COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF VILVARAJAH AND OTHERS v. THE UNITED KINGDOM

(Application no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87)

JUDGMENT

STRASBOURG

30 October 1991

In the case of Vilvarajah and Others v. the United Kingdom[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court[***], as a Chamber composed of the following judges:

Mr J. CREMONA, *President*,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 April and 26 September 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 11 July 1990 by the European Commission of Human Rights ("the Commission") and on 16 July 1990 by the Government of the United Kingdom ("the Government") within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms. It originated in five applications (nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87) against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Mr Nadarajah Vilvarajah, Mr Vaithialingam Skandarajah, Mr Saravamuthu Sivakumaran, Mr Vathanan Navratnasingam and Mr Vinnasithamby Rasalingam, citizens of Sri Lanka, on 26 August 1987 and 16 December 1987.

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[*] The case is numbered 45/1990/236/302-306. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

[***] The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 13 (art. 13) and also, in the case of the request, Article 3 (art. 3) of the Convention.

In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir Vincent Evans, the elected judge of United Kingdom nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1990 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr B. Walsh, Mr R. Macdonald, Mr C. Russo, Mr R. Bernhardt, Mr I. Foighel, Mr R. Pekkanen and Mr A. N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representative of the applicants on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the Registrar received, on 28 January 1991, the Government's memorial and, on 31 January 1991, the memorial of the applicants. The Delegate of the Commission subsequently informed the Registrar that he would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President had directed on 15 October 1990 that the oral proceedings should open on 23 April 1991 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr N.D. PARKER, Foreign and Commonwealth Office, *Agent*,
  Mr M. BAKER, Q.C.,
  Mr J. EADIE, *Counsel*,
  Mr C.M.L. OSBORNE, Home Office,
  Mr A. CUNNINGHAM, Home Office, *Advisers*;
- for the Commission
  Sir Basil HALL, *Delegate*;
- for the applicants

Dr R. PLENDER, Q.C.,
Mr N. BLAKE, *Counsel*,
Mr D. BURGESS,
Mr C. RANDALL, Solicitors.

7. The Court heard addresses by Mr Baker for the Government, by Sir Basil Hall for the Commission and by Mr Blake and Dr Plender for the applicant, as well as their replies to its questions. Various documents were filed by the applicants on the day of the public hearing. On 14 May 1991 the Government submitted their comments on the applicants' claims under Article 50 (art. 50).

8. For the final deliberations, Mr Cremona, Vice-President of the Court, who was present at the hearing as a substitute judge, replaced Mr Ryssdal who was unable to take part in the further consideration of the case (Rules 21 para. 5 and 24 para. 1 of the Rules of Court).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASES

A. Mr VILVARAJAH

1. Events prior to removal

9. The first applicant, Mr Nadarajah Vilvarajah, born in 1960, is a citizen of Sri Lanka, of Tamil ethnic origin. He worked as an assistant in his father's shop in Paranthon, Kilinochchi District, in the northern part of the island. On several occasions the Sri Lankan army had attacked his district, killing people and destroying property. His cousin and five other men were killed by the army in 1986 and the family shop was raided and damaged on 28 March 1987.

10. He stated that he was detained on two occasions by naval forces in March and April 1986 and assaulted. On the first occasion he was driving a minibus which broke down close to a naval base. He and his passengers were detained by a navy patrol for ten hours. He claimed to have been heavily beaten. On the second occasion, whilst driving the minibus, he was stopped by a naval patrol and detained for twenty-four hours. They accompanied the bus back to his home town of Karainagar where they opened fire at random on people there. Fire was also exchanged between a Tamil separatist group, the Liberation Tigers of Tamil Eelam ("LTTE"), and the naval personnel, who used the bus passengers as shields.

11. 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. In May 1987 his father arranged with an agent in Colombo for him to be sent to London. He travelled on his own passport to Madras on 6 June 1987. On 10 June he travelled with a Malaysian passport (provided by an agent in Madras) to London via Bombay. He arrived in London on 11 June seeking 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 enquiries. On admitting that he was not the rightful holder of the Malaysian passport in which his photograph had been substituted for that of the true owner, he was refused leave to enter the United Kingdom, under paragraph 3 of the Statement of Changes in Immigration Rules (see paragraph 84 below) which requires that a person seeking admission must produce a valid passport or other identity document.

12. On 12 June he requested asylum in the United Kingdom under the 1951 United Nations Convention relating to the Status of Refugees as amended by the Protocol of 1967 ("the 1951 Refugee Convention"). On 19 June he 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 for the reasons outlined above.

13. The applicant's asylum request was then referred to the Refugee Section of the Immigration and Nationality Department of the Home Office. However, they concluded that he had not shown that he had a well-founded fear of persecution for the purposes of the 1951 Refugee Convention. On 20 August 1987 the Secretary of State refused his request for asylum. He was informed of this decision 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 reasons 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."

14. Arrangements for his removal to Sri Lanka were made for 22 August 1987. The applicant then instituted proceedings for judicial review in which he sought, unsuccessfully, to have the Secretary of State's decision quashed (see paragraphs 67-69 below).

2. Events following return to Sri Lanka

15. The 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.

16. After his return an appeal was lodged in the United Kingdom by his solicitors under section 13 of the Immigration Act 1971 against the asylum refusal (see paragraphs 71-72 below). 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 stated 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 People's Liberation Organisation of Tamil Eelam ("PLOTE") and the LTTE, which he denied. The police noted his address and took his fingerprints.

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

18. 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 LTTE and became frightened. However, he was allowed to return home after questioning. On a visit to Jaffna in April 1988 he was rounded up with other Tamils and detained for ten hours by the IPKF. They were paraded in front of masked men who identified certain persons. He was afraid they would make an error, but he was released.

19. The applicant recounted other incidents which led 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 numerous IPKF and Sri Lankan checkpoints doubling the length of the normal eight hour journey.

