

AS TO THE ADMISSIBILITY OF

Application Nos. 13163/87, 13164/87, 13165/87,
13447/87 and 13448/87
by Nadarajah VILVARAJAH, Vaithialingam SKANDARAJAH,
Saravamuthu SIVAKUMARAN, Vathanan NAVRATNASINGAM
and Vinnasithamby RASALINGAM
against the United Kingdom

The European Commission of Human Rights sitting in private on
7 July 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER
G. BATLINER
J. CAMPINOS
Mrs. G.H. THUNE
Sir Basil HALL
M. C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the
Protection of Human Rights and Fundamental Freedoms;

Having regard to the first, second and third applications
introduced on 26 August 1987 by Nadarajah VILVARAJAH, Vaithialingam
SKANDARAJAH and Saravamuthu SIVAKUMARAN against the United Kingdom and
registered on 26 August 1987 under file Nos. 13163/87, 13164/87 and
13165/87;

Having regard to the fourth and fifth applications introduced
on 15 December 1987 by Vathanan NAVRATNASINGAM and Vinnasithamby
RASALINGAM against the United Kingdom and registered on 16 December
1987 under file Nos. 13447/87 and 13448/87;

Having regard to:

- reports provided for in Rule 40 of the Rules of Procedure of
the Commission;
- the Commission's decision of 18 December 1987 refusing
the applicants' requests under Rule 36;
- the Commission's decision of 13 April 1988 to bring the
applications to the notice of the respondent Government
and invite them to submit written observations on their
admissibility and merits;
- the observations submitted by the respondent Government
on 31 August 1988 and the observations in reply submitted
by the applicants on 24 November 1988;
- the Commission's decisions of 11 April 1989 to join the
applications and to invite the parties to a hearing on
admissibility and merits;

- the hearing of the parties on 7 July 1989;

Having deliberated;

Decides as follows:

THE FACTS

The applicants are citizens of Sri Lanka, of Tamil ethnic origin. They are represented before the Commission by Messrs. Winstanley-Burgess, Solicitors, London.

The facts of the cases, as submitted by the parties, may be summarised as follows:

A. The particular facts of the cases

1. The first applicant

The first applicant was born in 1960. At the time of lodging his application he was detained at H.M. Detention Centre Latchmere, England, pending his removal to Sri Lanka.

Before going to the United Kingdom the first applicant was an assistant in his father's shop at Paranthon, Kilinochchi District, Northern Province. Kilinochchi is near Vavuniya, bordering on the Sinhala area. The first applicant's district was under constant attack by the armed forces, which had established a camp there. On several occasions the army had attacked, killed and destroyed people and property. The first applicant's cousin, whilst working in the fields, was killed, together with five other men, by the army in 1986, and the family's shop was raided and damaged on 28 March 1987.

The first applicant states that he was detained twice by naval forces in March and April 1986 and assaulted. On this first occasion he was driving a mini-bus, which broke down close to a naval base. A naval patrol detained the first applicant and his passengers for 10 hours. He claims to have been heavily beaten. On the second occasion, whilst driving the mini-bus, he was stopped by a naval patrol and detained for 24 hours. They accompanied the bus back to his home town of Karainagar where they opened fire at random on the people there. Fire was also exchanged between a Tamil separatist group, the LTTE, and the navy personnel, who used the bus passengers as shields.

Young men like the first applicant were arrested by the army and disappeared. Others were tortured and can no longer lead useful lives. Many innocent people were killed by the State's armed forces. The State air force indiscriminately bombed the Tamil areas, helicopters shooting at those fleeing the air raids.

During a major Sri Lankan army offensive to retake the Northern Province from the LTTE, the first applicant's family lost their shop and belongings and were at serious risk of losing their lives, particularly the first applicant, a young male Tamil. Accordingly his father sent him to Colombo in May 1987 where he arranged with an agent for the first applicant to be sent to London. The first applicant travelled on his own passport to Madras on 6 June 1987. On 10 June 1987 he travelled with a Malaysian passport (provided by an agent in Madras) to London via Bombay. He arrived in London on 11 June 1987 and sought entry to the United Kingdom as a visitor for two days, in transit to Montreal, Canada, where he said he was going for a holiday. He was detained pending inquiries. As he later admitted, he was not the rightful holder of the Malaysian passport in which his photograph had been substituted for that of its owner. The first applicant was, therefore, refused leave to enter under paragraph 3 of the Statement of Changes in Immigration Rules which requires that persons seeking admission must produce a valid

passport or other identity/nationality document. On 12 June 1987 the first applicant requested political asylum in the United Kingdom.

On 19 June 1987 the first applicant was interviewed by immigration officers in the Tamil language with the assistance of an interpreter. He stated that it was unsafe for him to remain in Sri Lanka due to the Government's operations around Jaffna for the reasons outlined above. The solicitors previously representing the first applicant made no representations to the Home Office on his behalf.

In accordance with paragraph 73 of the Rules, the first applicant's asylum request was referred to the Refugee Section of the Immigration and Nationality Department of the Home Office. However they concluded that the applicant had not shown that he had a well-founded fear of persecution for the purposes of the 1951 UN Convention Relating to the Status of Refugees. This conclusion was endorsed by Home Office Ministers and, on 20 August 1987 (a Thursday), the Secretary of State for the Home Department refused the first applicant's request in the following terms:

"You have applied for asylum in the United Kingdom on the grounds that you hold a well-founded fear of persecution in Sri Lanka for reason of race, religion, nationality, membership of a social group or political opinion. You said it was unsafe for you to remain in Sri Lanka due to Government operations around Jaffna. You also said you had been detained on two occasions in March and April 1986 for 10 hours and 24 hours respectively and that on 28 March 1987 the army raided your family business. But it is noted that the incidents you have related were random and part of the army's general activities directed at discovering and dealing with Tamil extremists and that they do not constitute evidence of persecution.

You have produced no other evidence in support of your application for asylum.

The Secretary of State has considered the individual circumstances of your case and in addition the situation in Sri Lanka and has concluded that you have not established a well-founded fear of persecution in Sri Lanka.

Accordingly your application for asylum is refused. Since you do not otherwise qualify to enter the United Kingdom, the Immigration Service has been instructed to arrange for your removal to Sri Lanka to which country you are returnable under para. 10 of schedule 2 Immigration Act 1971."

Since the first applicant did not otherwise qualify for leave to enter the United Kingdom under the Immigration Rules, arrangements for his removal to Sri Lanka were made for 22 August 1987 (the Saturday). He instructed his present representatives, who are experienced in such cases, to apply to the High Court for judicial review of the Secretary of State's decision. The solicitors had considerable difficulty obtaining instructions, given the delay which occurred in procuring the necessary permission from the Governor of HM Remand Centre, Latchmere, where the first applicant was detained, the latter's ignorance of English and the urgency of his situation. They worked through Thursday night to prepare the necessary paper work, inevitably sketchy, for the Friday. The case before the High Court was delayed so that Treasury Counsel could attend. (Although such cases are usually argued initially by an applicant without the Home Office representative, Treasury Counsel, present, i.e. ex parte, the Home Office nowadays seeks to submit argument from the outset.) The single judge refused the application. A similar application to a single judge in the Court of Appeal was also unsuccessful. By this time it was too late in the afternoon to make up a full Court of

Appeal to hear further appeal arguments. The Home Office refused to defer the first applicant's removal, scheduled the next day, to enable him to go before a full Court of Appeal on the Monday. The first applicant's solicitors again worked through the night and submitted an application to the Duty Judge on Saturday morning at his home. They alleged that the Home Office's refusal to delay removal unreasonably denied the first applicant's right to renew his application to the Court of Appeal. The Judge accepted the argument and issued an injunction which was served by the solicitors at Heathrow Airport in the afternoon, thereby preventing removal. On 26 August 1987 the Court of Appeal granted the first applicant leave to apply for judicial review of the Secretary of State's decision.

