Neutral Citation Number: [2010] EWCA Civ 643

Case No: C4/2009/2272

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
NICOLA DAVIES QC (sitting as a Deputy High Court Judge)
[2008] EWHC 3162 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2010

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE LONGMORE
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
ST (ERITREA)	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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- -

Lisa Giovannetti (instructed by **the Treasury Solicitor**) for the **Appellant**
Richard Drabble QC and **Eric Fripp** (instructed by **Duncan Lewis & Co**) for the **Respondent**

Hearing date: 11 May 2010

- -

Judgment

Lord Justice Stanley Burnton :

Introduction

1. This is an appeal by the Secretary of State against the decision of Nicola Davies QC, sitting as a Deputy High Court Judge of the Administrative Court in the Queen's Bench Division, quashing his decision of 24 August 2006 declining to grant leave to remain and refusing to recognise the Claimant (to whom I shall refer as T) as a refugee, and ordering him to grant her leave to remain and to recognise her as a refugee.

2. The appeal raises an important question as to the effect of Article 32 of the Refugee Convention, namely whether a person who is, or is recognised to be, a refugee within the meaning of the Convention and the Protocol relating to the Status of Refugees ("the Refugee Convention") is by reason of that status alone entitled to the protection of Article 32 of the Convention, which precludes removal "save on grounds of national security or public order".

The facts

3. For the purposes of these proceedings, the Secretary of State accepts that T is of Eritrean nationality, although she has never lived in Eritrea and until she came to the UK in July 1998 she had lived in Ethiopia. On arrival in this country she claimed asylum and humanitarian protection. She claimed to fear persecution in both Eritrea and Ethiopia.

4. The Secretary of State did not accept that she would be at risk in either country, and decided that she should be removed to Eritrea. By notice of refusal of leave to enter dated 5 November 2004 he informed her that he had decided to refuse her application for the reasons set out in the attached letter dated 1 November 2004, and that "I have given/propose to give directions for your removal to Eritrea".

5. T appealed to an Adjudicator, who dismissed her appeal by a determination promulgated on 10 March 2005. In paragraph 2 of his determination, he stated that she had available to her the grounds mentioned in section 84 of the Nationality, Immigration and Asylum Act 2002, and that she raised her appeal under section 82 of that Act.

6. In paragraphs 17 to 19 of the determination, the Adjudicator set out the Secretary of State's contentions, which he summarised as asserting "that the appellant had no credible reason why she could not return either to Ethiopia or to Eritrea where she did not have a fear of persecution".

7. In paragraph 50 of his determination the Adjudicator found that T would be at risk of persecution in Eritrea on account of her religion. He rejected her contention that she would be treated as a draft evader or deserter. In paragraphs 56 to 60 of the determination, the Adjudicator addressed the question of T's removal to Ethiopia. In paragraph 57 he recorded that her counsel "acknowledged that the appellant's claim for refugee status on the basis of removal to Ethiopia could not be made out but that her submission related solely to the appellant's rights under Articles 3 and 8 … in the sense of the risk of her being deported to Eritrea where she could be subjected to

treatment contrary to both Conventions". The Adjudicator rejected T's case that there was any real risk of her being deported from Ethiopia to Eritrea if returned to the former country. His decision was to "dismiss the appellant's asylum appeal on the basis that she can safely be returned to Ethiopia". He also rejected T's article 3 and article 8 claims.

8. T sought permission to appeal to the Immigration Appeal Tribunal, contending that it had not been open to the Adjudicator to dismiss her appeal on the basis that she could be removed to Ethiopia because Ethiopia was not her country of nationality. The Adjudicator had concluded that T did have a well founded fear of persecution in Eritrea, which was T's country of nationality. It followed (T contended) that she was a refugee and her asylum appeal should have been allowed. She also sought to challenge the conclusion on Article 8.

9. The Asylum and Immigration Tribunal ordered reconsideration on the basis that, although removal directions had been set for Eritrea, the Adjudicator dismissed the appeal by reference to her conclusion that T could be returned to Ethiopia.

10. At the reconsideration hearing the Home Office Presenting Officer, Mr Tarlow and Mr Fripp, counsel for T, both pointed out that removal directions were set for Eritrea. According to the Tribunal's determination of February 2006:

> "Mr Fripp and Mr Tarlow reminded us that the respondent had proposed to remove the appellant to Eritrea. Mr Tarlow said that the respondent does not take issue with any of the findings made by the Adjudicator and nor does it challenge the conclusions drawn by the Adjudicator in paragraph 50 of his determination. However he went on to say that the respondent may decide to issue fresh removal directions in this case. He accepted that what the respondent might or might not do in the future is not a matter that need concern us. Mr Fripp asked us to find that the determination of Mr K R Doran is materially flawed and to allow the appeal.
>
> 4. The parties have agreed that the decision of the Adjudicator is in material error of law in that his conclusions are plainly contrary to the findings that he has made in paragraph 50 of his determination. We are satisfied that the Adjudicator erred in law and upon a review of all the relevant evidence, using the Adjudicator's clear and reasoned findings of facts, which are not challenged, we find that the appellant is a refugee and also that her removal to Eritrea would breach her protected rights under Article 3 of the ECHR. We conclude that her fear of persecution for a Convention reason in Eritrea is well founded and that she is entitled to international protection as a refugee under the 1951 Convention on Refugees. We further conclude that with regard to removal to Eritrea, the removal would be unlawful as it would lead to her ill treatment contrary to her protected rights under Article 3 of the ECHR."

