bombing campaign against Yugoslavia. In June 1999 President Milosevic agreed to withdraw the Yugoslav army from Kosovo. Nato forces entered the province and it became safe for Albanian Kosovars to return.

14. On 3 April 1998 **Bajram** Zeqiri**,** an ethnic Albanian from Kosovo, arrived in the United Kingdom on the Eurostar from Brussels and claimed asylum. He told an immigration officer that he had left Kosovo on 25 March, crossed to Macedonia on foot and travelled from there to Brussels in the back of a lorry. Inquiries by the Home Office revealed that his story was untrue. He had first gone to Germany and claimed asylum there. Subsequently he had claimed asylum in Belgium.

15. The United Kingdom and Germany are parties to the 1990 Dublin Convention on "determining the state responsible for examining applications for asylum lodged in one of the member states of the European Communities" (European Communities No. 40 (1991)). Article 6 provides that the member state into which an applicant for asylum has irregularly crossed from a non-member state shall be responsible for examining his application. By article 11.1, if a member state with which an application has been lodged considers that another member state is responsible for examining the application, it may "call upon the other member state to take charge of the applicant".

16. The Secretary of State requested the German government to determine Mr Zeqiri's application and on 12 November 1998 the German authorities agreed to do so.

17. The general rule, as stated in section 6 of the Asylum and Immigration Appeals Act 1993, is that during the period between the making of a claim for asylum and its substantive determination by the Secretary of State, the applicant may not be removed from the United Kingdom. But section 2 of the Asylum and Immigration Act 1996 creates an exception to give effect to the provisions of the Dublin Convention:

> "(1) Nothing in section 6 of the 1993 Act (protection of claimants from deportation etc) shall prevent a person who has made a claim for asylum being removed from the United Kingdom if -
> (a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled;…
> (2) The conditions are-
> (a) that the person is not a national or citizen of the country or territory to which he is to be sent;

(b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the [Geneva] Convention [of 28 July 1951 relating to the status of refugees as amended by the New York Protocol of 31 January 1967 relating to the status of refugees]."

18. On 16 November 1998 the Secretary of State wrote to Mr Zeqiri certifying that in his opinion the conditions in section 2(2) were satisfied. On 2 December 1998 an immigration officer refused him leave to enter and issued directions for his removal to Germany.

19. On 4 December 1998 Mr Zeqiri issued proceedings for judicial review to challenge the decisions of 16 November and 2 December 1998. The main ground was that the Secretary of State was not reasonably entitled to be of opinion that condition (c) was satisfied. He had not made adequate inquiry into the way the Germans dealt with Kosovo asylum applications. Inquiry would have revealed that there was a serious danger that he would be returned to Kosovo in breach of the Convention.

20. In his notice of application Mr Zeqiri said that at least some of the issued which he raised had also been raised in the case of *R v Secretary of State for the Home Department, Ex p Besnik Gashi* [1999] INLR 276. Mr Gashi, the applicant in that case, had arrived in England from Germany at the end of 1997 after spending a year in Germany, where his asylum application had been refused. The Secretary of State had certified on 16 March 1998 that he could be returned to Germany. His application was being treated as a test case on the question of the Dublin Convention certification of Kosovars who had come from Germany. It had come before the Divisional Court (Brooke LJ and Sedley J) in November 1998, when Mr Gashi's application had been dismissed. But he was appealing to the Court of Appeal. Mr Zeqiri suggested that his own application should be adjourned until the *Besnik Gashi* case, including any appeal, had been determined. This was agreed by correspondence on 17 December 1998 and no evidence was filed in Mr Zeqiri's case.