20. On 13 March 1989 the Adjudicator found in the applicant's favour and he was subsequently allowed to return to the United Kingdom on 4 October 1989 (see paragraphs 71-72 below). Shortly after his return he made a further application for asylum which is still under consideration. He

has been granted exceptional leave to remain initially for 12 months and thereafter until 22 March 1992.

B. Mr SKANDARAJAH

1. Events prior to removal

21. The second applicant, Mr Vaithialingam Skandarajah, born in 1958, comes from Jaffna in the north of Sri Lanka, an area which had been under the control of the LTTE when he was living there. He stated that 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 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. It was this and damage to his home and business on 24 April 1987 which made him decide to leave. He claimed to have been questioned by the police about the LTTE, although he has never belonged to them.

22. The 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 stated that he was held for twenty hours and tortured, resulting in injury and scarring to his right leg.

23. On 6 June 1987 the applicant travelled by air from Colombo to Madras on his Sri Lankan passport. On 10 June he then travelled with a false Malaysian passport, obtained through an agent in Madras, via Bombay to London. He sought entry as a visitor for two days, in transit to Montreal, Canada.

24. The applicant was refused leave to enter by the United Kingdom immigration authorities on 12 June under paragraph 3 of the Statement of Changes in Immigration Rules (see paragraph 11 above). He then revealed his Sri Lankan nationality and requested asylum. On 17 June he was interviewed by immigration officers about his asylum application in the Tamil language with the assistance of an interpreter. He explained his fear of persecution if returned to Sri Lanka.

25. His case was then referred to the Refugee Section of the Home Office. It was concluded that he had not demonstrated that he had a well-founded fear of persecution within the meaning of the 1951 Refugee Convention. On 20 August 1987 the Secretary of State refused his asylum request. He was informed of this decision 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 reasons 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."

26. Arrangements for his removal to Sri Lanka were made for 22 August 1987. The applicant then instituted proceedings for judicial review in which he sought, unsuccessfully, to have the Secretary of State's decision quashed (see paragraphs 67-69 below).

2. Events following return to Sri Lanka

27. The applicant was returned to Sri Lanka on 10 February 1988. His reception at the airport was the same as that of the first applicant (see paragraph 15 above). He was then interviewed by the Sri Lankan police for several hours and fingerprinted. He stayed at his uncle's house in Colombo for about a month until it was safe to travel to Jaffna.

28. After his return to Sri Lanka an appeal was lodged in the United Kingdom by his solicitors under Section 13 of the Immigration Act 1971 against the refusal of asylum. They went to Colombo to interview and take statements from him (see paragraphs 71-72 below). He told them that on 10 March 1988 he was travelling to Jaffna by bicycle from his home when he was stopped at an IPKF checkpoint. 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 ten 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 the LTTE, of which the applicant denied any knowledge. He was kept in a small room without bedding or sanitary facilities, with six other detainees who were receiving similar ill-treatment. Some of them were hung upside down and beaten. The applicant was beaten intensely on three occasions over the next seven days for periods of about half an hour.

29. He was detained until 24 May 1988, and questioned by the same men. 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 for ever. The detainees were given rice, dahl and chapatis and insufficient water. They became dehydrated and constipated. They were filmed and apparently later shown on television as surrendered LTTE men. The applicant was rescued by members of his family who bribed the local IPKF commander with gold.

30. On release he was told to report daily. He then fled to Colombo. He stated that life there at that time was very tense for Tamils. There was a constant danger of arbitrary arrest, detention and denunciation by informers. However, he felt safer in Colombo than in Jaffna. To justify his stay in Colombo he registered as a student.

31. On 13 March 1989 the Adjudicator found in the applicant's favour and he was subsequently allowed to return to the United Kingdom on 4 October 1989 (see paragraphs 71-72 below). Shortly after his return he made a further application for asylum which is still under consideration. He has been granted exceptional leave to remain initially for twelve months and thereafter until 22 March 1992.

C. Mr SIVAKUMARAN

1. Events prior to removal

32. The third applicant, Mr Saravamuthu Sivakumaran, born in 1966, comes from Point Pedro, where his family lives, in the north of Sri Lanka. In April 1984 he witnessed the killing of his brother by navy personnel. His brother was fishing in a boat with a friend off the coast at Point Pedro. Navy personnel came by in a boat and shot and killed both of them without warning or reason.

33. 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 300 male Tamils, including the applicant, were detained in Point Pedro. They were assaulted. The security forces took away fifteen people and shot and killed them the same day. The bodies were burned.

34. In September 1984 male Tamils were also rounded up and detained for one day. The applicant was again detained. About twenty people were taken away, shot and killed. The bodies were burned on the spot.

35. Point Pedro has been regularly subjected to air bombardment and shelling by the army. The applicant's family house was damaged during an air bombardment in October 1985 and the family had to move to another house in the area.

36. The applicant stated that he was in 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 claimed, however, never to have been involved in any violence or terrorist activities.

37. His father decided that the applicant should leave Sri Lanka as he feared for his son's safety as a young male Tamil. Arrangements were made through a Tamil agent in Point Pedro for his son to leave the country. The applicant travelled to Colombo on 28 November 1986 and stayed with the agent until 11 December 1986. He 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 applicant and the other passengers were accused of going for training with militants in India. They were taken to an office and held for three hours, questioned and fingerprinted.

38. The 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.

39. He was interviewed by immigration officers in the Tamil language with the aid of an interpreter. He described the events outlined above. At that stage he averred that he was not a member of the LTTE and, in fact, did not make this claim to the British authorities until September 1987 as he feared it would have adverse effects on his asylum application. His case was referred to the Refugee Section of the Home Office. They concluded that the applicant had not established a well-founded fear of persecution within the meaning of the 1951 Refugee Convention and his application for asylum 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 applicant's solicitors that a fresh decision would be taken on the asylum claim.

40. Representations from the United Kingdom Immigrants' Advisory Service ("UKIAS") were received and the 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 applicant had not demonstrated that he had a well-founded fear of persecution. Details of the case were referred to the Secretary of State, 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 reasons 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."