11. For these reasons, the Tribunal's decision was stated as follows:

> "The original Tribunal (Adjudicator) made a material error in law and we substitute the decision as follows:
>
> The appeal is allowed on asylum grounds.
>
> The appeal is also allowed on human rights grounds."

12. Following receipt of that determination, the Secretary of State issued a fresh reasons for refusal letter, dated 24 August 2006, and served notice refusing T leave to enter the United Kingdom and notifying her that he proposed to give directions for her removal to Ethiopia, and informing her that she had a fresh right of appeal against that decision. T lodged an appeal in order to protect her position. However, her primary position is that she is entitled to the grant of status on the basis of the AIT determination. She therefore commenced these proceedings seeking judicial review of the Secretary of State's decision of 24 August 2004.

The judgment below

13. As stated above, Nicola Davies QC, sitting as a Deputy Judge of the High Court, quashed the Secretary of State's decision declining to grant T refugee status and ordered him (as he then was) to recognise T as a refugee and to grant her leave to remain. She understandably applied what Lord Brown had said in *Szoma v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64 [2006] 1 AC 564, which I consider below, and held that the effect of the decision of the Tribunal that T was a refugee of itself entitled her to the protection of Article 32, and therefore was entitled to stay in this country.

The applicable statutory, Immigration Rule and Treaty provisions

14. Immigration and asylum appeals are the subject of Part 5 of the Nationality, Immigration and Asylum Act 2002. Sections 82 to 84 provide, so far as material:

> *Right of appeal: general*
>
> (1) Where an immigration decision is made in respect of a person he may appeal to an adjudicator.
>
> (2) In this Part "immigration decision" means–
>
> (a) refusal of leave to enter the United Kingdom,
>
> (b) refusal of entry clearance,
>
> …
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),
>
> (h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs

8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) refusal to revoke a deportation order under section 5(2) of that Act.

…

83 Appeal: asylum claim

(1) This section applies where a person has made an asylum claim and–

(a) his claim has been rejected by the Secretary of State, but

(b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).

(2) The person may appeal to an adjudicator against the rejection of his asylum claim.

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds–

(a) that the decision is not in accordance with immigration rules;

(b) …

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

(d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

(e) that the decision is otherwise not in accordance with the law;

> (f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.
>
> (2) …
>
> (3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

15. "Asylum claim" is defined in section 113 as "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention".

16. At the material time, paragraph 334 of the Immigration Rules provided:

> An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
>
> (ii) he is a refugee, as defined by the [Refugee] Convention and protocol;
>
> and
>
> (iii) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

17. "Asylum applicant" was a defined term. Paragraph 327 provided:

> Under the Rules an asylum applicant is a person who:
>
> (a) makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the United Kingdom's obligations under the Geneva Convention for him to be removed from or required to leave the United Kingdom; or

(b) otherwise makes a request for international protection.

"Application for asylum" shall be construed accordingly.

18. "Refugee" is defined in Article 1 of the Refugee Convention:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
>
> Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;
>
> (2) …. 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

19. Articles 32 and 33 of the Refugee Convention provide:

> *Article 32*
>
> *Expulsion*
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear

himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

…

Article 33

Prohibition of expulsion or return ("refoulement")

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

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

20. The French text of Article 32.1 is as follows:

> Les Etats Contractants n'expulseront un réfugié se trouvant régulièrement sur leur territoire que pour des raisons de sécurité nationale ou d'ordre public.

The contentions of the parties in summary

Issue 1

21. The first issue between the parties may be shortly stated, although its discussion requires rather lengthy consideration of the authorities. For the Secretary of State, Ms Giovannetti, while accepting that T is a refugee, submits that Article 32 does not apply to her, since she is not "lawfully" in the UK: she has never been granted leave to enter or to remain in the UK. She is protected by Article 33, but the Secretary of State does not intend to return her to a country where she would be persecuted: the Adjudicator held that she was not at risk of persecution if returned to Ethiopia. In any event, the notice of removal that has been served has given rise to a right of appeal, in which she may contend that in present circumstances she does face such a risk. In these circumstances, she is not entitled to the grant of asylum as defined in paragraph 334 of the Immigration Rules. Furthermore, the appeal that was the subject of the Tribunal decision was not a status appeal under section 83 of the 2002 Act: it was an appeal against a specific immigration decision, namely to refuse her leave to enter. The recognition of her status as refugee did not entitle her to the grant of asylum.

22. For T, Mr Drabble submitted that she is entitled to the protection of Article 32 of the Refugee Convention, since she is and has been recognised by the Tribunal as a refugee. Indeed, whatever view this court may have as to the proper scope of Article 32 if it were free from authority, we are bound by the judgment of the House of Lords

in *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64 [2006] 1 AC 564, in which it was held that Article 32 applies to any refugee who has been recognised as such. It follows that the Secretary of State cannot remove T without infringing this country's obligations under the Refugee Convention; his decision to do so is in breach of section 84(1)(g) of the 2002 Act.