On 24 September 1987 McCowan J. dismissed the application, but on 12 October 1987 the Court of Appeal quashed the refusal decision. The Secretary of State successfully appealed to the House of Lords, which gave judgment on 16 December 1987. The case before the House of Lords concerned the proper interpretation of Article 1A(2) of the UN Convention Relating to the Status of Refugees of 28 July 1951 and the definition of a refugee as being a person who has "a well-founded fear of being persecuted" on various grounds. The House of Lords held that the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated, on the basis of objective fact, a reasonable degree of likelihood, or a real and substantial risk, that he will be persecuted if returned to his own country.

The House of Lords was satisfied that the Secretary of State had acted reasonably and objectively in assessing the Tamil situation in Sri Lanka and in assessing whether there existed for the first applicant any real risk of persecution for a reason specified in the Refugee Convention:

Lord Keith of Kinkell: "The terms of <the Secretary of State's> decision letters make it clear that he has proceeded on the basis of the objective situation in Sri Lanka as understood by him. The affidavit of Mr. Potts, an official of the Home Office, indicates that the Secretary of State took into account reports of the refugee unit of his department compiled from sources such as press articles, journals and Amnesty International publications, and also information supplied to him by the Foreign Office and as a result of recent visits to Sri Lanka by ministers. It is well known that for a considerable time Sri Lanka, or at least certain parts of that country, have been in a serious state of civil disorder, amounting at times to civil war. The authorities have taken steps to suppress the disorders and to locate and detain those responsible for them. These steps, together with the activities of the subversives, have naturally resulted in painful and distressing experiences for many persons innocently caught up in the troubles. As the troubles have occurred principally in areas inhabited by Tamils, these are the people who have suffered most. The Secretary of State has in his decision letters expressed the view that army activities aimed at discovering and dealing with Tamil extremists do not constitute evidence of persecution of Tamils as such. This was not disputed by counsel for any of the applicants, nor was it seriously maintained that any sub-group of Tamils, such as young males in the north of the country, were being subjected to persecution for any Convention reason. It appears that the Secretary of State, while taking the view that neither Tamils generally nor any group of Tamils were being subjected to such persecution, also considered whether any individual applicant had been so subjected

and decided that none of them had been. Consideration of what had happened in the past was material for the purpose of assessing the prospects for the future.

It was argued that the Secretary of State's decision letters did not clearly indicate that he had applied the 'real and substantial risk' test, but left it open that he might have applied a 'more likely than not' test. But there is clearly to be gathered from what the Secretary of State has said that in his judgment there existed no real risk of persecution for a Convention reason."

Lord Templeman: "In order for a 'fear' of 'persecution' to be 'well-founded' there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. The Convention does not enable the claimant to decide whether the danger of persecution exists. The Convention allows that decision to be taken by the country in which the claimant seeks asylum. Under the <Immigration> Act of 1971 applications for leave to enter the United Kingdom, including applications based on a claim to refugee status, are determined by the immigration authorities constituted by the Act. By the Rules made under the Act the appropriate authority to determine whether a claimant is a refugee is the Secretary of State. The task of the Secretary of State in the present proceedings was and is to determine in the case of each appellant whether the appellant will be in danger of persecution if he is sent back to Sri Lanka. Danger from persecution is obviously a matter of degree and judgment. The Secretary of State accepts that an appellant who fears persecution is entitled to asylum in this country unless the Secretary of State is satisfied that there is no real and substantial danger of persecution. The Secretary of State has concluded that there is no real and substantial danger of persecution."

Lord Goff of Chieveley: "First, I respectfully agree with my noble and learned friend Lord Keith, for the reasons given by him, that the requirement that the applicant's fear must be well founded means no more than that there has to be demonstrated a reasonable degree of likelihood of his persecution for a convention reason; indeed, I understand the submission of counsel for the Secretary of State, that there must be a real and substantial risk of persecution, to be consistent with that interpretation. Second, it is not to be forgotten that the Secretary of State has in any event an overriding discretion to depart from the immigration rules and admit an applicant for refugee status if he considers it just to do so. Third, I am with all respect unable to agree with the view expressed by Sir John Donaldson MR that different tests are applicable under Art. 1 and Art. 33 of the Convention (see [1987] WLR 1047 at 1051). Article 33 (1) provides as follows:

'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.'

Sir John Donaldson MR suggested that, even if the Secretary of State decides that an applicant is a refugee as defined

in Art. 1, nevertheless he has then to decide whether Art. 33, which involves an objective test, prohibits a return of the applicant to the relevant country. I am unable to accept this approach. It is, I consider, plain, as indeed was reinforced in argument by counsel for the (United Nations High Commissioner for Refugees) with reference to the travaux préparatoires, that the non-refoulement provision in Art. 33 was intended to apply to all persons determined to be refugees under Art. 1 of the Convention. I cannot help feeling, however, that the consistency between Arts. 1 and 33 can be more easily accepted if the interpretation of well-founded fear in Art. 1 (A)(2) espoused by the Secretary of State is adopted rather than that contended for by the High Commissioner."

After the judgment in the House of Lords had been handed down on 16 December 1987 the first applicant's solicitors wrote to the Home Office later that day indicating that they would be making further representations and that they would be applying to the Commission seeking an indication under Rule 36 of its Rules of Procedure. They also sought the Home Office's confirmation that no steps would be taken against their client for 7 days, which confirmation was given. Representations were also made by the British Refugee Council and the United Kingdom Immigrants Advisory Service, even though neither body was responsible for the case work concerned. After considering these representations the Secretary of State concluded that they contained no new information to justify a reversal of the removal decision. Representations by the first applicant's Member of Parliament met with a similar response.

The first applicant was returned to Sri Lanka on 10 February 1988. He was escorted by police officers, the Sri Lankan authorities having been forewarned. His name was published in Sri Lankan newspapers. He was interviewed briefly on arrival by Sri Lankan immigration authorities at the airport. A member of the British High Commission was also present at the airport on arrival. The removal expenses were paid by the Home Office and the first applicant had funds in excess of £100.

Since the first applicant's return to Sri Lanka an appeal has been lodged in the United Kingdom by his solicitors on his behalf against the refusal of asylum. They went to Colombo to interview and take statements from him. He confirmed that thanks to the publicity surrounding his case and the presence of the member of the British High Commission he was given little trouble at the airport. He states that he was questioned for about three hours by the Sri Lankan police as to whether he had connections with Tamil separatist groups like the PLOTE and the LTTE, which he denied. The police noted his address and took his fingerprints.

The first applicant stated that he returned to his native village to avoid the Sri Lankan authorities and denunciation in Colombo by the PLOTE with whom the applicant had been associated, in fact, but who were now cooperating with the Indian Peace Keeping Forces (IPKF) in identifying their former members and alleged Tamil Tigers.

He also said that two weeks after his return he was denounced to the IPKF and summoned to the local Chief Officer's Office. He was accused of connections with the Tamil Tigers and became frightened. However he was allowed to return home after questioning. The first applicant found the security situation arbitrary and he was afraid to leave his home. On a visit to Jaffna in April 1988 he was rounded up with other Tamils and kept 10 hours by the IPKF. They were paraded in front of masked men who identified certain people. The first applicant was afraid they would make an error, but he was not detained. People so detained have been beaten and tortured and on

release have "disappeared". Certain other Tamil groups were cooperating with the IPKF, some for vengeful reasons. According to the first applicant, the IPKF were unpopular, although many Tamils felt marginally safer with them than with the prospect of the Sri Lankan army returning.

The first applicant recounts other incidents which lead him to fear IPKF ill-treatment because of his earlier involvement with the PLOTE and the IPKF's arbitrary manner of dealing with Tamils. When he went to Colombo to see his solicitors he had to go through about 13 frightening IPKF checkpoints and three other Sri Lankan checkpoints, doubling the length of the normal 8 hours journey.