41. Arrangements for his removal to Sri Lanka were made for 22 August 1987. The applicant then instituted proceedings for judicial review in which he sought, unsuccessfully, to have the Secretary of State's decision quashed (see paragraphs 67-69 below)

2. Events following return to Sri Lanka

42. The applicant was removed to Sri Lanka on 12 February 1988. His reception at the airport was the same as that of the first applicant (see paragraph 15 above).

43. On 9 January 1990 the applicant's representatives submitted a statement he had made to them about his treatment in Sri Lanka on his return there as of 13 February 1988. He alleged that on his return he was held by the Sri Lankan Police (Criminal Investigation Division) for a day and treated like a criminal whilst being interrogated about his reasons for having gone to the United Kingdom. He then stayed with his parents for a few weeks. On 2 April 1988 whilst passing through a checkpoint he was identified by a masked man as having being involved with the LTTE and detained by the IPKF. He was interrogated about the LTTE and tortured every four or five days. He was stripped and beaten with iron bars and sand-filled PVC pipes. Sometimes he was tied upside down and a fire, with chillies, lit underneath his head lasting 10 or 15 minutes until he passed out. On four or five occasions he was subjected to electric shock treatment to his genitals. He admitted his previous involvement with the LTTE. He was released on 3 October 1988 after his parents managed to bribe the Commanding Officer. He then spent two weeks in hospital as he could hardly walk. However, he was rearrested on 29 November 1988 by the IPKF, accompanied by members of the Eelam People's Revolutionary Liberation Front ("EPRLF"). He received the same ill-treatment as before and was released on 30 December 1988 following a further bribe from his parents. He went into hiding for two months and tried to travel to Canada but was cheated by an agent who left him in Malaysia. He then had to return to Sri Lanka in April 1989 and hid in Colombo. There he was once beaten

up by navy personnel. Since his return to the United Kingdom he stated that the IPKF and EPRLF are still harassing his family.

44. Although the applicant's whereabouts were undisclosed for some time, he kept in contact with his solicitors, who lodged an appeal in the United Kingdom on his behalf against the refusal of asylum. This appeal was successful. The Adjudicator upheld his claims on 13 March 1989 (see paragraphs 71-72 below). The applicant was subsequently allowed to return to the United Kingdom on 4 October 1989, where he was granted exceptional leave to remain initially for twelve months and thereafter until 22 March 1992. Shortly after his return he made a further application for asylum which is still under consideration.

D. Mr NAVRATNASINGAM

1. Events prior to removal

45. The fourth applicant, Mr Vathanan Navratnasingam, born in 1970, comes from Achelu but received his schooling in Point Pedro until December 1986. He claimed to have been detained five times by the Sri Lankan 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.

46. In May 1984 the army set fire to his school at Point Pedro. The day after the raid he was detained at the local army camp for six or seven hours and accused of burning down the school. The principal of the school protested and secured his release.

47. In May 1986, while the applicant was on his way to school by bus, an army helicopter bombed a bridge which the bus was to cross and everyone was ordered off the bus. He was detained at an army camp for seven hours and threatened with ill-treatment. His elder brother in the meantime fled to France (January 1986) where he was granted political asylum.

48. After August 1986 there was intensive shelling by the army and on 1 January 1987 the family home in Achelu was destroyed. 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.

49. They arrived in Colombo on 18 January 1987, where his father arranged with an agent for his son to leave Sri Lanka. The applicant had felt insecure in Colombo as he had Tamil identity cards and the authorities knew he was not a local. He subsequently flew to London, arriving at Heathrow airport on 13 February 1987 where he requested asylum. Several pages of his passport had been removed. He was one of the group of 64 Tamil asylum seekers (see paragraph 38 above).

50. The applicant was detained pending the proceedings. He was interviewed on two occasions by an immigration officer in the Tamil language with the assistance of an interpreter. During these interviews he described the events outlined above. He also stated that he had not been politically involved in Sri Lanka.

51. His case was then referred to the Refugee Section of the Home Office. They concluded that the applicant had not established a well-founded fear of persecution within the meaning of the 1951 Refugee Convention and his application was refused on 17 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 fourth applicant's solicitors that a fresh decision would be taken on the asylum claim.

52. Representations from UKIAS were received and the 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. Details of the case were referred to the Secretary of State, who reached a similar conclusion. The fourth applicant was informed of this decision by the Home Office 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 reasons 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 six 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."

53. Arrangements for the applicant's removal to Sri Lanka were made for 4 September 1987. The applicant then instituted proceedings for judicial review in which he sought, unsuccessfully, to have the Secretary of State's decision quashed (see paragraphs 67-69 below).

2. Events following return to Sri Lanka

54. The applicant was removed to Sri Lanka on 12 February 1988. His reception at the airport was the same as that of the first applicant (see paragraph 15 above). 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.

55. After his return to Sri Lanka an appeal was lodged in the United Kingdom by his solicitors against the refusal of asylum. They went to Colombo to interview and take statements from him. He told his solicitors that on his return he stayed with a family friend in Colombo because no trace had been found of his family. He did not go out unless escorted by a Sinhalese speaker who could deal with any trouble from the police. He had many difficulties because he did not have his identity card which had been lost by the Home Office immigration service. He did not try to find his family because he could not get through the many checkpoints.

56. The applicant was arrested without any identity card by the police on or around 10 March 1988, detained for four hours and questioned about his activities in Colombo. A family friend persuaded the police to release him. The atmosphere in Colombo for Tamils was very tense since they were subject to attack by Sinhalese. In May 1988 the applicant was again arrested by the police, detained overnight, 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 his release.

The beating 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.

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

58. The applicant's appeal in the United Kingdom was successful. The Adjudicator upheld his claims on 13 March 1989 (see paragraphs 71-72 below). He was subsequently allowed to return to the United Kingdom on 4 October 1989, where he was granted exceptional leave to remain initially for twelve months and thereafter until 22 March 1992. Shortly after his return he made a further application for asylum which is still under consideration.