23. Ms Giovannetti submitted that *Szoma* is not binding on the interpretation of the Refugee Convention: it concerned entitlement to social security benefits rather than the right to enter and to remain under immigration law. In any event, in *JA (Ivory Coast) and ES (Tanzania) v Secretary of State for the Home Department* [2009] EWCA Civ 1353, the Court of Appeal restricted the authority of *Szoma* to social security benefits.

Issue 2

24. The second issue between the parties is of less general importance. It relates to the effect of the Tribunal decision of February 2006. T contends that she was recognised as a refugee and is entitled to the grant of asylum referred to in its decision. The Secretary of State contends that it has no such effect: T was recognised as a refugee, but she has not been granted asylum and no direction that she should be granted asylum was made by the Tribunal.

Discussion

Issue 1

25. It seems to me to be appropriate first to consider the interpretation and effect of Article 32 of the Refugee Convention without reference to the judgment of Lord Brown in *Szoma*, the status of which is in issue. I do so bearing in mind that it is inappropriate to interpret an international treaty as if it was an Act of Parliament. The Vienna Convention on the Law of Treaties of 1980 is generally regarded as declaratory of the interpretative rules of Public International Law. Paragraph 1 of Article 31 provides:

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

See too Article 32 of that Convention

26. The crucial question here is whether the words "lawfully in their territory" in Article 32 of the Refugee Convention qualify "refugee", and if so what they mean. In *Szoma*, Lord Brown of Eaton-under-Heywood stated, in effect, that any person who is recognised as a refugee is entitled to the protection of Article 32. The Secretary of State contends that Article 32 applies only to a refugee who has been given the right lawfully to stay in the Contracting State in question.

27. The object of the Refugee Convention is to require safe countries to give refuge to those who need what is referred to as international protection: a right to live free from persecution in the country in which they seek refuge. However, not every person who fears persecution in his country of nationality is in need of refuge. An obvious

example is a person who flees his country of nationality through fear of persecution and is given refuge, including a right of residence, in a safe country. To give an example free of the complications of Community law, let us say Canada. If such a refugee comes to this country, he has no need of refuge here: he may return to Canada and live peacefully there. The example is by no means fanciful: we often come across cases in which a person has fled his country of nationality and been recognised and given asylum in a third country, such as Sweden, and then comes to this country seeking to stay here. It is difficult to see why this country should be obliged to allow that person to stay here by reason of his status as a refugee. If he could, he could go round the world, claiming the right to live in every country that is a party to the Refugee Convention and to be irremovable by reason of Article 32.

28. I can take another example, closer to the facts of the present case. The respondent claims to have Eritrean, but apparently not Ethiopian, nationality, although she has always lived in Ethiopia. Let us take the case of a person of Eritrean nationality, who like the respondent has always lived in Ethiopia, and who is entitled to live there, but does not have Ethiopian nationality. He has not been persecuted in Ethiopia and has no reason to fear persecution there. He would however be persecuted on account of his religion if he were to enter Eritrea. He comes to this country and claims asylum. I doubt that such a person satisfies the definition of refugee in the Refugee Convention, since he is not outside Eritrea, he country of nationality, "owing to well-founded fear of being persecuted" there, but because he has always lived in Ethiopia. But even if he is a refugee within the definition, I see no reason why the Convention should have imposed an obligation on this country to grant him asylum, for which he had no need when he left Ethiopia and came to this country.

29. For these reasons, I would not expect the Contracting States to have accepted, in the Refugee Convention, an obligation not to expel (otherwise than to a place where he would be persecuted) a refugee solely because he is such. In other words, giving the Convention a purposive interpretation, I would expect Article 32 to be restricted to refugees who have been granted a right to reside in the Contracting State in question, and on that account to be "lawfully in their territory". I would also interpret Article 32 as inapplicable to a person who has been allowed in to a Contracting State for the sole purpose of its investigating and determining his claim to be a refugee and entitled to a right to reside. Otherwise, Article 32 would have the irrational effect of conferring on a person a right to remain in a Contracting State merely because he claims (on this hypothesis wrongly) his right to remain in the state in question. It is Article 33 that protects all refugees from being expelled to a country where they would be persecuted.

30. Mr Drabble recognised the force of these points, but he submitted that Article 32 must, by reason of the decision in *Szoma*, be interpreted as applying to persons who have been recognised by the appropriate judicial (including tribunal) authority as a refugee, even if they do not need asylum in this country.