He submitted evidence to the Commission from, inter alia, an expert in Sri Lankan affairs, Professor J.G. Manor, who described the situation in Sri Lanka in August 1987 as unstable despite the peace Accord signed between Sri Lanka and India in late July 1987. In December 1987 a special representative of the World Council of Churches, Mr. G. Jackson, had found after visiting Sri Lanka for a month that the Tamil areas remained inaccessible, subject to guerilla attack, with a shortage of food, accommodation, transport and medical care. He had however noticed a slow easing of conditions in the north of the island since the beginning of November 1987. Amnesty International (17 December 1987) and the United Nations High Commissioner for Refugees (17 December 1987) recommended that Tamil asylum seekers in the United Kingdom should not have been removed back to Sri Lanka because of continued instability and fighting in northern and eastern Sri Lanka between Tamil militants and the IPKF.

2. The second applicant

The second applicant was born in 1958. At the time of lodging his application he was detained at H.M. Detention Centre Latchmere, England, pending his removal to Sri Lanka.

The second applicant comes from Jaffna in the north of Sri Lanka, an area which had been controlled by Tamil separatists, the Tamil Tigers, when he was living there. In 1985 the Sri Lankan army staged a reign of terror. People could not go out in the street. Young men were arrested without reason; some were tortured or "disappeared" or were shot on sight. Everyone was suspected of being a Tamil separatist and lived in fear. When the army conducted searches the second applicant and his family hid in trenches. His house was searched regularly until 1985. It was destroyed in 1986. The family had to go for days without food and starved because it was dangerous to go out to fetch it. The army's daily bombing of the Tamil area was indiscriminate, without concern for human life. It was the bombing and damage to his home and business on 24 April 1987 which made him decide to leave. He claims to have been questioned by the police about Tamil Tigers, although he has never belonged to them.

The second applicant left Jaffna having lost all his possessions apart from 150,000 rupees. He went to Colombo where he was arrested by the police on 2 May 1987 at his uncle's home. He states that he was held for 20 hours and tortured, resulting in injury and scarring to his right leg. He claims that he was deliberately injured with barbed wire and that he was released in a dazed and dying state.

An agent, instructed by the second applicant's father, arranged for his flight to an unknown destination. On 6 June 1987 he travelled by scheduled service Indian Airways from Colombo to Madras on his own Sri Lankan passport issued in Colombo in December 1986. On 10 June 1987 he then travelled with a Malaysian passport via Bombay to London. There he sought entry as a visitor for two days in transit for Montreal, Canada. The second applicant was travelling on a Malaysian passport in the name of Srirengan Rengasamy. As he later

admitted, he was not the rightful holder of the document, his photograph having been substituted for the original.

He stated that his own Sri Lankan passport had been obtained through normal channels, but it had been retained by his travel agent in Madras. The Malaysian passport had been obtained from the same agent in Madras at a cost of 100,000 rupees (which had been paid for before leaving Colombo) and which included the cost of the airline ticket.

The second applicant was refused leave to enter by the United Kingdom immigration authorities on 12 June 1987 under paragraph 3 of the Statement of Changes in Immigration Rules, which requires the production of a valid identity/nationality document. Arrangements were made for his removal back to Sri Lanka on a 22.00 h flight. However, before the flight he revealed his Sri Lankan nationality and claimed asylum. His removal was, therefore, postponed.

On 17 June 1987 he was interviewed about his asylum claim in the Tamil language with the assistance of an interpreter. During the three hour interview, the second applicant explained his fear of persecution if returned to Sri Lanka as outlined above.

In accordance with paragraph 73 of the aforementioned Immigration Rules, the matter was referred to the Refugee Section of the Home Office. They concluded that the second applicant had not demonstrated that he had a well-founded fear of persecution for the purposes of the 1951 UN Convention Relating to the Status of Refugees. Details of the case were referred to Ministers in the Home Office, who reached a similar conclusion. Accordingly, on 20 August 1987 a refusal notice was served on the second applicant, who had remained in detention pending consideration of his case.

The Secretary of State's refusal of the second applicant's asylum request was in the following terms:

"You have applied for asylum in the United Kingdom on the grounds that you hold a well-founded fear of persecution in Sri Lanka for reason of race, religion, nationality, membership of a social group or political opinion. The Secretary of State has considered your application. You said it was unsafe for you to return to Sri Lanka because of the Government operation around Jaffna. You stated that your house and business premises had been destroyed by Government shelling. You also said that you had been detained for 20 hours in May 1987 and had been assaulted. But it appears that the destruction of your house and business resulted from a random shelling arising from civil disorder and it appears that your arrest and brief detention were part of the army's general activities directed at discovering and dealing with Tamil extremists.

The Secretary of State has considered the individual circumstances of your case and in addition the situation in Sri Lanka and has concluded that you have not established a well-founded fear of persecution in Sri Lanka. Accordingly your application for asylum is refused. Since you do not otherwise qualify to enter the United Kingdom, the Immigration Service has been instructed to arrange for your removal to Sri Lanka to which country you are returnable under para. 10 of schedule 2 Immigration Act 1971."

Arrangements for his removal to Sri Lanka were made for 22 August 1987.

The subsequent events in this case up to the second applicant's removal to Sri Lanka were identical to those of the first

applicant (see pp. 4-6 above).

The second applicant was returned to Sri Lanka on 10 February 1988. He was escorted by police officers, the Sri Lankan authorities having been forewarned. His name was published in Sri Lankan newspapers. He was first interviewed briefly on arrival by Sri Lankan immigration authorities at the airport. A member of the British High Commission was also present at the airport on arrival. The removal expenses were paid by the Home Office and the second applicant had funds in excess of £100. He was then interviewed by the Sri Lankan police for several hours and fingerprinted. He laid low in Colombo at his uncle's house for about a month until it was safe to travel to Jaffna.

Since the second applicant's return to Sri Lanka an appeal has been lodged in the United Kingdom by his solicitors on his behalf against the refusal of asylum. They went to Colombo to interview and take statements from him. He told his solicitors that on 10 March 1988 he was travelling to Jaffna by bicycle from his home when he was stopped by an IPKF check. Tamil men and boys were lined up for identification by two masked men, one of whom picked out the applicant. He was taken with about 10 others to an IPKF camp in a Jaffna house where he was beaten for about three hours. Part of the time he was clubbed with sand filled PVC pipes. At the same time questions were shouted at him about a Tamil separatist group, the LTTE, of which group the applicant denied any knowledge. He was kept in a small room without bedding or sanitary facilities, squashed up with six other detainees who were receiving similar ill-treatment. Some of these people were treated more harshly than the applicant by being beaten hung upside down. The second applicant was beaten intensely three more times over the next seven days for periods of about half an hour.

He was detained for some two and a half months until 24 May 1988, the same men questioning him. He lost 20-30 lbs in weight, had bad headaches and was very frightened. The Indian soldiers constantly told him that if he did not talk they would keep him locked up forever. The detainees were given rice, dahl and chapatis for food and insufficient water. They therefore became dehydrated and constipated. They were filmed and apparently later shown on television as surrendered LTTE men. The second applicant was rescued by his family by bribing the local IPKF commander with gold, even though his family could not really afford to do so. He still has nightmares about this period.

On release he was told to report daily. Given his experience, he fled to Colombo. On the way there he had to pass 15 IPKF checkpoints and several Sri Lankan army checkpoints. Everyone was searched at the checkpoints but no one was arrested.

The second applicant states that life in Colombo is very tense for Tamils. A few weeks ago 25 boys were arrested for not having good reason enough for being in the south. It is nerve-racking for the second applicant having already been beaten and tortured by the Sri Lankan army in Colombo. There is a constant danger of arbitrary arrest and detention, particularly with denunciation by informers. However the second applicant feels safer in Colombo than in Jaffna. To justify his stay in Colombo he has registered as a student.

3. The third applicant

The third applicant was born in 1966. At the time of lodging his application he was temporarily resident in Morden, Surrey, whilst awaiting his removal to Sri Lanka.

The third applicant comes from Point Pedro, Sri Lanka, where his family are living. His father is a fisherman. He is the eldest

son. He was studying for his 'O' level examinations at Khartly College in Point Pedro until the end of 1985 and he then stayed at home.