E. Mr RASALINGAM

1. Events prior to removal

59. The fifth applicant, Mr Vinnasithamby Rasalingam, born in 1961, comes 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. He believed that two of his brothers had been shot dead by the army in 1986. He had already witnessed the army killing two people in 1985. At that time the applicant was hiding in the jungle for his safety. He was also shot at by soldiers passing through his town. Since 1983 problems have existed in the applicant's area with the town's Sinhalese majority. Many people have been killed and buildings destroyed. There had been rumours of massacres elsewhere.

60. An army camp was situated five miles from the 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 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.

61. The applicant paid an agent 50,000 Sri Lankan rupees to help him leave Sri Lanka. 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.

62. The applicant's request for asylum was then referred to the Refugee Section of the Home Office. They concluded that he had not demonstrated a well-founded fear of persecution within the meaning of the 1951 Refugee Convention. Details of the case were referred to the Secretary of State, who reached a similar conclusion. In a letter dated 1 September 1987, the applicant was informed of the refusal of his asylum request 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 reasons 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 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."

63. Arrangements for the applicant's removal to Sri Lanka were made for 4 September 1987. The applicant then instituted proceedings for judicial review in which he sought, unsuccessfully, to have the Secretary of State's decision quashed (see paragraphs 67-69 below).

2. Events following return to Sri Lanka

64. The applicant was returned to Sri Lanka on 12 February 1988. His reception at the airport was the same as that of the first applicant (see paragraph 15 above).

65. On returning to Sri Lanka he had difficulties because, like the fourth applicant, he had no identity card. It had been temporarily lost by the Home Office immigration service and was returned to him by post later. He obtained a forged card and managed to escape arrest during numerous police searches. His brother joined the LTTE and the applicant had money extorted out of him for their cause. He was suspected by the Sri Lankan and Indian authorities and is still being sought by them. In April 1988 he fled to France after learning that his father and brother had been detained by the IPKF.

66. Although his whereabouts were undisclosed for some time, the applicant kept in contact with his solicitors, who lodged an appeal in the United Kingdom on his behalf against the refusal of asylum. This appeal was successful. The Adjudicator upheld his claims on 13 March 1989 (see paragraphs 71-72 below). The applicant was subsequently allowed to return to the United Kingdom on 28 August 1989, where he was granted exceptional leave to remain initially for twelve months and thereafter until 22 March 1992. He made a further application for asylum in October 1989 which is still under consideration.

F. The applicants' judicial review proceedings

67. The first three applicants instituted proceedings before the High Court seeking leave to apply for judicial review of the Secretary of State's refusal to grant asylum. Their applications were refused by a single judge on 21 August 1987. Further applications to a single judge in the Court of Appeal were also rejected on the same day. The Home Office refused to defer the removal of the first three applicants, scheduled for the next day, to enable applications to be made to a full Court of Appeal on Monday 24 August. Applications were then made to the Duty Judge of the High Court on the morning of 22 August (a Saturday) alleging that the Secretary of State's refusal to defer removal unreasonably denied the first three applicants' right to renew their applications to the Court of Appeal.

The Duty Judge accepted the submission and issued an injunction against their removal. On 26 August 1987 the Court of Appeal granted the applicants leave to apply for judicial review of the Secretary of State's decision.

After the refusal by the Secretary of State of the fourth and fifth applicants' application for asylum they too instituted proceedings for judicial review and were granted leave to apply.

68. All five applications were dismissed by the High Court on 24 September 1987 by Mr Justice McCowan. On appeal, however, the Court of Appeal quashed the decisions refusing asylum on 12 October 1987. The Secretary of State then appealed to the House of Lords which, on 11 December 1987, gave judgment in his favour (R. v. Secretary of State for the Home Department, ex parte Sivakumaran and conjoined appeals [1988] 1 All England Law Reports 193).

69. The applicants' case before the House of Lords concerned the proper interpretation of Article 1 (A)(2) of the 1951 Refugee Convention as amended which defines a refugee as a person who has a "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 ...".

The House of Lords found that the test was an objective one and that there has to be demonstrated a reasonable degree of likelihood, or a real and substantial risk, that the person will be persecuted if returned to his own country. The evidence before the House of Lords confirmed that in reaching his decision not to grant asylum the Secretary of State had applied the test in the 1951 Refugee Convention. In the course of the judgment the following opinions were delivered:

Lord Keith of Kinkel: "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 Pott, 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 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 ... In the present case an examination of the decision-making process does not disclose any error on the part of the Secretary of State or justify the court in contradicting his view that the applicants will not be in danger of persecution if they are returned to Sri-Lanka."

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] Weekly Law Reports (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."

70. Following this decision the solicitors acting on behalf of all five applicants wrote to the Home Office indicating that they would be making further representations and that they would be applying to the European Commission of Human Rights 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 clients for seven days, which confirmation was given. The Commission refused the applicants' request for an indication under Rule 36 on 18 December 1987. Representations that they should not be removed were also made by the British Refugee Council, UKIAS and a Member of Parliament at the request of the Tamil Action Committee U.K. The Secretary of State considered that asylum candidates who failed to qualify for refugee status should be returned to Sri Lanka unless there were strong compassionate circumstances in any particular case. In the applicants' case he did not consider that such compassionate circumstances existed.

G. The applicants' subsequent appeals under Section 13 of the Immigration Act 1971

71. Following the applicants' removal to Sri Lanka their 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 no other material upon which the

latter based his decisions to refuse asylum was put before the Adjudicator. In a decision of 13 March 1989 the Adjudicator 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 also accepted that in general the victims of 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.

Finally he concluded that the applicants had had a well-founded fear of persecution and he held, inter alia, as follows:

(1) that they were all entitled to asylum at the time of the Secretary of State's decision;

(2) that the circumstances since that time had not materially changed;

(3) that the Secretary of State's decisions in respect of all the applicants were not in accordance with the law;

(4) that the applicants' appeals were accordingly allowed; and

(5) that they should be returned to the United Kingdom with the minimum of delay.