31. I cannot accept the proposition that judicial recognition that a person is a refugee makes any difference to the application of Article 32. If the relevant executive authority in a Contracting State accepts that a person is a refugee, that should suffice. It would make no sense to apply Article 32 to a person who the Secretary of State denied was a refugee, but who the Tribunal determined to be a refugee, but to exclude from its scope someone who the Secretary of State accepted from the beginning to be

a refugee. The view that unless qualified "refugee" in the Convention means someone who objectively satisfies the requirements of the definition, without any recognition of his status, is supported by paragraph 28 of the foreword to the UNHCR 1979 Handbook issued "for the guidance of Governments … relating to procedures and criteria for determining refugee status" cited by Lord Brown in *Hoxha v Special Adjudicator* [2005] 1 WLR 1063 [2005] UKHL 19:

> 28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

32. In my judgment, the drafting of the Convention, and authority, support the interpretation of Article 32 that I favour. The definition of refugee itself distinguishes between those who have been recognised as refugees (in the language of Article 1, who "have been considered a refugee") and refugees *simpliciter*. This suggests that "refugee" *simpliciter* means a person who objectively fulfils the requirements of the definition. Language such as that in Article 1.A(1) is not used in Article 32. Secondly, "refugee" is a defined term, and good reason is required before concluding that in a Treaty the Contracting States intended some other meaning. With respect to the House of Lords in *Szoma*, their interpretation of Article 32 involves giving a different interpretation to "refugee" in adjacent provisions of the Convention; and it results in the words "lawfully in their territory" as surplusage, having no meaning or effect. That too is an unlikely interpretation.

33. The phrases "lawfully in their territory" and "lawfully staying in their territory" are used in a number of places in the Convention, but not universally. The phrases are used with discrimination. Thus, no such phrase appears in Article 16, which was clearly intended to apply to any refugee, whether entitled to reside in the State in question or not. See too Article 12, which similarly so applies. On the other hand, provisions such as Article 17, 18 and Article 21, in which such phrases are used, could sensibly be restricted to refugees who have been granted the right to be in the State in question. To construe Article 32 as limited to refugees who have been granted rights of residence, but Article 33 as applicable to all refugees, makes perfect sense.

34. The interpretation of the Convention which I favour is supported by authority. The leading work on the Convention is Professor Hathaway's *The Rights of Refugees under International Law* (2005). Discussing the structure of entitlement under the Convention, he states, at page 154:

> While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state. The most basic set of rights inheres as soon as a refugee comes under a state's de jure or de facto jurisdiction; a second set applies when he or she enters a state party's territory; other rights inhere only when the refugee is lawfully within a state's territory; some when the refugee is lawfully staying there; and a few rights accrue only

> upon satisfaction of a durable residency requirement. Before any given right can be claimed by a particular refugee, the nature of his or her attachment to the host state must therefore be defined.

35. Professor Hathaway discusses the meaning and effect of lawful presence in Chapter 3. At page 185 he states:

> "For refugees resident in another state who were authorized to enter on a strictly temporary basis, lawful presence normally concludes with the refugee's departure from the territory. The lawful presence of a sojourning refugee may also be terminated by the issuance of a deportation or other removal order issued under a procedure that meets the requirements of the Refugee Convention, in particular Art.33. The same is true of a refugee admitted upon arrival into a procedure designed to identify the country which is to examine his or her claim under the terms of a responsibility-sharing agreement: his or her lawful presence in the state conducting the inquiry comes to an end when and if an order is made for removal to a partner state."

Footnotes 145 and 146 are as follows:

> "145: "The expression "lawful entry within their territory" throughout this draft convention would exclude a refugee who, while lawfully admitted, has over-stayed the period for which he was admitted of was authorized to stay or who has violated any other condition attached to his admission or stay": Report of the Ad Hoc Committee on Statelessness and Related Problems", UN Doc. E/1618, Feb.17 1950, at Annex II (Art.10).
>
> 146: Critically, however, so long as the refugee remains in the territory or otherwise under the jurisdiction of the moving country, the duty of non-refoulement (Art.33) continues to apply."

See too Professor Hathaway's discussion of Article 32 at page 663 ff.

36. To similar effect is Michelle Foster's article *Protection Elsewhere; the Legal Implications of Requiring Refugees to seek Protection in Another State*, 28 Mich J Int'l Law 223 at 235:

> "Article 32 of the Convention proscribes the expulsion of refugees "save on grounds of national security or public order" and requires that due process be afforded an individual refugee prior to expulsion. However, this does not apply until a refugee is "lawfully present" in the territory of the relevant state party. This suggests some flexibility between the point at which Article 33 is activated (explored below) and the point at which a refugee is lawfully present in a state, during which a state is

> not explicitly constrained from removing a refugee to a third state."

37. In *The Land Beyond, Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen, the highly-regarded Norwegian "father of refugee law", stated, at page 7:

> [Article 32] only applies to persons lawfully in the territory of the contracting state in question. A refugee who has entered illegally may be expelled without being able to invoke Article 32. The same applies to a refugee whose residence permit has expired, provided that the state in whose territory he lives is not under an obligation to renew it.

38. Similarly, the UNHCR Note on the Expulsion of Refugees of 24 August 1977 states:

> 1 A refugee *who has been granted the right of lawful residence in a particular* State needs the assurance that this right will not be withdrawn, with the result that he again becomes an uprooted person in search of refuge. Such assurance is given in Article 32 of the 1951 Convention and Article I(1) of the 1967 Protocol relating to the Status of Refugees. These provisions, however, also recognize that circumstances may arise in which a State may consider expulsion measures.

The italics are mine.