21. Judgement in the *Besnik Gashi* case was given on 25 March 1999. The court (Evans, Thorpe and Buxton LJJ) dealt with various grounds of complaint. One was that the German courts applied the wrong standard of proof for asylum applications and another was that the decision of the Secretary of State was irrational. Buxton LJ, who gave the main judgment, rejected these arguments. But he accepted that statistics which had been produced in evidence, revealing what appeared to be a wide disparity between German and UK acceptances of asylum applications from Kosovars over the same periods "should have put the Secretary of State on further inquiry as to whether Germany is in fact a safe country" ([1999] INLR 276, 304H). He said, at p 306H "There may well be an explanation; but it has not been given." He concluded this part of his judgment by saying, at p 307:

"The duty of anxious consideration to enable the Secretary of State to be satisfied that there is no real risk of Mr Gashi being sent by Germany to another country otherwise than in accordance with the Convention therefore required, on the facts of this case, that the Secretary of State should consider,

> and almost certainly seek further explanation of, the figures as to actual recognition rates in Germany. Since he has taken no steps in that direction, his decision cannot stand."

22. If one pauses at this point, the conclusion which would seem to follow from the judgment is that the Secretary of State could not lawfully remove Mr Gashi in reliance on the certificate purported to be given on 16 March 1998. He could reconsider the matter in accordance with the principles laid down by the Court of Appeal and, if so minded, issue another certificate. Otherwise, he would be obliged to give substantive consideration to Mr Gashi's application.

23. Buxton LJ ended his judgment by saying:

> "I would allow this appeal, and quash what has transpired to be the only live order, the certification by the Secretary of State of 16 March 1998. It follows that the Secretary of State will now consider the applicant's substantive application for asylum, and apply to it the policy that he described to this court of following the decision of the Immigration Appeal Tribunal in [*Gashi and Nikshiqi v Secretary of State for the Home Department* [1997] INLR 96]".

24.

Gashi and Nikshiqi v Secretary of State for the Home Department [1997] INLR 96 was a case in which, after hearing submissions on behalf of the United Nations High Commission for Refugees, the Immigration Appeal Tribunal had laid down guide lines for dealing with applications by Kosovars in the situation then prevailing in Kosovo. By the time of the Court of Appeal's judgment in *Ex p Besnik Gashi* in March 1999, when the Nato bombing had just commenced, those guidelines meant that in practice all Kosovar applicants, if entitled to substantive determination in the United Kingdom, would be accorded refugee status. So Buxton LJ clearly did not think that the Secretary of State would be reconsidering his certificate under section 2(2) of the 1996 Act. Why he should have thought so is a matter to which I shall have to return. But it plainly does not follow from the grounds upon which the certificate was quashed. It might well have followed if the certificate had been quashed on another of the grounds relied upon. For example, if the conclusion had been that German courts applied the wrong standard of proof, then absent evidence of a change of German practice, the Secretary of State would be unable to certify. But the actual ground of decision left open the possibility that full investigation might show that there was nothing wrong with German practice.

25. Nor does Buxton LJ's conclusion follow from the terms of the Court of Appeal's order. There is no transcript of the discussion after the judgment was handed down. But we have been provided with what we are told is a pupil's note, carrying the warning: "This is a draft copy and in no way should be taken as a verbatim transcript." After making some corrections to the text, counsel and the court discussed what order should be made. Mr Dias, who had been junior counsel for Mr Gashi, asked that there should be a mandamus for substantive consideration. Buxton LJ is noted as saying "I did not say mandamus. But it is clear what I said. What does Miss [Giovanetti] have to say?". According to the note, Miss Giovanetti, who had been junior counsel for the Secretary of State, said:

> "The effect of the judgment…is the Secretary of State will have to consider it in the light of the law as set out in the judgment."

26. Buxton LJ then said "Goes further than that and must follow *Gashi and Nikshiqi*", to which Miss Giovanetti replied "That is what I meant". Evans LJ asked "Is there going to be a need for a stay?" and Miss Giovanetti said that she was not asking for a stay. She then asked for leave to appeal, which was refused. On 23 April 1999 the Secretary of State presented a petition for leave to appeal to the House of Lords and leave was granted on 18 October 1999.