72. The Secretary of State's appeal to the Immigration Appeal Tribunal was rejected on 19 April 1989 as being out of time, the fourteen day time-limit for lodging appeals having been missed due to an administrative error. On 12 May 1989 the Secretary of State applied for judicial review of the Tribunal and Adjudicator's decisions. In particular he challenged the lawfulness or reasonableness of the 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 heard on 11 July 1989 by Lord Justice Lloyd

and Mr Justice Auld. The High Court upheld the decision of the Immigration Appeal Tribunal. On 31 July 1989 the Secretary of State applied for a stay of execution against the return of the five applicants pending a possible appeal against the refusal of judicial review. This application was rejected on 31 July 1989.

On 17 May 1990 the Court of Appeal dismissed an appeal by the Secretary of State against the finding by Mr Justice Auld in the above proceedings that Mr Vilvarajah and Mr Skandarajah were entitled to raise their asylum claim on appeal to the Adjudicator notwithstanding the fact that they had first presented forged Malaysian passports and sought leave to enter as visitors (R v. Immigration Appeal Tribunal and Another, ex parte Secretary of State for the Home Department [1990] I Weekly Law Reports 1126).

H. The situation in Sri Lanka

73. Sri Lanka has a population of 16.1 million, of which 74% are Sinhalese and 18% are Tamil Hindus. The Tamils are concentrated in particular areas, and in the northern peninsula of Jaffna account for over 90% of the population. The history of the ethnic conflict between Tamils and Sinhalese goes back for generations, with Sinhalese, anti-Tamil chauvinism being a major factor in Sri Lankan politics since 1948. One result of the anti-Tamil sentiment in Sri Lanka has been a series of pogroms against Tamil communities, particularly since 1956, and which increased dramatically in 1983, triggered off by the killing of thirteen Sri Lankan soldiers by a Tamil liberation group. A state of emergency was proclaimed which is still in force. This resulted in considerable governmental violence against the Tamil community, including organised massacres tolerated, if not approved of, by the Government.

74. Following an Accord which was signed between Sri Lanka and India on 29 July 1987 the Indian Army entered Tamil areas with a view to protecting the Tamil community and the Sinhalese forces were to be returned to barracks. However, the IPKF became involved in fighting Tamil extremists who rejected the Accord. Incidents of arrest, arbitrary detention, torture and destruction were reported, especially in October and November 1987, with indiscriminate shelling and shooting in villages and towns in the north. There was a siege of Jaffna town during which it was estimated that some 2,000-5,000 civilians were killed by the IPKF with a high level of atrocities committed during the assault on the town and thereafter. Identity cards were indispensable for Tamils at this time, not only a Sri Lankan identity card, but also a card issued by the IPKF for anyone in the north, in order to avoid the risk of summary detention.

75. When the applicants were returned to Sri Lanka in February 1988 reports of civil disturbance were still rife. The respondent Government

analysed the situation as follows: they accepted that there was widespread disruption and violence, particularly in the north and east of Sri Lanka, although large parts of the country remained quiet. The disturbances seem to have eased off in December 1987. Having regard to the July 1987 Accord they considered that the Sri Lankan and Indian Governments were firmly committed to the restoration of law and order, civil rights for all communities and the democratic election of regional representatives. They were also aware of the voluntary repatriation of a large number of Sri Lanka Tamils, mostly having taken refuge in India, under a scheme organised by the United Nations High Commissioner for Refugees ("UNHCR") in response to provisions in the Accord to this effect.

76. Under the UNHCR scheme which was begun in late December 1987, 2,746 Sri Lankans had been repatriated by 11 February 1988. By August 1988 the total number of Sri Lankans voluntarily repatriated under this scheme was more than 23,000. The UNHCR has estimated that a further 12,000 had made their own arrangements to return voluntarily to Sri Lanka by August 1988. Some Western European countries were also beginning to send Tamils back to Sri Lanka during the period August 1987 - February 1988 (e.g. the Netherlands and France). Other countries had a policy of not returning Tamil asylum-seekers at this time (e.g. Federal Republic of Germany and Italy).

77. In December 1987 Amnesty International, the British Refugee Council and the UNHCR each urged the respondent Government not to send any Tamils back to Sri Lanka in view of the instability at that time, the uncertain effect of the July Accord and reports of human rights violations by both the Sri Lankan security forces and the IPKF.

78. A report by the Asia Committee of the British Refugee Council dated 15 December 1987 noted that there was widespread devastation of property as well as food and health problems. Although the situation had slightly eased since the beginning of November 1987, the view was maintained that the whole of the majority Tamil areas was subject to guerilla attack, and counter-attack by the IPKF, and that little resembling normal life was possible.

I. Sources of information used in assessing the applicants' asylum claims

79. The information available to the Secretary of State about the situation in Sri Lanka came from numerous sources, including reporting telegrams from the British High Commission in Colombo and advice from the Foreign and Commonwealth Office, information and documentary evidence from thousands of asylum applicants from Sri Lanka, frequent contact with representatives of UNHCR, press articles, journals and reports from organisations like Amnesty International directly concerned with the

situation in Sri Lanka. The Foreign and Commonwealth Office also supplied information derived from diplomatic representatives about developments in Sri Lanka.

80. In addition, Mr Timothy Renton MP, Minister of State at the Home Office, visited Sri Lanka from 10-14 September 1987. He was accompanied by the most senior official in the Immigration and Nationality Department, who had overall responsibility for asylum policy as well as the Head of the South Asian Department in the Foreign and Commonwealth Office. In the course of his visit he met President Jayawardene and other government Ministers. He visited Jaffna and Trincomalee, meeting local officials, members of the Sri Lanka Armed Forces, citizens, committees and representatives of the LTTE.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The decision-making process in asylum cases

81. 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", House of Commons paper 169 of 9 February 1983 ("the 1983 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."

82. An application for asylum can be made by a person either on arrival at a port in the United Kingdom or after entering 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 1983 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."

83. In cases to which paragraph 73 of the 1983 Rules applies, an immigration officer at the port of entry 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 paragraph 73 of the 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.