In April 1984 the third applicant witnessed the killing of his brother by navy personnel. The brother was a fisherman and was fishing in a boat with a friend within the one mile limit off the coast at Point Pedro. Navy personnel came by in a boat and shot and killed both of them without warning or reason.

In March 1984 security forces came to the area and rounded up male Tamils, including the third applicant. They were detained for one day and assaulted with rifle butts and sticks. Their names and family details were noted. Some of them were taken away by the army.

In June 1984 the security forces came to Point Pedro and again rounded up the male Tamils, including the third applicant. About 300 people were rounded up. Part of the time they were detained outside, part of the time in a building. They were assaulted. The security forces took away 15 people and shot and killed them the same day. The bodies were burned. Others were sent to an army camp.

In September 1984 the situation repeated itself with male Tamils being rounded up and detained for one day. The third applicant was again detained. About 20 people were taken away, shot and killed. The bodies were burned on the spot.

After these incidents, whenever they saw the security forces approaching, the men would run away and go into hiding.

Point Pedro has been subject regularly to air bombardment and shelling from the army camp. The third applicant's family house was damaged during air bombardment in October 1985 and the family had to move to another house in the area.

The third applicant states that he was in the Tiger Movement (the LTTE) from late 1984 until he left Sri Lanka. He did some military training and was a sentry for the camp. He also carried communications for them. He claims, however, never to have been involved in any violence or terrorist activities.

His father decided that the third applicant should leave Sri Lanka as he feared for his son's safety as a young, male Tamil. His father made arrangements through a Tamil agent in Point Pedro for his son to leave the country. The third applicant travelled to Colombo on 28 November 1986 and stayed with the agent until 11 December 1986. The agent obtained a passport for him. The third applicant travelled to the United Kingdom via India, Nepal and Dhaka.

On the way to Colombo airport, the minibus in which he was travelling was stopped at an army checkpoint just before the airport. The third applicant and the other passengers were accused of going for training with militants in India - they were in possession of tickets for India. They were taken to an office and held for 3 hours and questioned. They were also fingerprinted.

The third applicant was one of a group of some 64 Tamils who arrived at Heathrow Airport, London, on 13 February 1987 and claimed asylum. He originally stated that he was in transit to Norway. The 64 Tamils were all detained pending the proceedings.

The third applicant was interviewed in the Tamil language with the aid of an interpreter. As to conditions in Sri Lanka he described the events outlined above. At that stage he averred that he was not involved in the Tamil Tiger movement. (He did not make this claim to the British authorities until September 1987.)

Pursuant to paragraph 73 of the Statement of Changes in Immigration Rules, the matter was referred to the Refugee Section of the Home Office. They concluded that the third applicant had not established a well-founded fear of persecution for the purposes of the 1951 UN Convention Relating to the Status of Refugees and his application was refused on 16 February 1987. However, an application for leave to apply for judicial review was made to the Divisional Court and granted on 24 February. On 2 March the Home Office informed the third applicant's solicitors that a fresh decision would be taken on the asylum claim.

Representations from the United Kingdom Immigrants' Advisory Service were received and the third applicant was re-interviewed about his asylum claim on 14 April 1987.

The application for asylum was reconsidered in the Refugee Section but they again concluded that the third applicant had not demonstrated that he had a well-founded fear of persecution for the purposes of the 1951 Convention. Details of the case were referred to Ministers, who reached a similar conclusion. Accordingly, on 20 August 1987 a refusal letter was served on the third applicant, which read as follows:

"You have applied for asylum in the United Kingdom on the grounds that you hold a well-founded fear of persecution in Sri Lanka for reason of race, religion, nationality, membership of a social group or political opinion. The Secretary of State has further considered your application. You said it was too dangerous to stay in Sri Lanka. People were being arrested indiscriminately and killed by the security forces. You also said that you had been detained on three occasions between 1984 and 1985 and that you had been detained for three days after being arrested with your travelling companions on the way to Colombo. Lastly you said your brother, Kamarajah, had been shot by the navy in 1984. But it is noted that the experiences to which you refer were the result of civil disorder in Sri Lanka rather than persecution within the terms of the United Nations Convention Relating to the Status of Refugees and that your arrests were part of the army's general activities directed at discovering and dealing with Tamil extremists and that on each occasion you were released without charge after a short period. It is further noted that your brother was shot dead by the navy when he failed to obey a lawful order. The Secretary of State has considered the individual circumstances of your case and in addition the situation in Sri Lanka and has concluded that you have not established a well-founded fear of persecution in Sri Lanka. Accordingly your application for asylum is refused. Since you do not otherwise qualify to enter the United Kingdom, the Immigration Service has been instructed to arrange for your removal to Sri Lanka to which country you are returnable under para. 10 of schedule 2 Immigration Act 1971."

Arrangements for his removal to Sri Lanka were made for 22 August 1987.

The subsequent events in this case up to the third applicant's removal to Sri Lanka were identical to those of the first applicant (see pp. 4-6 above).

The third applicant was removed to Sri Lanka on 12 February 1988. He was escorted by police officers, the Sri Lankan authorities having been forewarned. His name was published in Sri Lankan newspapers. A member of the British High Commission was present at the airport on arrival. The removal expenses were paid by the Home

Office and the third applicant had funds in excess of £100.

On returning to Sri Lanka the third applicant, according to his father, was detained from 2 April until 11 July 1988. He then spent some time out of that country. Although his present whereabouts are undisclosed, he keeps in contact with his solicitors, who lodged an appeal in the United Kingdom on his behalf against the refusal of asylum.

4. The fourth applicant

The fourth applicant was born in 1970. At the time of lodging his application he was temporarily resident in Ilford, Essex, whilst awaiting his removal to Sri Lanka.

The fourth applicant comes from Achelu but received his schooling 15 miles away in Point Pedro until December 1986 when he took 'O' level examinations. He claims to have been detained 5 times by the State armed forces: in 1983 for one month, in 1984 for one day, in 1985 for one week, in 1986 for half a day and in 1987 for one and a half days.

In May 1984 the army set fire to his school, Hardly College at Point Pedro. Half of the school was destroyed and the army occupied the other half. The school was moved to a temporary shed. The fourth applicant was arrested the day after the raid and, accused of burning down the school, was taken to the local army camp where he was held for 6/7 hours. The principal of the school protested and secured his release.

In May 1986, while the fourth applicant was on his way to school by bus, an army helicopter bombed a bridge which the bus was to cross and ordered everyone off the bus. 16 people were taken to a nearby temple and held for 4 hours. They were then taken to the Thonhondamanai army camp for further questioning. The fourth applicant was at the camp from 6 h to 13 h and was released alone. He was not ill-treated but threatened with ill-treatment. His elder brother in the meantime fled to France (January 1986) where he has granted political asylum.

After August 1986 there was intensive shelling by the army and the fourth applicant's family dug trenches round their house in which they spent long periods.

On 1 January 1987 the family home in Achelu was destroyed by army bombing from the air and advancing armed forces on the ground. The fourth applicant and his father ran in the direction of Urelu (3 miles from Achelu) during the bombing, his mother and sister ran in the opposite direction. He has not seen either his mother or sister since. His father returned to the family house to find it destroyed and on 15 January 1987 took his son to Colombo by bus. They were arrested at Elephant Pass, 30 miles from Jaffna, and held at the army camp there for one and a half days.

They arrived in Colombo on 18 January 1987, where his father arranged with an agent for his son to leave Sri Lanka. The fourth applicant had felt insecure in Colombo as he had Tamil identity cards and the authorities knew he was not a local. He flew to Kuala Lumpur on 2 February 1987. He then flew to London via Malaysia and Dhaka, arriving at Heathrow airport on 13 February 1987 where he claimed asylum. Several pages of his passport had been removed. He was one of the group of 64 Tamil asylum seekers.