27. Immediately after the decision of the Court of Appeal, Mr Gashi's solicitors wrote to the Home Office quoting the concluding words of Buxton LJ's judgment and saying that as Miss Giovanetti had not sought a stay, Mr Gashi's claim should now be considered on its merits. The Home Office replied:

> "The Secretary of State is presently reconsidering his position according to law following the Court of Appeal judgment in the case of *Ex p Besnik Gashi.* He is seeking legal advice from counsel, in particular, in relation to his intention to petition the House of Lords. We will revert to you as soon as our decision on petitioning the House of Lords has been reached."

28. The terms of this letter make it clear that the Secretary of State was in general terms considering the consequences of the *Besnik Gashi* judgment and giving particular attention to the question of an appeal. Mr Gashi's solicitors returned to the subject in a letter of 4 August, saying that the Home Secretary was not entitled to refuse substantive consideration and relying on Buxton LJ's remarks and Miss Giovanetti's statement that she was not seeking a stay. The Secretary of State was anxious about how to deal with his petition, which was still pending. On the one hand, he wanted to have the point of principle decided without reference to any facts peculiar to Mr Gashi. He had been advised that the best way to make certain that this happened was to accept him, ex gratia so to speak, for substantive consideration. The facts of his case would then no longer give rise to live issues. On the other hand, he was concerned that if he did so, the House might refuse the petition on the ground that the point of principle had become academic. So he offered to give Mr Gashi substantive consideration in return for his agreement that the petition raised a point of general importance which the House should still consider.

29. Mr Gashi rejected this offer. He said that by virtue of the judgment of the Court of Appeal and the absence of a stay, he was entitled to substantive consideration as of right and not as a matter of concession. It is now agreed that this was wrong. The Home Office said nothing to suggest that they accepted it. The Secretary of State successfully pursued his application for leave to appeal to the House of Lords. He then wrote to Mr Gashi saying that leave having been granted, he would now give substantive consideration to his application. At the same time, he wrote to the Judicial Office (with a copy to Mr Gashi) to say that he had made this decision in the exercise of his discretion but wished to pursue the appeal.

30. Meanwhile, other applicants in the same situation as Mr Gashi were writing to the Home Office to find out what their position was after the judgment of the Court of Appeal. On 30 June 1999, after the Serbian withdrawal from Kosovo had taken place,

a partner in Christian Fisher wrote on behalf of a Mr Ahmeti, saying that she understood that Mr Gashi had been successful and that Kosovan asylum seekers were being granted leave to remain in the United Kingdom. She asked for confirmation that her client would receive substantive consideration. The Home Office replied on 5 July 1999:

> "As you may know, the Secretary of State has now presented a petition for leave to appeal to the House of Lords from the order of the Court of Appeal in *Ex p Besnik Gashi.* I can also confirm that the Secretary of State is presently reconsidering his position according to law following the judgment of the Court of Appeal in *Ex p Besnik Gashi.* In the circumstances, the Secretary of State considers that it is appropriate for all related cases, such as *Ex p Muhamet Ahmeti*, to remain deferred pending the resolution of *Ex p Besnik Gashi.* (My emphasis)."

31. The sentence which I have emphasised in this letter makes it clear that the Secretary of State did not regard the *Besnik Gashi* decision as necessarily requiring him to give substantive consideration to the application. He was considering his position, independently of whether his appeal was successful or not.

32. After the *Besnik Gashi* decision in the Court of Appeal, the Home Secretary suspended removals to Germany under the Dublin Convention. He made further inquiries into whether Germany was a safe country. He formed the opinion that at least as of 15 June 1999 onwards it was. Furthermore, the withdrawal of Serbian forces meant that the substantive applications were now unlikely to succeed. He therefore announced on 13 July 1999 that he would once more enforce the terms of the Dublin Convention with Germany and made certificates under section 2(2) of the 1996 Act in respect of Kosovars who had arrived from that country and had not been already certified before the decision of the Court of Appeal in *Ex p Besnik Gashi* on 25 March 1999. These in turn were also challenged on various grounds in judicial review. The applications in two specimen cases came before Collins J in *R v Secretary of State for the Home Secretary, Ex p Shefki Gashi and Artan Gjoka* (unreported), 15 June 2000.