84. The specialist Refugee Section has a large staff, who are divided into geographical sections under four Senior Executive Officers responsible for the Middle East, the Far East, Africa and Eastern Europe/the Americas. There is also a Research Unit which collates and disseminates background information on specific countries. 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 to enter; a decision to refuse outright must be taken at at least Senior Executive level. Cases which are complex or about which an officer has particular doubts can be referred up to higher grade officers and, as in the applicants' cases, to a Minister for decision.

85. These arrangements are subject to the referral arrangements with UKIAS described below (see paragraphs 94-95). 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.

B. Appeal rights of an asylum seeker under the Immigration Act 1971

86. If an application for asylum is refused 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. However, the refusal of asylum can also be challenged in judicial review proceedings (see paragraphs 89-93 below).

Appeals under section 13 in the first instance are to an Adjudicator, who is a single judge, appointed by the Lord Chancellor. 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 at sittings.

87. 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.

88. 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 (Statutory Instruments, 1984/2041).

An appellant can be represented at the appeal by UKIAS which is funded by the Secretary of State under section 23 of the 1971 Act for the purpose of enabling it to give free advice and assistance to those with appeal rights under the Act. Alternatively, an appellant can be represented by solicitors. Provision is made in the 1984 Rules 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 for 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 make 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. 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.

C. Judicial review of asylum decisions

89. 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 above-mentioned statutory right of appeal on the merits. The courts (as opposed to the appellate authorities under the 1971 Act) have no power to determine whether a person is a refugee. However, the decision of the Secretary of State is subject 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 to any person regardless of nationality.

90. The courts will examine whether the Home Secretary has correctly interpreted the law in relation to the grant or refusal of asylum. If the courts are satisfied that he has made no error of law they may nevertheless review

the refusal of asylum in the light of the "Wednesbury principles" (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] I Kings Bench 223), namely, an examination of the exercise of discretion by the Secretary of State to determine 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 came to a conclusion so unreasonable that no reasonable authority could have reached it. According to the Government a court would, in application of these principles, have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one which no reasonable Secretary of State could take. The applicants, on the other hand, contest the scope of judicial control of the merits of the Secretary of State's decision (see paragraph 118 below).

91. 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 England Law Reports 940) when it was held that the Home Secretary had indeed failed to appreciate a factor which he should have specifically dealt with. Lord Bridge stated (at 945 and 952):

> " ... all questions of fact on which the discretionary decision whether to grant or withhold leave to enter or remain depends 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 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 (at page 956):

> "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."

In that case, following a careful review of the evidence the House quashed the removal orders in regard to one of the applicants on the ground that relevant facts had not been taken into account.

The Secretary of State's refusal of asylum was also quashed by the courts following judicial review proceedings in R v. Secretary of State, ex parte

Jeyakumaran (High Court decision of 28 June 1985), R v. Secretary of State, ex parte Yemoh (High Court decision of 14 July 1988), and Gaima v. Secretary of State ([1989] Immigration Appeals Reports). In the Jeyakumaran case the court reviewed the decision of the Secretary of State on "Wednesbury principles". In his judgment, Mr Justice Taylor said "I am ... disturbed by some of the factors which do seem to have been taken into account and others which have not. It is, therefore, necessary to look at the respondent's evidence in some detail". He concluded that the Secretary of State's rejection of the claim for asylum should be quashed on the ground that "in reaching his decision he took into account matters which ought not to have been taken into account and failed to take into account matters he should". A similar approach was adopted by the High Court in the Yemoh case. In the Gaima case it was more a matter of the fairness of the procedures followed in reaching the decision to refuse political asylum in that the Court of Appeal held that the applicant was given insufficient opportunity to give her explanation of the facts taken into account by the Secretary of State in assessing her credibility. In his judgment, with which the other two judges agreed, Lord Justice May stressed that "in these refugee asylum cases the court is entitled to, and should, subject administrative decisions to rigorous examination. The court should ensure that the decision- making process has been wholly fair throughout".

92. Although the Home Secretary has stated that there can be no expectation that asylum seekers will automatically be allowed to stay in the United Kingdom until proceedings are complete, the practice is that no applicant is removed once he has obtained leave to apply for judicial review. Moreover, in R v. Secretary of State for Education and Science, ex parte Avon County Council ([1991] 88 Local Government Reports 737) the Court of Appeal held that a judicial review court has power to order a stay even where such an order would have the effect of restraining the Crown.

93. If an application for leave to apply for judicial review is refused a renewed application can be made to the Court of Appeal. Even where, after a full hearing, an application for judicial review is dismissed the applicant can appeal on a point of law to the Court of Appeal as of right and, subsequently, to the House of Lords with the leave of the Court of Appeal or the House of Lords.

D. The UKIAS referral system

94. 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. In such cases the Home Office regards UKIAS as the agent of the UNHCR.

95. Since 1 September 1988 (i.e. after the applicants' removal) no category of asylum seeker is automatically excluded from the referral system although the Home Secretary retains the right at all times not to refer a case. 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. The Secretary of State is obliged to consider and answer any representations made. The representations and the response to them may then be used as material against which the reasons and conclusions of the decisions taken may be tested on review, if asylum is refused.

E. Members of Parliament

96. Members of Parliament frequently make representations to the Minister about unsuccessful asylum seekers or other expulsion cases. The first guidelines on the subject were issued in 1986. Prior to March 1987 a mere telephone contact could stop a removal pending further representations being made. On 3 March 1987 the Home Secretary announced that Members of Parliament could no longer assume that "stops" would be accepted in all cases. Under revised guidelines for handling representations from Members which came into force on 3 January 1989 removal may be deferred for eight working days to enable representations to be made if new and compelling evidence has become available which has not already been taken into account.

F. The law and practice in the case of refugees to whom the 1951 Refugee Convention does not apply

97. The power to give or refuse leave to enter and to remain in the United Kingdom, in a case of a person not having refugee status under the 1951 Refugee Convention, is exercisable at the discretion of the Secretary of State. Accordingly, if a person entering the United Kingdom is found not to be entitled to have refugee status, but nevertheless alleges that if he is returned to his own country he runs a real risk of being subjected to treatment inconsistent with the provisions of Article 3 (art. 3) of the European Convention, the Secretary of State, in the exercise of his discretion, could decide that exceptional leave to enter should be given. This entitles an asylum seeker to remain in the United Kingdom for a period of twelve months in the first instance.