39. All these authorities support the proposition that a refugee is not entitled to the protection of Article 32 unless he or she has been granted the right of lawful presence in the state in question. The phrase "régulièrement sur leur territoire" in the French text, set out above, supports this interpretation. Whether a refugee is lawfully in the territory of a state is determined by its domestic law. However, any refugee is entitled to the protection of Article 33, whatever the legal status of his presence under national law.

40. With these authorities in mind, I turn to consider our domestic authorities. The first time the House of Lords came to consider the Refugee Convention was in *R v Home Secretary ex parte Bugdaycay*, otherwise known as *Re Musisi*, 1987] 1 AC 514. Mr Musisi was an asylum seeker of Ugandan nationality who came to this country from Kenya and was temporarily admitted pending a decision on his application for leave to enter as a visitor from Kenya. When his application was refused, he applied for asylum as a refugee from Uganda, and alleged that if returned to Kenya, which the Secretary of State intended to do, he would be removed to Uganda where he would be persecuted. The House of Lords held that he was not entitled to the protection of Article 32 because he was not lawfully present in this country. Lord Bridge of Harwich, giving the main speech, with which the other members of the Judicial Committee agreed, said:

> The case of Musisi raises first a distinct issue of law. The decision to refuse him leave to enter was not based on the denial of his claim to refugee status quoad Uganda, which is the

country of his nationality, but on a conclusion by the Secretary of State that, even if he is properly to be treated as a refugee from Uganda, within the definition of "refugee" under the Convention, this presents no obstacle to his return to Kenya whence he came to this country. The primary submission made by Mr. Collins on his behalf is that, if he is a refugee, as is to be assumed, he is protected not only by Article 33.1 of the Convention against return to the country where he fears persecution, but also by Article 32.1 against return to any other country because he is now "lawfully in [the] territory" of the United Kingdom and cannot, therefore, be expelled save on grounds of national security or public order. The temporary admission pursuant to paragraph 21 of Schedule 2 to the Act of an applicant for leave to enter pending a decision on his application has the effect, it is submitted, of making the applicant's presence in the United Kingdom lawful for the purpose of his entitlement to the protection of Article 32.1 of the Convention.

Section 11(1) of the Act provides:

> "A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act."

Mr. Collins was constrained to concede that, if his argument is right, it must apply equally to any person arriving in this country at a regular port of entry and presenting himself to the immigration authorities, whether he is detained or temporarily admitted pending a decision on his application for leave to enter. It follows that the effect of the submission, if it is well-founded, is to confer on any person who can establish that he has the status of a refugee from the country of his nationality, but who arrives in the United Kingdom from a third country, an indefeasible right to remain here, since to refuse him leave to enter and direct his return to the third country will involve the United Kingdom in the expulsion of "a refugee lawfully in their territory" contrary to Article 32.1.

The United Kingdom was already a party to the Convention when the Act was passed and it would, to my mind, be very surprising if it had the effect contended for. But I am satisfied

> that the deeming provision enacted by section 11(1) makes Mr. Collin's submission on this point quite untenable.

41. Mr Musisi succeeded in his appeal because of his claim that if returned to Kenya, he would be expelled to Uganda, where he would be persecuted. He would otherwise have failed in his appeal. Lord Bridge's interpretation of Article 32 is consistent with the international authorities to which I have referred.

42. However, in *Szoma* the House of Lords rejected Lord Bridge's interpretation. Lord Brown gave the only substantive opinion. *Szoma* was concerned with entitlement to social security benefits rather than the application of the Refugee Convention, as may be seen from the headnote:

> The claimant, a Polish national from the Roma community, claimed asylum on arrival in the United Kingdom. In accordance with paragraph 21 of Schedule 2 to the Immigration Act 1971[1] he was temporarily admitted under the "written authority of an immigration officer" and was thereafter "at large in the United Kingdom". The Secretary of State initially refused his claim for income support on the ground that, as a person requiring leave to enter or remain, he was subject to immigration control and was thereby excluded from benefits by section 115 of the Immigration and Asylum Act 1999. On reconsideration the Secretary of State confirmed his decision, concluding that, since the claimant was not "lawfully present in the United Kingdom" within the meaning of paragraph 4 of Part 1 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, his exclusion from benefit was not displaced. A social security appeal tribunal allowed the claimant's appeal but its decision was reversed by a social security commissioner. The Court of Appeal, dismissing the claimant's appeal, concluded that, since a person was deemed by section 11(1) of the 1971 Act not to have entered the United Kingdom as long as he was temporally admitted, he was not lawfully present here and his claim for benefit was therefore properly excluded.

43. The House of Lords allowed the claimant's appeal, on the ground that since he had been temporarily admitted, albeit for the purpose of determining his claim to asylum, he was lawfully present notwithstanding the provisions of section 11(1) and therefore eligible for benefit. Lord Brown said:

> 17. The Secretary of State's main argument is that the phrase "lawfully present" in paragraph 4 of the Schedule to the 2000 Regulations has to be read as a whole and that lawful presence for this purpose is a status gained only by having lawfully entered the United Kingdom with leave to enter (and having subsequently remained within the terms of that leave). Not having been granted leave to enter, the appellant accordingly lacks the required immigration status and is not to be regarded as lawfully present. The Secretary of State's fallback argument

is that, even if one takes the words "lawfully present" separately, the appellant was not to be regarded as "present": section 11(1) deems him not to have entered the United Kingdom and, not having entered, he must be deemed not to be present either.