33. Before the substantive hearing, there had been a procedural application before Burton J in which Miss Giovanetti, for the Secretary of State, put forward a number of declarations which she wished the court to make. These included declarations that:

> "1. The Secretary of State was lawfully able to conclude that, as of 15 June 1999, there was no significant disparity between the approach of the German authorities and that of the UK immigration authorities as regards asylum claims by Kosovar Albanians.
> 2. In forming an opinion for the purposes of section 2(2)(c) of the Asylum and Immigration Act 1996 as to the safety of the country to which he proposes to remove an applicant, the Secretary of State should consider the law and practice of that country as at the date of certification, or any subsequent decision to maintain the certificate." (My emphasis).

34. These declarations were capable of applying not only to applicants who had been certified for the first time after 25 March 1999 but also to those who had

previously been wrongly certified as the situation then stood. The words I have underlined at the end of the second declaration made this clear. The Home Office was certainly of this opinion. Miss Giovanetti tendered a witness statement made on 9 May 2000 by Mr Taylor of the Home Office Third Country Unit saying that: "The outcome of these applications will, potentially, affect the Respondent's handling of the cases stood out pending the resolution of *Ex p Besnik Gashi*." Burton J gave the applicants in all those cases leave to intervene and ordered that they be notified of the proceedings. The Home Office did so by fax on 19 May 2000.

35. At the hearing on 25 May 2000 Mr Manjit Gill QC appeared for the applicants, as he has for the applicant before your Lordships. The judge noted that he had not been asked by either party to express a view about applicants who had been certified before 25 March 1999: "Somewhat different considerations are said to apply to [this] category" but "[n]either counsel was prepared or able to argue the legal result of [that] category and so I do not deal with it in this judgment." Mr Gill did not challenge the principles stated in the first two declarations but submitted that the applicants had a legitimate expectation that their claims to asylum would be considered quickly. If the Home Secretary had given consideration to whether they could be returned to Germany immediately after 25 March 1999 and before 15 June 1999, he could not (in the light of the *Besnik Gashi* case) have lawfully decided that Germany was a safe country. Therefore he should not be entitled to do so afterwards. Collins J rejected this argument. He said that delay was not material to the question of whether a section 2(2) certificate could be validly given or not. The judge did not make any formal declarations but the judgment makes it clear that he accepted Miss Giovanetti's draft declarations 1 and 2 as in principle correct.

36. After the judgement of Collins J the Home Office formed the view that although he had not expressly decided anything about pre-25 March 1999 certifications, the principle of the case should apply equally to them. This meant that the appeal in the *Besnik Gashi* case had little if any practical significance for any of the applicants in the same situation. They could all be re-certified. The Secretary of State therefore petitioned the House of Lords for leave to withdraw his appeal. On 26 October 2000 it was by leave withdrawn. On 2 November 2000 the Secretary of State wrote to the present respondent Mr Zeqiri. He referred to the judgment of Collins J and quoted the declarations which had in principle been approved and said:

> "Following the judgment of [Collins J] … the Secretary of State reviewed his certificate in your client's particular case, in order to determine whether or not it should be maintained, in the light of the changed situation for Kosovan Albanians both in Europe and in Kosovo. The Secretary of State remains clearly of the view that your client is properly returnable to Germany under section 2 of the [1996 Act]…"

37. Mr Zeqiri amended his application for judicial review to include a challenge to the decision of 2 November 2000. The application came before Moses J and was dismissed on 15 December 2000. On 12 March 2001 the Court of Appeal (Lord Phillips of Worth Matravers MR, Kennedy and Dyson LJJ) allowed Mr Zequiri's appeal and quashed the decision of 2 November. The grounds were, first, that Mr Zequiri had a legitimate expectation that unless the Secretary of State was successful in his appeal in the *Besnik Gashi* case, he and all other applicants whose cases had

been adjourned pending the *Besnik Gashi* decision would receive substantive consideration of their asylum claims, and secondly that it was unfair of the Secretary of State, having left Mr Zeqiri in a state of uncertainty while he waited for the *Besnik Gashi* appeal to be heard, to remove him to Germany on other grounds. This would deprive him of what he regarded as the advantage of having his claim determined in the United Kingdom rather than Germany. Against that decision the Secretary of State appeals to your Lordships' House.