In 1988 57.4% of decisions in asylum cases were to give exceptional leave, usually on humanitarian grounds, and in 25.4% of the cases the entitlement to refugee status was accepted. 17.2% were outright refusals. In 1988 304 Sri Lankans were given exceptional leave.

PROCEEDINGS BEFORE THE COMMISSION

98. Mr Vilvarajah, Mr Skandarajah and Mr Sivakumaran lodged their applications (nos. 13163/87, 13164/87 and 13165/87) with the Commission on 26 August 1987. Mr Navratnasingam and Mr Rasalingam lodged their applications (nos. 13447/87 and 13448/87) on 15 December 1987. In their applications they alleged that, as young male Tamils, they had reasonable grounds to fear that they would be subjected to persecution, torture, arbitrary execution or inhuman or degrading treatment contrary to Article 3 (art. 3) of the Convention. They further alleged that they had no effective remedy under United Kingdom law in respect of their complaint under Article 3 (art. 3).

On 18 December 1987 the Commission decided not to make any Rule 36 indication to the United Kingdom Government, as requested by the applicants, that their removal to Sri Lanka be suspended pending the outcome of the proceedings.

99. The Commission declared the applications admissible on 7 July 1989.

In its report adopted on 8 May 1990 (Article 31) (art. 31) the Commission expressed the opinion that there had been no breach of Article 3 (art. 3) (seven votes to seven, with a casting vote by the President) but that there had been a breach of Article 13 (art. 13) (by thirteen votes to one).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

100. At the public hearing on 23 April 1991 the Government maintained the concluding submissions set out in their memorial, whereby they invited the Court to hold:

[*] Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 215 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

"1. that in the particular circumstances of each of the cases there has been no violation of Article 3 (art. 3);

2. that there has been no violation of Article 13 (art. 13) having particular regard to the manner in which judicial review now operates in this field."

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 3 (art. 3)

101. The applicants alleged that their removal to Sri Lanka in February 1988 amounted to inhuman and degrading treatment in breach of Article 3 (art. 3) which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Applicability of Article 3 (art. 3) in expulsion cases

102. At the outset, the Court observes that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including Article 3 (art. 3), to control the entry, residence and expulsion of aliens (see the Moustaquim judgment of 18 February 1991, Series A no. 193, p. 19, para. 43, and the authorities cited therein). Moreover, it must be noted that the right to political asylum is not contained in either the Convention or its Protocols. This is borne out by several recommendations of the Assembly of the Council of Europe on the right of asylum (see Recommendation 293 (1961), Texts Adopted, 30th Ordinary Session, 21-28 September 1961, and Recommendation 434 (1965), Yearbook of the Convention, Vol. 8, pp. 56-57 [1965]) as well as a subsequent resolution and declaration of the Committee of Ministers (see Resolution 67 (14), Yearbook of the Convention, Vol. 10, pp. 104-105 [1967], and Declaration on Territorial Asylum, adopted on 18 November 1977, Collected Texts, 1987 edition, p. 202).

103. In its Cruz Varas judgment of 20 March 1991 the Court held that expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned (Series A no. 201, p. 28, paras. 69 and 70).

B. Application of Article 3 (art. 3) in the circumstances of the case

1. Arguments presented by those appearing before the Court

104. The applicants claimed that, at the time of their removal, there were substantial grounds for fearing that they would be subjected to treatment in breach of Article 3 (art. 3) on their return to Sri Lanka. They rejected the argument that the general interest should be taken into account in assessing this question. Reference was made to the deteriorating security situation in Sri Lanka which had existed since September 1987 and the strong representations expressing concern at their return which had been made by various organisations (see paragraph 77 above). Furthermore they faced a greater risk of ill-treatment than the population of Sri Lanka generally in the light of their individual experience of ill-treatment in the past and the fact that young male Tamils were especially at risk of being arrested by the security forces on suspicion of having militant sympathies. In the case of the fourth and fifth applicants these risks were increased by having to travel through army checkpoints without identification since they were sent back to Sri Lanka without identity cards.

In substantiation of their allegations they claimed that following their return to Sri Lanka three of them had been detained by the security forces and had been tortured or otherwise ill-treated (see paragraphs 28-29, 43 and 56 above). Moreover, the Adjudicator subsequently found that at the time of the Secretary of State's decision the applicants had had a well-founded fear of persecution and ought to have been granted asylum (see paragraph 71 above).

105. The Government submitted that, in determining whether a State's responsibility is in fact engaged in any particular case, a balance is to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The consequences of finding a breach of Article 3 (art. 3) in the present case would be that all other persons in similar situations, facing random risks on account of civil turmoil in the State in which they lived, would be entitled not to be removed, thereby permitting the entry of a potentially very large class of people with the attendant serious social and economic consequences.

In the Government's view none of the applicants appeared to be especially at risk. The risks were essentially random in nature and were the same as those faced by many other young men in their position caught up in a state of civil disturbance. These risks followed from the general situation in Sri Lanka and were shared by all non-combatants. Further, by February 1988 there had been an improvement in the situation in the north and east of Sri Lanka as was evidenced by the UNHCR programme of voluntary repatriation of Tamil refugees.

The Government had considered carefully all the information available to them and all the representations made to them in the cases of the applicants. In the light of the above factors they had concluded that the applicants had not established that there was a sufficiently high degree of risk of ill-treatment or a sufficiently clear causal link between the removal and any ill-treatment which might have occurred. The decision to remove them could not therefore be said to have been unreasonable or arbitrary.

106. A majority of the Commission had reached a similar conclusion, finding that the general instability in Sri Lanka created risks for all non-combatants in certain areas and that the applicants did not have to face greater personal risks on their return in February 1988.