18. One of the group of cases decided by your Lordships' House under the title *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 was *In re Musisi* where the question arose whether Mr Musisi, a Ugandan asylum seeker who had arrived in this country via Kenya, was someone whom the Home Secretary could return to Kenya as a safe third country for that country rather than the United Kingdom to determine his entitlement to refugee status. One ingenious argument raised on his behalf was that his return to Kenya was precluded by article 32(1) of the Geneva Convention relating to the Status of Refugees 1951 (Cmd 9171): "The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Mr Musisi was, his counsel argued, "a refugee lawfully in" the United Kingdom.

19. The argument was given short shrift. If well-founded, Lord Bridge of Harwich pointed out, at p 526, it would follow that any asylum seeker arriving in the United Kingdom would have "an indefeasible right to remain here". That, he observed, would be "very surprising" and he concluded rather that "the deeming provision enacted by section 11(1) makes [the argument] quite untenable".

…

24. … *In re Musisi* was rightly decided but for the wrong reasons. The term "refugee" in article 32(1) of the Refugee Convention can only mean someone already determined to have satisfied the article 1 definition of that term (as, for example in article 23 although in contrast to its meaning in article 33). Were it otherwise, there would be no question of removing asylum seekers to safe third countries and a number of international treaties, such as the two Dublin Conventions (for determining the EU state responsible for examining applications lodged in one member state) would be unworkable. In short, Mr Musisi failed to qualify as "a refugee lawfully in" the United Kingdom not because he was not lawfully here but rather because, within the meaning of article 32(1), he was not a refugee.

25. … In my opinion, however, section 11's purpose is not to safeguard the person admitted from prosecution for unlawful entry but rather to exclude him from the rights (in particular the right to seek an extension of leave) given to those granted leave

to enter. Even assuming that section 11's deemed non-entry "for purposes of this Act" would otherwise be capable of affecting the construction of the 1999 Act and the 2000 Regulations (as legislation *in pari materia*), it would in my judgment be quite wrong to carry the fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all. "The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further" - the effect of the authorities as summarised by *Bennion, Statutory Interpretation*, 4th ed (2002), section 304, p 815.

26. To my mind the only way the respondent could succeed in these proceedings would be to make good his core argument, that the word "lawfully" in this context means more than merely not unlawfully; rather it should be understood to connote the requirement for some positive legal underpinning. Mr Giffin illustrates the argument by reference to *Taikato v The Queen* (1996) 186 CLR 454, a decision of the High Court of Australia on very different facts. The question there was whether an individual carrying a formaldehyde spray possessed it "for a lawful purpose", and it was held that she did not do so even though her purpose (self-defence) was one not prohibited by law. Brennan CJ said, at p 460:

> "'Lawful purpose' in [the relevant legislation] should be read as a purpose that is authorised, as opposed to not forbidden, by law because that meaning best gives effect to the object of the section. The meaning of 'lawful' depends on its context, as Napier J pointed out in *Crafter v Kelly* [1941] SASR 237, 243. As a result, a 'lawful purpose' may mean a purpose not forbidden by law or not unlawful under the statute that enacts the term … or it can mean a purpose that is supported by a positive rule of law … As a general rule, interpreting 'lawful purpose' in a legislative provision to mean a purpose that is not forbidden, rather than positively authorised, by law is the interpretation that best gives effect to the legislative purpose of the enactment. This is because statutes are interpreted in accordance with the presumption that Parliament does not take away existing rights unless it does so expressly or by necessary implication â€¦ Nevertheless, the purpose, context or subject matter of a legislative provision may indicate that Parliament has used the term 'lawful purpose' to mean a purpose that is positively authorised by law."

27. So too here, submits the respondent: paragraph 4 of the Schedule to the 2000 Regulations confers an entitlement to certain state benefits (or, more accurately, displaces a prima

> facie disqualification from receiving such benefits) upon persons who are nationals of a relevant state and who are "lawfully present" in the United Kingdom. Unless, submits Mr Giffin, the appellant's presence in the United Kingdom has been positively authorised by a specific grant of leave to enter, rather merely than by temporary admission, his disqualification from the benefits should not be found displaced.
>
> 28. I would reject this argument. There is to my mind no possible reason why paragraph 4 should be construed as requiring more by way of positive legal authorisation for someone's presence in the United Kingdom than that they are at large here pursuant to the express written authority of an immigration officer provided for by statute. (Much of the argument before the House assumed that if a temporarily admitted applicant were "lawfully present" in the United Kingdom for paragraph 4 purposes, so too would be any asylum seeker even were he in fact detained under Schedule 2 to the 1971 Act: he too would be legally irremovable unless and until his asylum claim were rejected. It now occurs to me that that assumption may be ill-founded: certainly Mr Giffin's *Taikato*-based argument would have greater force in that type of case. For present purposes, however, it is unnecessary to decide the point.)