38. My Lords, I think that the first step is to consider whether the Secretary of State's letter of 2 November 2000 purported to be a certificate within the meaning of section 2(1) of the 1996 Act. The difficulty arises from the fact that the Secretary of State said that he was entitled to "review his certificate" and that he was satisfied that "he may properly maintain his certificate". This looks as if he was not issuing a new certificate but seeking to revive one which, as a result of the application of the unappealed decision in the *Besnik Gashi* case, had been held unlawful and void. So it was submitted that the Secretary of State's letter was ineffective. It did not purport to be a new certificate and could not resurrect the old one.

39. Moses J rejected this argument and Lord Phillips MR, at paragraph 47, said that it was "purely a matter of form". I agree. The statute requires the Secretary of State to address the position at the time when he is giving the certificate: he must certify that in his opinion the subsection (2) conditions "are fulfilled" and condition (c) is that the German government "would not" send the applicant to another country otherwise than in accordance with the Convention. The letter says that he has "taken into account the present situation" and in my opinion the important passage, in which he addresses the applicant's situation, is paragraph 6:

> "The Secretary of State remains clearly of the view that your client is properly returnable to Germany under section 2 of the [1996 Act] and that he is readmissible to Germany under the provisions of the Dublin Convention".

He does not use the word "certify" and I agree with Lord Phillips MR that the use of the words "review" and "maintain" in relation to the earlier certificate were inappropriate. But on a fair reading of the letter it seems to me inescapable that the Secretary of State is saying that in the circumstances as they then exist, the subsection (2) conditions are in his opinion satisfied. The letter should therefore be treated as a certificate as of the date it was written.

40. I turn therefore to the question of whether Mr Zeqiri had a legitimate expectation that unless the House of Lords reversed the *Besnik Gashi* case, his application for asylum would receive substantive consideration in the United Kingdom. There is no doubt that the *Besnik Gashi* case was regarded as a test case for all Albanian Kosovar applicants, such as Mr Zeqiri, who were seeking to challenge the section 2 certificates for their removal to Germany. But what does that mean? In my opinion, that the applicants and the Home Office agreed to abide by whatever the *Benik Gashi* case decided. None of the issues decided by the Court of Appeal would be relitigated.

41. It might well have been expected that the outcome of the *Besnik Gashi* case would be either that the certificate would be upheld or that it would be quashed and

the Home Secretary directed to determine the asylum applications. But there was a third possibility, which was the one which actually happened, namely that the certificate would be quashed on grounds which did not preclude the Home Secretary from reconsidering the matter and issuing a new one.

42. In the Court of Appeal in this case, Mr Gill did not accept that this was the outcome of the *Besnik Gashi* case. He said that once a certificate had been shown to be unlawful, "no facts that subsequently come to the attention of the Secretary of State nor any change of circumstances, can be invoked to maintain or revive the certificate, nor can the Secretary of State issue a fresh certificate". Lord Phillips MR rejected that argument. He said, at paragraph 50:

> "The normal position in public law where a decision is quashed is that the decision-maker is free to reconsider the decision in the light of the material circumstances then prevailing. In *Artan Gjoka and Shefki Gashi* Mr Gill accepted the proposition that the Secretary of State could issue a certificate after a change of circumstances, notwithstanding that he had not been in a position to do so at the date of the applicant's claim for asylum. I can see no reason why he should not be free to do so, whether or not he mistakenly issued a certificate at the time of the original application."

43. There is no cross-appeal against that decision, which I respectfully think was obviously right. So it was common cause before your Lordships that the *Besnik Gashi* case did not prevent the Secretary of State from issuing a new certificate on 2 November 2000. What the Court of Appeal said in this case, however, was that the conduct of the Secretary of State in relation to that appeal gave rise to a legitimate expectation that unless he overturned the decision on appeal, he would not issue a fresh certificate.