The fourth applicant was detained pending the proceedings. He was interviewed twice in the Tamil language with the assistance of an interpreter. During these interviews he described the events outlined above. He also averred that he had not been politically involved in

Sri Lanka.

In accordance with paragraph 73 of the Statement of Changes in Immigration Rules, the matter was referred to the Refugee Section of the Home Office. They concluded that the fourth applicant had not established a well-founded fear of persecution for the purposes of the 1951 UN Convention Relating to the Status of Refugees and his application was refused on 17 February 1987. However, application for leave to apply for judicial review was made to the Divisional Court and granted on 24 February. On 2 March the Home Office informed the fourth applicant's solicitors that a fresh decision would be taken on the asylum claim.

Representations from the United Kingdom Immigrants' Advisory Service were received and the fourth applicant was re-interviewed about his asylum claim on 23 April 1987. The application for asylum was reconsidered in the Refugee Section, but they again concluded that he had not demonstrated that he had a well-founded fear of persecution for the purposes of the 1951 Convention. Details of the case were referred to Ministers, who reached a similar conclusion. The fourth applicant was informed of this decision on 1 September 1987 in a letter which read as follows:

"You applied for asylum in the United Kingdom on the grounds that you have a well-founded fear of persecution in Sri Lanka for reason of race, religion, nationality, membership of a particular social group or political opinion. The Secretary of State has further considered your application.

Sri Lanka has in recent years experienced considerable disorder which the Sri Lanka authorities have had to take measures to control. As a result of this disorder individuals of all ethnic groups have suffered. However the Secretary of State, having considered all the available evidence, does not consider that Tamils in Sri Lanka are a persecuted group who have a claim to refugee status under the 1951 UN Convention Relating to the Status of Refugees simply by virtue of their ethnic or national origins.

Nevertheless the Secretary of State does consider individual applications for asylum made by Tamils from Sri Lanka to see whether they fall within the terms of the 1951 UN Convention. This depends on the circumstances in the individual case.

In support of your application you said that your life was in danger in Sri Lanka and that your house had been damaged by army shelling. You also said that you had once been held up by the army with the others on your school bus for 6 hours, and also that the bus you were travelling on from Jaffna to Colombo had been held up by the army for 24 to 36 hours. At your interview on 13 April 1987 you added that you had been picked up by the army and held for an hour in 1984.

However the Secretary of State has also taken account of the fact that the damage to your house had been caused by indiscriminate shellings, that neither you nor your travelling companions had been harmed in any way on the two occasions you were held up and that you had not been harmed while detained for an hour in 1984. Moreover the United Kingdom Immigrants' Advisory Service have stated on your behalf that you did not stay in Colombo after reaching there on 18 January 1987 because you felt insecure on account of holding a Tamil identity card and because the authorities knew that you were not a local.

You stated at a further interview in April 1987 that you thought your father, who had accompanied you to Colombo and saw you off on the plane on 2 February, had probably gone back to take up his job as a teacher in a government run school and had re-established contact with your mother and sister.

Having taken account of all the matters you have put forward in support of your application and of the other matters set out in this letter the Secretary of State is not satisfied that you have a well-founded fear of persecution in Sri Lanka within the terms of the 1951 UN Convention Relating to the Status of Refugees.

Since you do not otherwise qualify for leave to enter the United Kingdom, the Immigration Service have been instructed to arrange your removal to Sri Lanka to which country you are returnable under para. 10 of schedule 2 to the Immigration Act 1971."

Arrangements for the fourth applicant's removal were made for 4 September 1987.

The subsequent events in this case up to the fourth applicant's removal to Sri Lanka were identical to those of the first applicant (see pp. 4-6 above).

The fourth applicant was removed to Sri Lanka on 12 February 1988. He was escorted by police officers, the Sri Lankan authorities having been forewarned. His name was published in Sri Lankan newspapers. He was first interviewed briefly on arrival by the Sri Lankan immigration authorities at the airport. A member of the British High Commission was also present at the airport on arrival. The removal expenses were paid by the Home Office and the fourth applicant had funds in excess of £100. He was then interviewed aggressively by the Sri Lankan police for four hours about his association with Tamil groups and the travel agencies who had been involved in his escape to the United Kingdom. His fingerprints were taken.

Since the fourth applicant's return to Sri Lanka an appeal has been lodged in the United Kingdom by his solicitors on his behalf against the refusal of asylum. They went to Colombo to interview and take statements from him. He told his solicitors that since his return he has stayed with a charitable family friend in Colombo because no trace has been found of his family. He does not go out unless escorted by a Sinhalese speaker who could deal with any trouble from the police. He has had many difficulties because he does not have an identity card. (It had been lost by the Home Office immigration service.) He cannot try to find his family because he could not get through the many checkpoints. He is thereby trapped outside his home area.

The fourth applicant stated that he was arrested without any identity by the police on or around 10 March 1988. He was detained for four hours and questioned about his activities in Colombo. The family friend persuaded the police to release him. The atmosphere in Colombo for the Tamils is very tense for they are subject to attack by Sinhalese. In May 1988 the fourth applicant was again arrested by the police at the friend's shop. He was detained overnight and beaten with belts and kicked for about half an hour. He was accused of hiding Tamil terrorists from the LTTE group. The family friend managed to bribe someone to obtain the applicant's release. The beating has aggravated an ulcer condition that began when the applicant was in the United Kingdom. As a result he had to spend a week in hospital and cause much expense to his friend who has paid for all necessary treatment and medicines.

The fourth applicant was further distressed to see a television report in which two of his relatives were shown to have been killed in crossfire between Tamil separatists (the LTTE group) and the IPKF several miles from his home village.

5. The fifth applicant

The fifth applicant was born in 1961. At the time of lodging his application he was temporarily resident in Southall, Middlesex, whilst awaiting his removal to Sri Lanka.

The fifth applicant is from Manor Town which is in the north-west of Sri Lanka about 90 miles from Jaffna. This town was constantly bombarded by the State's military forces towards the end of 1986. Many Tamils were hiding in the jungle. His family home and shop were burnt down in 1985 by soldiers. Two of his brothers were shot dead by the army in 1986. At that time the fifth applicant was hiding in the jungle otherwise he would have been killed too. He was shot at by soldiers passing through his town. There have been problems in the applicant's area since 1983 with the town's Singhalese majority. Many people have been killed and buildings destroyed. There have been rumours of massacres elsewhere.

There was an army camp 5 miles from the fifth applicant's home. Young men were particularly at risk. If the military saw them they were liable to summary arrest, torture or even murder. People ran away when they saw soldiers coming, although by the time the applicant left Sri Lanka they were mostly confined to their camps. Nevertheless soldiers would search for people in convoys. The fifth applicant's area was controlled by Tamil separatists. His house was searched weekly by the army. He was not a member of any political group or terrorist organisation.

The fifth applicant paid an agent 50,000 Sri Lankan rupees to get him out of Sri Lanka, which he left from Colombo Airport. He travelled alone, spending over a month in Bangkok. He arrived at Heathrow Airport on 19 March 1987 and claimed asylum, although he had originally planned to go to Canada. Several pages had been removed from his passport. On 20 March he was interviewed in the Tamil language with the assistance of an interpreter. During this interview he described the events outlined above.

In accordance with paragraph 73 of the Statement of Changes in Immigration Rules, the fifth applicant's request for asylum was referred to the Refugee Section of the Home Office. They concluded that the applicant had not demonstrated a well-founded fear of persecution for the purposes of the 1951 UN Convention Relating to the Status of Refugees. Details of the case were referred to Ministers in the Home Office, who reached a similar conclusion. Accordingly on 1 September 1987 a refusal notice was served on the fifth applicant, who had remained in detention pending consideration of his case.