44. Lord Brown did not refer to any international authority on the interpretation of Article 32, or indeed on the Refugee Convention at all, and none is mentioned in the law report as having been cited. If those authorities had been cited, I do not think that he would have said what he did about Article 32. His statement in paragraph 24 that "refugee" in Article 32(1) can only mean someone already determined to satisfy the Article 1 definition of that term is inconsistent with the statement in the UNHCR Handbook that he had himself cited with apparent approval in *Hoxha* some months previously. Furthermore, if "refugee" is given what I consider to be the correct meaning, there is no breach of the Convention if a Contracting State expels to a safe third country a person who is or may be a refugee, but who has not been granted a right to stay in this country (and is therefore not lawfully present). In other words, the third sentence of paragraph 24 of Lord Brown's opinion is, with respect to him, a *non sequitur*. To the contrary, the practice of Contracting States of expelling persons claiming to be refugees, who may *ex hypothesi* be such, but who have not been granted right to remain in the expelling State, to safe third countries under the Dublin Convention is consistent with, and is state practice supportive of, my interpretation of Article 32.

45. I accept that it is a strong thing to depart from a statement by as eminent a judge as Lord Brown, with which the other judges on the Judicial Committee agreed, on the interpretation of the Refugee Convention. However, for the reasons I have given, I consider that it is incorrect. Furthermore, in my judgment it is not binding on this Court. *Szoma* is binding authority on the meaning of "lawfully present in the United Kingdom" in paragraph 4 of Part 1 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, not the

Refugee Convention. It is one thing to hold that a person admitted for the purpose of determining his claim to asylum is excluded from eligibility for social security benefits; it is another thing to hold that he is irremovable by reason of Article 32. It is clear from paragraph 28 of Lord Brown's opinion that he was not deciding any question of irremovability under the 1971 Act.

46. My view as to the scope of the *ratio* of *Szoma* is supported by the judgment of this Court in *JA (Ivory Coast) v Secretary of State for the Home Department* [2009] EWCA Civ 1353. Giving the judgment, Sedley LJ said:

> 19. The first basis of [Miss Giovannetti's] submission is the case of *Szoma* [2005] UKHL 64, in which the House of Lords held that a person was "lawfully present" in the UK even if he was liable to detention as an illegal entrant and at large only because he has been temporarily admitted. That decision concerned the interface between two provisions: the provision of s.11 of the Immigration Act 1971 that a foreign national who is not given leave to enter but is detained or temporarily admitted is deemed not to have entered the UK; and the provision made by regulations that persons "lawfully present" were entitled to certain benefits. It was held that an unlawful entrant who was at large by virtue of a temporary admission was lawfully present for the purposes of the benefit regulation.
>
> 20. We do not accept Ms Giovannetti's argument. *Szoma* neither decides nor gives any basis for inferring that an illegal entrant is to be assimilated for any wider purposes to a lawful entrant. As the House made clear in *Khadir* [2002] UKHL 39, temporary admission is a term of art within the Immigration Act 1971, allowing the temporary release (under strict limits prescribed by law) of persons otherwise liable to administrative detention pending removal as illegal entrants. Illegal entrants who are temporarily admitted rather than detained may thus be lawfully present here in the restricted sense material to the decision in *Szoma*; but they remain without an entitlement to be here.

47. I respectfully agree. Furthermore, if, contrary to my view, this Court would otherwise be bound by the interpretation placed on Article 32 by the House of Lords in *Szoma*, we are equally bound by the subsequent decision of this Court in *JA (Ivory Coast)* as to the *ratio* of *Szoma*.

48. I would therefore hold that Article 32 applies only to a refugee who has been granted leave to enter and to stay in the United Kingdom. I would reject the contention that temporary admission or leave to enter for the purpose of the determination of a claim for asylum (or any other ground for claiming a right to stay) renders a stay lawful for the purpose of Article 32. The purpose of Article 32 is to give security of residence to a refugee who has been given the right to live in the Contracting State in question. As Lord Brown himself said in *Hoxha* at paragraph 65:

> Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both

> under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration and before it is granted.

49. Moreover, any other conclusion would lead to the absurd result that the Secretary of State could avoid the application of Article 32 by granting leave to remain for a very short time, say a week, at the expiration of which the refugee would cease to be lawfully present.

50. In addition, I see no reason why section 11(1) should not be given full effect in the present context. Its purpose in this context is to preclude a person to whom it applies being considered lawfully present for the purposes of immigration control; and since the lawfulness of presence is determined by domestic law, its effect is that a person permitted to be in this country only for the purpose of the determination of his claim is not lawfully present for the purposes of Article 32.

51. For these reasons, I would accept the contentions of the Secretary of State on Issue 1. If T can live in Ethiopia without fear of persecution, she may remove her there without breaching this country's obligations under the Refugee Convention.

52. It is perhaps striking that my long, perhaps over-long, exegesis ends up with the proposition stated in paragraph 12.3 of the standard textbook, Macdonald's Immigration Law and Practice, 7th edition:

> But refugees present in the United Kingdom do not have to be given asylum here if there is a safe third country to which they can be removed.