44. It is well established that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which judicial review is the appropriate remedy: see Lord Templeman in *R v Inland Revenue Commissioners, Ex p Preston* [1985] AC 835, 866-867. This particular form of the more general concept of abuse of power has been characterised as the denial of a legitimate expectation. In considering the expectations which may legitimately arise from statements to taxpayers by the Inland Revenue, Bingham LJ said that they must be "clear, unambiguous and devoid of relevant qualification": see *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569G. Mr Gill said that while it might be appropriate in the case of dealings between the Revenue and sophisticated tax advisers to insist upon a high degree of clarity in the alleged representation, this need not necessarily be required in other cases. Kosovar refugees cannot be expected to check the small print. In principle I agree that an alleged representation must be construed in the context in which it is made. The question is not whether it would have founded an estoppel in private law but the broader question of whether, as Simon Brown LJ said in *R v Inland Revenue Commissioners, Ex p Unilever plc* [1996] STC 681, 695B, a public authority acting contrary to the representation would be acting "with conspicuous unfairness" and in that sense abusing its power.

45. In the present case what is relied upon is not a representation directly to the applicants but one which is said to arise out of the conduct of adversarial litigation and was made to the applicant's legal representatives. The question is therefore what would have been understood by a lawyer rather than an unaided Kosovar refugee.

46. There is no suggestion that the Secretary of State made any representation in advance of the *Besnik Gashi* hearing that, if his certificate was quashed, on whatever grounds, he would (subject to an appeal) give substantive consideration to the applications. As I have said, a quashing on some of the grounds advanced by Mr Gashi might in practice have left the Secretary of State with no choice. But that was not necessarily the case. Clearly, however, Buxton LJ obtained the impression during the hearing that substantive consideration would follow. His concluding remarks began with the words "it follows". Before your Lordships, it was accepted on both sides that it did not follow from anything which Buxton LJ had said before. So there must have been some silent premise. But what was it?

47. Lord Phillips MR said, at paragraph 61, that Buxton LJ's conclusion reflected a "general expectation" that the case would be determinative of whether the claims to asylum would be determined in this country or in Germany. That may well have been the expectation before the judgment was delivered. In fact, however, the judgment did not determine the question. Possibly Buxton LJ's remarks were based upon the way Mr Michael Beloff QC had conducted the case for the Secretary of State. It was part of his argument that requiring the Secretary of State to analyse the track records of other member states in dealing with asylum applications would be very burdensome. Mr Beloff may, for forensic purposes, have given the impression that the task was virtually impossible. All this is entirely speculative. Mr Pannick QC, who appeared for the Secretary of State, has consulted Miss Giovanetti, who was present in the Court of Appeal. She says that counsel for the Secretary of State made no express statement that the application would automatically be entertained if the certificate was quashed. Mr Gill does not suggest otherwise, but he does say that the "common expectation" was that the case would be determinative.

48. In my opinion there is no evidence to show that Buxton LJ's concluding remark reflects an express or implied promise by the Secretary of State. This view is in my opinion confirmed by what happened when the judgment was handed down. Miss Giovanetti had instructions to ask for leave to appeal. She knew that, if leave was refused (as ordinarily it would be), the Secretary of State might wish to petition the House. She was asked by Evans LJ whether she wanted a stay of the order and she said that she did not. The only conclusion which anyone in court could draw is that Miss Giovanetti did not think that the judgment required the Secretary of State to determine the substantive applications. If it did, the fact that she was appealing would not have been sufficient to suspend the obligation. She would have required a stay. In the absence of a stay, there would have been no point in pursuing an appeal.