The Secretary of State's refusal of the fifth applicant's asylum request was in the following terms:

"You have applied for asylum in the United Kingdom on the grounds that you have a well-founded fear of persecution in Sri Lanka for reason of race, religion, nationality, membership of a particular group or political opinion. Sri Lanka has in recent years experienced considerable disorder which the Sri Lanka authorities have had to take measures to control. As a result of this disorder individuals of all ethnic groups have suffered. However the Secretary of State, having considered all the available evidence, does not consider that Tamils in Sri Lanka are a persecuted group who have a claim to

refugee status under the 1951 UN Convention Relating to the Status of Refugees simply by virtue of their ethnic or national origins.

Nevertheless the Secretary of State does consider individual applications for asylum made by Tamils from Sri Lanka to see whether they fall within the terms of the 1951 UN Convention. This depends on the circumstances in the individual case.

In support of your application you said that it was impossible to live in Sri Lanka because Tamils are being persecuted. There was an army camp 5 miles from your village and villagers were always being chased away by troops. You said that your parents' home was burnt down in 1985 together with the rest of your village and that you had been questioned and threatened by troops in February 1985 and your shop had been burnt down. You also said that two of your five brothers had been shot dead by troops.

However the Secretary of State has also taken account of the fact that you lived safely in Sri Lanka for two years following the destruction of your parents' home and of your shop and that your parents have lived in a small house the other side of the forest from where they used to live and that you helped on your father's land. Your parents, three other brothers and four sisters, some married with families of their own have, on the information which you have provided, continued to live safely in Sri Lanka to the present time.

Having taken account of all the matters you have put forward in support of your application and of the other matters set out in this letter the Secretary of State is not satisfied that you have a well-founded fear of persecution in Sri Lanka within the terms of the 1951 UN Convention Relating to the Status of Refugees.

As you do not otherwise qualify for entry under the Immigration Rules I therefore refuse you leave to enter."

Arrangements for the fifth applicant's removal to Sri Lanka were made for 4 September 1987.

The subsequent events in this case up to the fifth applicant's removal to Sri Lanka were identical to those of the first applicant (see pp. 4-6 above).

The fifth applicant was returned to Sri Lanka on 12 February 1988. He was escorted by police officers, the Sri Lankan authorities having been forewarned. His name was published in Sri Lankan newspapers. A member of the British High Commission was present at the airport on arrival. The removal expenses were paid by the Home Office and the fifth applicant had funds in excess of £100.

On returning to Sri Lanka the fifth applicant had difficulties because, like the fourth applicant, he had no identity card. (It had been lost by the Home Office immigration service.) He obtained a forged card and managed to escape arrest during numerous police searches. His brother joined the LTTE and the fifth applicant has had money extorted out of him for this Tamil separatist cause. He has apparently managed to leave that country again. Although his present whereabouts are undisclosed, he keeps in contact with his solicitors, who have lodged an appeal in the United Kingdom on his behalf against the refusal of asylum.

6. The applicants' subsequent appeals in the United Kingdom

The applicants' solicitors lodged an appeal against the asylum refusals to an adjudicator in the United Kingdom, pursuant to section 13 of the Immigration Act 1971. They filed voluminous documentary material concerning the past and present situation for Tamils in Sri Lanka. None of this material was challenged by the Secretary of State's representatives and none of the material upon which the latter based his decisions to refuse asylum was put before the adjudicator. The adjudicator, in his determination of 13 March 1989, found a consistency between the applicants' claims and the evidence of non-governmental organisations and South Asian specialists. This showed that generally the victims of individual ill-treatment at the hands of Sri Lankan forces had been young male Tamils and that excessive force had been used against non-combatants in the North by both Sri Lankan armed forces and the IPKF afterwards. He accepted the applicants' claim that they had left Sri Lanka for fear that as young Tamils they were at risk of, inter alia, "interrogation, detention and even physical harm". He largely believed the accounts given by the applicants of their personal situations:

- as regards the first applicant, the raid on the family business, the death of his cousin, his arrests and detention in 1986 and later, on his return to Sri Lanka, his interrogation by the police (but not his claim to membership of PLOTE);
- as regards the second applicant, his family situation, the alleged detention and assault, destruction of his home and, on his return to Sri Lanka, his arrest and ill-treatment in Jaffna;
- as regards the third applicant, his arrests, interrogations and death of his brother (but not his claim to membership of the LTTE);
- as regards the fourth applicant, the destruction of his family home by shelling, the incidents he witnessed and, on his return to Sri Lanka, his detention several times due to his lack of an identity card;
- as regards the fifth applicant, the arson of his home, the shooting dead of two of his brothers and, after his return to Sri Lanka, the arrest of his family and relatives.

The adjudicator concluded that the applicants had had a well-founded fear of persecution and he held as follows:

- that they were all entitled to political asylum at the time of the Secretary of State's decision;
- that the circumstances since that time have not materially changed;
- that the Secretary of State's decisions in respect of all the applicants were not in accordance with the law;
- that the applicants' appeals were accordingly allowed and
- that they should be returned to the United Kingdom with the minimum of delay, the fourth and fifth applicants being entitled to indefinite leave to remain in the United Kingdom.

The Secretary of State's appeal to the Immigration Appeal Tribunal was rejected on 19 April 1989 as being out of time, the 14 day time limit for lodging appeals having been missed due to an administrative error (the envelope containing the notice of appeal had

been wrongly addressed). On 12 May 1989 the Secretary of State applied for judicial review of the Tribunal and adjudicator's decisions. In particular the Secretary of State challenges the lawfulness or reasonableness of adjudicator's directions that the applicants be returned to the United Kingdom. Leave for judicial review was granted by Mr. Justice McCowan on 17 May 1989 and the case was due to be heard on 11 July 1989.

B. Relevant domestic law and practice

a) Appeal rights of an asylum seeker under the Immigration Act 1971

Special provision is made for the position of refugees and for those seeking asylum in the United Kingdom in the Statement of Changes in Immigration Rules HC 169 (9 February 1983) ("the Rules"). Paragraph 16 of the Rules provides as follows:

"Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmnd. 9171 and Cmnd. 3096). Nothing in these Rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

An application for asylum can be made by a person either on arrival at a port in the United Kingdom or after he has entered the country. If the application is made on arrival, it is, by virtue of section 4(1) of the Immigration Act 1971 ("the 1971 Act"), dealt with by an immigration officer in accordance with paragraph 73 of the Rules, which reads as follows:

"Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these Rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees."

Article 1.A(2) of the Refugee Convention, as amended by the 1967 Protocol, reads, so far as is relevant as follows:

" ... the term 'refugee' shall apply to any person who:

- (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 ..."

If an application for leave to enter as a refugee is refused at this stage (that is to say, before leave to enter the United Kingdom is given), there is a right of appeal on the merits against that refusal under section 13 of the 1971 Act to the appellate authorities set up under Part II of that Act ("the appellate authorities"), but such right may in general only be exercised from outside the United Kingdom. Appeals in the first instance are to an

adjudicator, who is a single judge, appointed by the Home Office. From there appeals lie, usually with leave, to a three-person Immigration Appeal Tribunal. Members of the Tribunal are appointed by the Lord Chancellor and need not have legal qualifications, although a lawyer must preside sittings.

By virtue of section 17 of the 1971 Act, where directions are given for a person's removal from the United Kingdom on his being refused leave to enter, he may appeal to an adjudicator against the directions on the ground that he ought to be removed (if at all) to a different country or territory. It is for the person concerned to find another country which will accept him.

By virtue of section 13(1) of the 1971 Act a person who is refused leave to enter the United Kingdom may appeal to an adjudicator against the decision that he requires leave or against the refusal. However, a person is not entitled to appeal against a refusal of leave to enter so long as he is in the United Kingdom unless he was refused leave at a port of entry and at a time when he held a current entry clearance or was a person named in a current work permit. Entry clearance is not normally available for refugees. Since the applicants in the present case did not have current entry clearances or work permits, their appeals under section 13 had to be lodged from outside the United Kingdom.