Issue 2

53. Issue 2 is of course connected with issue 1. If recognition as a refugee of itself confers the protection of Article 32, the Tribunal's acceptance that T is a refugee entitles her to remain in this country. However, as I have explained, in my judgment it is clear that recognition as a refugee does not of itself confer any such right. Consistently with this interpretation of Article 32, the grant of asylum is more than the recognition that a person is a refugee. Were it otherwise, as I have already pointed out, a refugee with a right of residence in a safe third country would be entitled to asylum in this country. Thus rule 334 of the Immigration Rules provides:

> 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

> (ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;
>
> (iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not constitute danger to the community of the United Kingdom; and
>
> (v) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

It is only if subparagraph (v) is satisfied that a person who is recognised to be a refugee is entitled to asylum. The application of that paragraph was not considered by the Tribunal in this case, because the issue of return to Ethiopia was and was known to be outstanding, and it made no finding on it.

54. The effect of a grant of asylum is set out in paragraph 335 of the Immigration Rules:

> If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

55. Thus our law differs from the Australian statute considered by the High Court of Australia in *NAGV and NAGW of 2002 v MIMA* [2005] HCA 6, to which in fairness Mr Drabble did not refer in his oral submissions. As Miss Giovannetti has pointed out, the Australian statute, namely section 36(2) of the Migration Act 1958 ("the 1958 Act") required the grant of a visa to "any person to whom Australia has protection obligations under [the Refugee Convention]". As the Court explained, that wording "describes no more than a person who is a refugee within the meaning of Art 1 of the Convention". It followed that under Australian domestic law at the time of the initial decision under challenge, any refugee was entitled to a protection visa. In other words, Australian law did not then (but does now) distinguish between the recognition of a person as a refugee and his right to asylum. As the High Court said at paragraph 58 of its judgment:

> It would have been open to the Parliament to deal with the question of "asylum shopping" by explicit provisions qualifying what otherwise was the operation for statutory purposes of the Convention definition in Art 1. As indicated earlier in these reasons, such a step may have been taken with

the changes to s 36 made by the 1999 Act. The primary change is indicated by sub-s (3):

> "Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national."

56. I fully accept that the determination of the Tribunal must be respected by the Secretary of State, as I said in *TB (Jamaica)* [2008] EWCA Civ 977 at paragraphs 32 ff. But the determination must be read as a whole. In the present context, it is especially important to avoid formalism. The appeal before the Tribunal when it made its determination of February 2006 was under section 82 of the 2002 Act, against an immigration decision within the meaning of subsection (2). I read the determination as having allowed T's appeal on the ground specified in section 84(1)(c) and (g), i.e., that her removal to Eritrea would breach this country's obligations under the Refugee Convention and the European Convention on Human Rights. The Tribunal did not identify which provision of the Refugee Convention was engaged, but it was clearly Article 33, i.e. that her life or freedom would be threatened in Eritrea on account of her religion. No one suggested, and the Tribunal did not rule, that their determination would result in the Secretary of State being precluded from returning her to Ethiopia. I therefore read the reference in the determination to "on asylum grounds" as no more than a reference to the Refugee Convention. Significantly, the Tribunal did not make a direction under section 87 of the Act requiring the Secretary of State to grant asylum. Such a direction would have been inconsistent with the stated intention of the Secretary of State, explained to the Tribunal, that he might serve removal directions for Ethiopia, to which, according to its determination, no objection was made on behalf of T.

57. Appeals against asylum claims are the subject of section 83 of the 2002 Act. "Asylum claim" is a defined term. By section 113:

> "asylum claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

The definition implicitly refers to Article 32, and not Article 33, since it refers to removal or a requirement to leave without identifying a destination. The same applies to paragraphs 327 and 334 of the Immigration Rules. The appeal before the Tribunal was an appeal under section 82, not section 83.

58. I do not consider that the decision of this Court in *Saad, Diriye and Osorio v Secretary of State for the Home Department* [2002] EWCA Civ 2008 requires the determination of the Tribunal to have the effect of a direction to the Secretary of State to grant asylum. That case concerned the situation where there was no statutory right of appeal against a refusal of asylum, and the Court of Appeal held that section 8 of the Immigration Appeals Act 1993, which did not in terms provide such a right of

appeal, should be construed as permitting a claimant to appeal against the Secretary of State's refusal to recognise his refugee status. With respect to the Court of Appeal's judgment in that case, it is not always clear whether it appreciated the distinction between recognition that a person is a refugee and the grant of asylum. Be that as it may, *Saad, Diriye and Osorio* is authority on the interpretation of the 1993 Act, which did not include the equivalent of section 83 of the 2002 Act. Furthermore, it was conceded by the Secretary of State and accepted by the Tribunal in the present case that T is a refugee. The appeal determined by the Tribunal was not a status appeal under section 83, but an appeal against an immigration decision under section 82, and cannot, in my judgment, have had the unintended effect of a direction that the Secretary of State grant asylum.

59. I would therefore uphold the Secretary of State's contentions on Issue 2.

Conclusion

60. In my judgment, for the reasons given above, the Secretary of State's appeal should be allowed and the order of the Administrative Court set aside. T's appeal under section 82 against the removal directions for Ethiopia will be determined by the Tribunal.

Lord Justice Longmore

61. I agree.

Sir Anthony May, President of the Queen's Bench Division:

62. I also agree that the appeal should be allowed for the reasons given by Stanley Burnton LJ.