49. Lord Phillips MR, in deciding that the conduct of the Secretary of State "carried a clear message" that he regarded the *Besnik Gashi* decision as obliging him to determine the applications, said that Miss Giovanetti (who had seen a draft of the judgment in advance) could have said at the hand down (or two later hearings to clear up various points) that the Secretary of State disagreed with Buxton LJ's conclusion. What she in fact said was that the Secretary of State would consider the judgment in

the light of the law it set out. This seems to me a perfectly reasonable attitude. There were various hypotheses on which Buxton LJ could have been right. For example, if the submission which Mr Gill afterwards made to the Court of Appeal in the present case about the impossibility of issuing any fresh certificate had been accepted, he would certainly have been right. But the question was not immediately relevant because on any view, nothing was going to happen until the question of an appeal had been decided. So there was no point in getting into an argument about Buxton LJ's obiter dicta. Miss Giovanetti made it clear that the Secretary of State accepted the judgment for whatever as a matter of law it decided. I do not think any further representation can be implied.

50. Furthermore, Mr Gashi's solicitors almost immediately asserted their understanding, based entirely upon what Buxton LJ had said, that the Secretary of State was obliged to consider his application. So did other solicitors. In reply, the Secretary of State made it clear that, despite the absence of a stay, he was not under any such obligation. And his letters indicate that this was not merely because he was contemplating an appeal but also because he wished to obtain legal advice on the effect of the judgment.

51. Lord Phillips MR said, at paragraphs 63-65, that the Secretary of State could have undone the effect of his implied representation at the hearing if he had acted immediately after the end of the Kosovo bombing and told applicants like Mr Zeqiri that they would now be recertified. Instead, he waited for a ruling on the post-25 March 1999 recertifications in May 2000 and then applied that ruling to the earlier applicants. He therefore allowed them to:

> "remain under the impression that the final outcome in *Besnik Gashi* was likely to determine whether or not they would be removed to Germany for well over a year after the change of circumstances had occurred." Paragraph 65).

52. My Lords, since I do not think that there were reasonable grounds for ascribing to the Secretary of State the creation of any such impression, I do not think that it was incumbent upon him to take action to correct it. It was not unreasonable for him to obtain a ruling on whether he could issue a certificate which reflected changed circumstances and he notified applicants like Mr Zeqiri that the ruling could have consequences for them. They did not avail themselves of their liberty to intervene. On the other hand, they did not suggest to the Secretary of State that this was because they did not accept that the ruling could affect them. Still less did they say that the reason was an assurance that their cases depended exclusively upon the outcome of the *Besnik Gashi* appeal. The reason for their non-intervention was, I imagine, that the pre- and post-25 March 1999 applicants were largely represented by the same group of solicitors and counsel.

53. Furthermore, there seems to me no ground for believing that if the Secretary of State had recertified the pre-25 March 1999 applicants immediately after 13 July that year, the issues would have been clarified any earlier. The earlier applicants might have been formally represented before Collins J. On the other hand, their reaction to the invitation to be joined suggests that they might have wanted their cases to be

separately determined. In either case, it is likely that some of the questions which have been raised in this litigation would have had to be decided.

54. For these reasons I would respectfully disagree with the Court of Appeal on the finding that the Secretary of State had created a legitimate expectation. In my view there was no conduct which amounted within its context to a sufficiently clear representation as to the effect of the *Besnik Gashi* case. I do not think there would be any unfairness or abuse of power in allowing the Secretary of State to treat that case as deciding no more than it actually did.

55. The Court of Appeal also made a separate finding that recertification by the Secretary of State would be unfair: "It is unfair that the Secretary of State should change tack at this late stage" (paragraph 68). But that finding is in reality another way of saying that the Secretary of State had unequivocally nailed his colours to the *Besnik Gashi* appeal mast. Otherwise there was no change of tack. And in my opinion there is no evidence that there was.

56. Mr Gill put forward two additional grounds for claiming that the decision to certify was unfair. The first was that Mr Gashi had received substantive consideration (in the event, his application for asylum was rejected) and it was unfair that everyone else in his position should not receive the same treatment. But the Secretary of State has explained why he exercised his discretion in favour of Mr Gashi. He had been advised that this would avoid any possibility that the appeal to the House of Lords might go off upon some point which left the issue of principle undecided. It would therefore be advantageous for the general administration of the immigration service if Mr Gashi's personal circumstances could be removed from consideration. It seems to me reasonable for the Secretary of State to have acted upon this advice, even if over cautious. Although I accept that it would be unfair of the Secretary of State not to treat like cases alike in the sense of discriminating against someone upon inadequate grounds, it would unduly restrict his discretion if he could not make an ex gratia concession on the ground of a general public interest in the fair and efficient administration of the immigration law: compare Bingham LJ's remarks on concessions by the Inland Revenue in the *MFK* case [1990] 1 WLR 1545, 1568.