The procedure for determining an appeal by an asylum seeker against a refusal of leave to enter is governed by the Immigration Appeals (Procedure) Rules 1984 (S.I. 1984/2041). An appellant can be represented at the appeal by the United Kingdom Immigrants' Advisory Service (UKIAS) which is funded by the Secretary of State under section 23 of the 1971 Act for the purpose of enabling it to give advice and assistance to those with appeal rights under the Act. Alternatively, an appellant can be represented by solicitors. Since the Government provide UKIAS with funds to enable it to provide free advice and assistance to appellants, there is no provision for legal aid for those who are represented privately by solicitors. Provision is made in the Immigration Appeals (Procedure) Rules 1984 for the submission of an explanatory statement by the Government (rule 8); for the appellate authority to require the furnishing of particulars (rule 25); for the summoning of witnesses (rule 27); for each party to the appeal to be heard (rule 28); for the receiving of oral, written or other evidence (rule 29); and the inspection of documentary evidence (rule 30). No provision is made in the Immigration Rules for an appellant to return to the United Kingdom to attend his appeal, but his representations may be submitted in writing or through his representative. The appellant may seek an expedited hearing from the appellate authorities. If the appeal is successful, the adjudicator under section 19 of the 1971 Act, or the Tribunal under section 20 of that Act, shall give such directions for giving effect to the determination as is necessary. In the case of a successful appeal from abroad by an asylum seeker the direction may require the entry clearance officer to grant the necessary entry clearance to enable the appellant to return to the United Kingdom if he were still able to do so by them. The statute requires compliance with any such direction. The adjudicator or Tribunal may also make recommendations with respect to any other action which the adjudicator or Tribunal consider should be taken in the case. Either party may appeal the adjudicator's determination to the Immigration Appeal Tribunal. In addition, the Tribunal's determination can be challenged by judicial review and legal aid is available, if necessary, for this purpose.

b) Judicial review

The question whether an application for asylum in the United Kingdom should be granted is one for the determination of the Secretary of State, subject to the statutory right of appeal on the

merits described above. There is no power in a court (as opposed to the appellate authorities) to determine whether a person is a refugee. However, the decision of the Secretary of State is liable to judicial review and may be quashed on a variety of grounds. Leave to apply for judicial review may be obtained at short notice and legal aid may be available, for the purposes of such an application, to any person regardless of nationality whose application for asylum on arrival in the United Kingdom has been refused.

The courts will review the Home Secretary's powers to grant asylum in the light of the "Wednesbury principles" (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation <1948> 1 K.B. 223). The challenge in the courts of the Home Secretary's exercise of discretion is thereby limited to investigation of whether he left out of account a factor that should have been taken into account or took into account a factor he should have ignored, or whether he exercised his power unreasonably, absurdly, or even perversely, or without thorough examination of the case before him.

The extent and effect of judicial review was demonstrated by the House of Lords in the Bugdaycay case (R v. Home Secretary ex parte Bugdaycay and Others <1987> 1 All ER 940) when it was held that the Home Secretary had indeed failed to appreciate a factor which he should have specifically dealt with. This failure was held to be fatal to the refusal of asylum. Lord Bridge, while acknowledging the limitations of the Wednesbury principles, explained that the courts will apply them extremely strictly against the Home Secretary when a refusal of asylum is under review:

"... all questions of fact on which the discretionary decision whether to grant or withhold leave to enter or remain must necessarily be determined by the Immigration Officer or the Secretary of State ... The question whether an applicant for leave to enter or remain is or is not a refugee is only one, even if a particularly important one ... of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine ... determination of such questions is only open to challenge in the courts on well-known Wednesbury principles ... there is no ground for treating the question raised by a claim to refugee status as an exception to this rule ...

Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision is under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

Lord Templeman added:

"In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process."

It is to be stressed, however, that the courts' control is limited to a review of whether there has been a defect in the decision making process (Lord Templeman, R v. Home Secretary ex parte Musisi (1987) 1 All ER 514).

The courts have held that it is appropriate that the Secretary of State should remain the authority who determines whether passengers arriving at the ports should be allowed to remain as refugees on the basis that he is the only authority with the knowledge and expertise to make a proper determination on these matters. Moreover, the courts have held that, whereas it is appropriate for judges to review the Secretary of State's decision on an application for judicial review, it is not appropriate for judges to have the role themselves of determining applications in the first instance. Lord Justice Lawton commented as follows in *R v. Nazari* <1980> 3 All ER 880 in the Court of Appeal at page 885:

"... the courts are not concerned with the political systems which operate in other countries. They may be harsh; they may be soft; they may be oppressive; they may be the quintessence of democracy. The court has no knowledge of those matters over and above that which is common knowledge and that may be wrong. In our judgment it would be undesirable for this court or any other court to express views about regimes which exist outside the United Kingdom of Great Britain and Northern Ireland.

It is for the Home Secretary to decide in each case whether an offender's return to his country of origin would have consequences which would make his compulsory return unduly harsh. The Home Secretary has opportunities of informing himself about what is happening in other countries which courts do not have ..."

This approach was confirmed by the House of Lords in aforementioned *Bugdaycay* case, where Lord Templeman stated as follows at page 955 c and d:

"The 1971 Act does not allow the courts of this country to participate in the decision making or appellate processes which control and regulate the right to enter and remain in the United Kingdom. This also is not surprising. Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Act are administrative and discretionary rather than judicial and imperative. Such decisions may involve the immigration authorities in pursuing inquiries abroad, in consulting official and unofficial organisations and in making value judgments. The only power of the court is to quash or grant other effective relief in judicial review proceedings in respect of any decision under the Act of 1971 which is made in breach of the provisions of the Act or the rules thereunder or which is the result of procedural impropriety or unfairness or is otherwise unlawful."

The courts have indicated that in considering whether to grant leave to apply for judicial review to asylum seekers who have been refused leave to enter the United Kingdom they attach considerable importance to the giving of reasons by the Secretary of State for his decision to refuse asylum (see *R v. Secretary of State for the Home Department ex parte Gurmeet Singh* (22 May 1987) unreported). Since the *Singh* case the Home Office now gives asylum seekers a written statement of the reasons for the decision. This facilitates the courts' review task.

Additional features of the judicial review process are that:

(aa) it has been established that an asylum seeker, in order to satisfy the test that he has a well-founded fear of persecution, does not need to prove that fear on a balance of probabilities. A lesser degree of likelihood is

sufficient: "reasonable chance", "substantial grounds for thinking" or "a serious possibility";

(bb) although the Home Secretary stated in the House of Commons on 3 March 1987 that there can be no expectation that asylum seekers will automatically be allowed to stay in the United Kingdom until proceedings are completed, the practice is usually that no applicant is removed from the United Kingdom once he has obtained leave to apply for judicial review. In this context it is important to note that leave is granted at a point in the proceedings when the applicant only has to show that he has an arguable legal point in his favour;

(cc) if an application for leave to apply for judicial review is refused a renewed application can be made to the Court of Appeal;

(dd) even after the full hearing of the application for judicial review the applicant can appeal on points of law to the Court of Appeal as of right and can appeal to the House of Lords either with the leave of the Court of Appeal or the House of Lords.

c) The UKIAS referral system

Since 1983 where an asylum seeker is otherwise unrepresented, his case may be referred to the Government subsidised United Kingdom Immigrants' Advisory Service (UKIAS) for advice or other welfare services.

Since 1 September 1988 no category of asylum seeker is automatically excluded from the referral system. Where a person can be sent to a third country where he does not fear persecution, UKIAS will be telephoned to establish whether they wish to interview that person, in which case two days will be allowed for this to be done and representations made. Where an unrepresented person is likely to be sent back to a country where he claims to fear persecution, if the Home Office proposes to refuse the asylum application it will refer the case to UKIAS who will have one week (for those in detention) or four weeks (for those not detained) to make representations. Ministers will take the relevant decision if the Home Office cannot follow UKIAS recommendations.

d) Members of Parliament

Members of Parliament (MPs) frequently make representations to the Minister about unsuccessful asylum seekers or other expulsion cases. Prior to March 1987 a mere telephone contact could stop a removal pending further representations being made. New arrangements are under consideration in which, for example, a five day stay of removal could be agreed if new and compelling evidence has become available which the Home Office has been unable to consider.

e) The decision making process in asylum cases

Where an application for asylum is made on arrival at the port, an immigration officer will, with the aid, if necessary, of an interpreter, interview the passenger. Immigration officers are trained in asylum matters as part of their general training. A recent development has been the involvement of the United Nations High Commissioner for Refugees in this training. The matter is then, in pursuance of Rule 73 of the Immigration Rules, referred to the specialist Refugee Section of the Home Office's Immigration and Nationality Department. No decision on an asylum application is taken by an immigration officer at the port.