57. Mr Gill's second ground was that the Secretary of State did not have sufficient regard to the unfairness of removing Mr Zeqiri to Germany after he had been here since 1998. In *Shefki Gashi and Artan Gjoka's* case (unreported) 15 June 2000, at paragraph 13, Collins J. said:

> "If the member state requested to deal with the claim accedes to the request in accordance with the Dublin Convention, allegations of delay are by themselves irrelevant. It may be possible in an individual case to argue that the respondent has failed to consider properly compassionate or other circumstances which ought to have persuaded him to take responsibility for a particular asylum seeker (for example, the presence of family ties) and to show that delay has some relevance. Otherwise…delay is not material."

58. In his certification letter of 2 November 2000, the Secretary of State invited Mr Zeqiri to put forward any personal grounds for the exercise of the discretion. Mr Zeqiri did so and the Secretary of State considered them in a letter of 15 November.

Mr Zeqiri has no family or other ties with this country. All that can be said is that he has made friends (principally with other Kosovo Albanians) during a period prolonged by his legal proceedings and during which he was aware that the Secretary of State regarded him as removable to Germany. In my opinion it is impossible to challenge the conclusion that these were insufficient grounds to require an exercise of discretion in his favour.

59. The judgment of the Court of Appeal was influenced by the view, expressed by Lord Phillips MR in paragraph 70, that a "particularly rigorous examination of the decision" was required because "important human rights are in play". If the question was whether or not Germany would return the applicant to the possibility of persecution, contrary to the Geneva Convention, I would certainly accept that very close scrutiny of the decision was appropriate. In this case, however, it is accepted by the applicant that the German authorities will examine his claim in accordance with the Convention. While therefore I entirely accept that Mr Zeqiri's wish to remain in the United Kingdom is an important matter to be taken into account, I do not think that it justifies the courts in placing unnecessary obstacles in the way of the administration of the Dublin Convention.

60. I would allow the appeal and dismiss the application.

LORD MILLETT

My Lords,

61. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons he gives I too would allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

62. I have had the advantage of reading the speeches of my noble and learned friends Lord Mackay of Clashfern and Lord Hoffmann in draft. For the reasons which they give, I too would allow the appeal.

63. The point which has troubled me most is what happened when the Court of Appeal gave judgment in the *Besnik Gashi* [1999] INLR 276 case. We were shown a note taken by a pupil who was present. I confess that I have not found it as easy as Lord Hoffmann to affirm that the only conclusion which anyone in court could have drawn from Miss Giovanetti's indication that she did not want a stay was that she did not think that the judgment required the Secretary of State to determine the substantive applications. While that might indeed have been plain if nothing more had been said, it is by no means so clear when the answer is considered against the preceding exchanges between Mr Dias and Buxton LJ and between Buxton LJ and Miss Giovanetti. Indeed, in the light of those exchanges, I even wonder whether the

judges and the opposing counsel actually drew that conclusion from what she said. If they did, I find it surprising that they said nothing.

64. On the other hand, I accept that the inference identified by Lord Hoffmann is certainly one way - and indeed probably the best way - of interpreting that particular reply by Miss Giovanetti. In these circumstances, even if there is an element of doubt, what she said in court cannot in itself constitute the kind of "clear and unambiguous representation" on behalf of the Secretary of State upon which it would have been reasonable for the respondent to rely: *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73, 88F per Simon Brown LJ. Her statements could therefore not in themselves be a sound basis for any legitimate expectation that the Secretary of State would determine the substantive applications for asylum of persons such as the applicant. Furthermore, I find nothing in the later exchanges between the Secretary of State's representatives and the lawyers for the parties concerned which would found a legitimate expectation of that kind.