The specialist Refugee Section has a large staff, who are divided into geographical sections under four Senior Executive Officers ("SEO's") responsible for the Middle East, the Far East, Africa and Eastern Europe/the Americas. The Section is headed jointly by two grade 7's (i.e. the former Principal grade) to each of whom two SEO's report. There is also a Research Unit which collates and disseminates background information on specific countries and supports the grade 7's on policy work. The whole Section is led by the Head of Division (grade 5, the former Assistant Secretary grade).

An application is considered initially by an Executive Officer in the appropriate geographical section. It is then assessed with a recommendation to a Higher Executive Officer. He or she may decide to grant asylum or exceptional leave; a decision to refuse outright must be taken at at least SEO level. Cases which are complex or about which an officer has particular doubts can be referred up to the higher grade officers. A considerable degree of specialised knowledge and experience can therefore be applied.

These arrangements are subject to the referral arrangements with UKIAS described above. Where in any case referred to UKIAS officials feel unable to grant an application following representations from UKIAS against refusal, the case will be referred to a Minister for decision and UKIAS will be informed of the issues to be put before the Minister.

In the applicants' cases the decision to refuse asylum was taken at Ministerial level following a recommendation to that effect by the Head of Division. In making this recommendation and taking this decision, account was taken by the Minister and the Far East Section of the Refugee Section not only of all the representations made on behalf of the applicant but also of the position of Tamils as an ethnic group within Sri Lanka and the prevailing conditions within the country, which are monitored on a regular basis. Information about the situation in Sri Lanka is derived from a wide range of sources. In particular, the Far East section has available to it information collected by the Research Unit of the Refugee Section, one of whose functions is to collect, collate and disseminate information about developments in countries which are relevant to the consideration of asylum applications. The section derives its information from numerous sources including press articles, journals and reports from organisations directly concerned with the country in question. In addition, the Foreign and Commonwealth Office supply information derived from diplomatic representatives about developments in particular countries, including Sri Lanka, on a routine basis. The combined sources of information provide a substantial body of material about the situation in Sri Lanka and the position of the communities within it, in particular the Tamil community. This information has been further supplemented by a visit paid to Sri Lanka by the then Minister of State, Mr. David Waddington, in April 1987, and by the current Minister of State, Mr. Timothy Renton, in September 1987.

COMPLAINTS

The applicants complain that their removal to Sri Lanka constituted a breach of Articles 3 and 13 of the Convention. Reliance is placed on the case of *M.K. v. the United Kingdom* (No. 9856/82, Dec. 14.5.87). The applicants contend, on the basis of that decision, that "the removal of a person to a jurisdiction where he has reason to dread treatment contrary to Article 3 of the Convention may give rise to an issue engaging the responsibility of the removing State under Article 3 of the Convention". They, as young male Tamils, had reasonable grounds to fear persecution if returned to Sri Lanka, but they had no effective remedies in the United Kingdom for their complaint under Article 3. They claim thereby also to have been victims of a breach of Article 13 of the Convention

PROCEEDINGS BEFORE THE COMMISSION

The first three applications were introduced on 26 August 1987 and registered on the same day. They were presented with another application by a Tamil, No. 13162/87. The latter had requested the Commission to intercede to stay his removal from the United Kingdom, pursuant to Rule 36 of the Commission's Rules of Procedure. This was refused by the Acting President of the Commission on 26 August 1987 but that same day the Secretary to the Commission gave notice of all four applications to the respondent Government pursuant to Rule 41 of the Commission's Rules of Procedure. (Application No. 13162/87 was declared inadmissible on 9 November 1987.)

Following the House of Lords' judgment of 16 December 1987 a further Rule 36 request concerning a stay of removal was made by the three applicants' representatives. At the same time the fourth and fifth applications were introduced with the same Rule 36 request. The Commission decided on 18 December 1987 not to make any Rule 36 indication in the circumstances of the five cases as presented to the Commission.

After a preliminary examination of the cases by the Rapporteur, the Commission considered the admissibility of the applications on 13 April 1988. The Commission decided to request the parties' written observations on the admissibility and merits of the applications pursuant to Rule 42 para. 2(b) of its Rules of Procedure.

The Government lodged their observations on 31 August 1988, after an extension of the time-limit fixed for their submission. The applicant's representatives submitted observations in reply on 24 November 1988. Legal aid had been granted to the second and fourth applicants by the President of the Commission on 11 November 1988.

On 10 March 1989 the Commission adjourned its examination of the case pending the decision of the adjudicator which was imminent (13 March 1989). On 11 April 1989 the Commission joined the applications and decided to invite the parties to an oral hearing on admissibility and merits.

The hearing was held on 7 July 1989. The Government were represented by Mr. N.D. Parker, Foreign and Commonwealth Office, Agent, Mr. M. Baker, Counsel, Mr. J. Eadie, Counsel, Mr. D. Seymour and Mr. N. Sanderson, both of the Home Office. The applicants were represented by Mr. N. Blake, Counsel, Mr. D. Burgess and Mr. C. Randall, both solicitors with Messrs. Winstanley-Burgess, solicitors, London.

THE LAW

The applicants have complained that their removal to Sri Lanka in February 1988 by the United Kingdom Government was in violation of Article 3 (Art. 3) of the Convention, in respect of which alleged breach they claim to have no effective remedies, contrary to Article 13 (Art. 13) of the Convention. They submitted, inter alia, that the removal exposed them to a serious risk of persecution and the kind of ill-treatment proscribed by Article 3 (Art. 3) of the Convention. They commented that the risk materialised on their return (cf. adjudicator's determination of 13 March 1989, pp. 18-19, of THE FACTS above).

The Government contended that the applications were manifestly ill-founded on the grounds, inter alia, that the applicants had not substantiated their claim of a strong and substantial fear of ill-treatment contrary to Article 3 (Art. 3) of the Convention at the material time in 1987. The Secretary of State, whilst acknowledging the civil disorder in Sri Lanka, did not consider that the applicants personally faced persecution. The incidents related by the applicants were deemed to be random and part of the

Sri Lankan army's general activities to deal with Tamil extremists. The ill-treatment which had allegedly been suffered on return to Sri Lanka cannot be verified by the Government and was irrelevant to consideration of the Convention issues. Insofar as the United Kingdom's responsibility under the Convention could be incurred at all, it was in respect of the removal decisions only, based on an assessment of the general situation in Sri Lanka and the applicants' personal circumstances in 1987. This assessment had not revealed any real risk of persecution in the Government's view. The Government also contended that, even if the applicants could be said to have an arguable claim under Article 3 (Art. 3) of the Convention, the applicants had had effective domestic remedies to test this claim, in particular by way of judicial review of the Secretary of State's refusal of political asylum and the appeals to an independent adjudicator under section 13 of the Immigration Act 1971 (cf. Eur. Court H.R., Soering judgment of 7 July 1989, paras. 120-124).

Article 3 (Art. 3) of the Convention prohibits torture, inhuman and degrading treatment or punishment. Article 13 (Art. 13) of the Convention guarantees an effective remedy before a national authority for any breach of the Convention.

The Commission considers, in the light of the parties' submissions, that the five cases raise complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the applications as a whole. The Commission concludes, therefore, that the applications are not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring them inadmissible have been established.

For these reasons, the Commission

DECLARES THE APPLICATIONS ADMISSIBLE
without prejudging the merits of the cases.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)