2. The Court's examination of the issues

(a) General approach to assessing the risk of ill-treatment

107. In its Cruz Varas judgment of 20 March 1991 the Court noted the following principles relevant to its assessment of the risk of ill-treatment (Series A no. 201, pp. 29-31, paras. 75-76 and 83):

(1) In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu;

(2) Further, since the nature of the Contracting States' responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears;

(3) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum, is, in the nature of things, relative; it depends on all the circumstances of the case.

108. The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 (art. 3) at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe (see the Soering judgment of 7 July 1989, Series A no. 161, p. 34, para. 88). It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka in

the light of the general situation there in February 1988 as well as on their personal circumstances.

(b) Whether the removal of the applicants exposed them to a real risk of inhuman treatment

109. In the light of the Commission's report and the observations thereon by the applicants and the Government it seems clear that by February 1988 there was an improvement in the situation in the north and east of Sri Lanka - the main areas of disturbance. The IPFK had, in accordance with the Accord of July 1987, taken over from the Sinhalese dominated security forces in these areas and the major fighting at Jaffna had ended.

Although large parts of the country remained quiet, occasional fighting still took place in the north and east of Sri Lanka between units of the IPKF and Tamil militants who rejected the Accord. In these areas there was a persistent threat of violence and a risk that civilians might become caught up in the fighting (see paragraphs 74-75 above).

110. Nevertheless, the UNHCR voluntary repatriation programme which had begun to operate at the end of December 1987 provides a strong indication that by February 1988 the situation had improved sufficiently to enable large numbers of Tamils to be repatriated to Sri Lanka notwithstanding the continued existence of civil disturbance. It also appears that many others returned by their own means (see paragraph 76 above).

111. The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants (see paragraphs 10, 22 and 33 above). A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3 (art. 3).

112. It is claimed that the second, third and fourth applicants were in fact subjected to ill-treatment following their return (see paragraphs 28-29, 43 and 56 above). Be that as it may, however, there existed no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way.

113. In addition, the removal to Sri Lanka of the fourth and fifth applicants without identity cards is open to criticism on the basis that it was likely to make travelling more difficult for them because of the existence of numerous army checkpoints. It cannot be said however that this fact alone exposed them to a real risk of treatment going beyond the threshold set by Article 3 (art. 3).

114. The Court also attaches importance to the knowledge and experience that the United Kingdom authorities had in dealing with large numbers of asylum seekers from Sri Lanka, many of whom were granted leave to stay, and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the current situation in Sri Lanka and the position of the Tamil community within it (see the above-mentioned Cruz Varas judgment, Series A no. 201, p. 31, para. 81, and paragraphs 5, 17, 34, 46, 57, 77-79 and 97 above).

115. In the light of these considerations the Court finds that substantial grounds have not been established for believing that the applicants would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3 (art. 3) on their return to Sri Lanka in February 1988.

116. Accordingly, there has been no breach of Article 3 (art. 3).

II. ALLEGED BREACH OF ARTICLE 13 (art. 13)

117. The applicants further alleged that they had no effective remedy in the United Kingdom in respect of their Article 3 (art. 3) complaint as required by Article 13 (art. 13) which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

118. In their submission, in judicial review proceedings the courts do not control the merits of the Secretary of State's refusal of asylum but only the manner in which the decision on the merits was taken. In particular, they do not ascertain whether the Secretary of State was correct in his assessment of the risks to which those concerned would be subjected. Moreover, the courts have constantly stated that in reviewing the exercise of discretion in such cases they will not substitute their views on the merits of the case for that of the Secretary of State.

The applicants accepted that judicial review might be an effective remedy where, as in the Soering case (above-mentioned judgment of 7 July 1989, Series A no. 161), the facts were not in dispute between the parties and the issue was whether the decision was such that no reasonable Secretary of State could have made it. However, this was not so in their case where the question of the risks to which they would be exposed if sent back to Sri Lanka was the very substance of the dispute with the Secretary of State.

119. The Commission agreed with the applicants, observing that in asylum cases judicial review of the reasonableness of the asylum seekers' fear of persecution should be a thorough one.

120. The Government considered that judicial review proceedings provided an effective remedy in respect of a complaint under Article 3 (art. 3) as the Court had found in its Soering judgment (loc. cit., pp. 46-48, paras. 116-124), there being no material difference in that respect between that case and the present one. It was not accepted that the evidential issues in the Soering case were less complex or that there was no dispute between the parties as to the risk of the applicant facing inhuman and degrading treatment. In both cases the issues were the same, namely, whether there existed a real and substantial risk that the applicants would be exposed to inhuman and degrading treatment. It was open to the applicants on the basis of objections now advanced to the Secretary of State's decisions to challenge those decisions, on the ground of "Wednesbury unreasonableness" but they did not do so. Judicial review on this ground does have the effect of controlling the merits of the Secretary of State's decision, as illustrated by the Bugdaycay Jeyakumaran and Yemoh cases (see paragraph 91 above), and is, in the circumstances, a sufficient means of doing so.

121. It is not disputed before the Court that the applicants' claim under Article 3 (art. 3) was an "arguable" one on its merits (see, inter alia, the Boyle and Rice judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

122. Article 13 (art. 13) guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order (ibid.). Its effect is thus to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see, inter alia, the above-mentioned Soering judgment, Series A no. 161, p. 47, para. 120). However, Article 13 (art. 13) does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in conforming to their obligations under this provision. Nor does the effectiveness of a remedy for the purposes of Article 13 (art. 13) depend on the certainty of a favourable outcome for the applicant (see the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 18, para. 50).

123. In its Soering judgment of 7 July 1989 (loc. cit., pp. 47-48, paras. 121 and 124) the Court considered judicial review proceedings to be an effective remedy in relation to Mr Soering's complaint. It was satisfied that the English courts could review the "reasonableness" of an extradition decision in the light of the kind of factors relied on by the applicant before the Convention institutions in the context of Article 3 (art. 3). In particular, it noted that in judicial review proceedings a court may rule the exercise of executive discretion unlawful on the ground that it is tainted with illegality, irrationality or procedural impropriety and that the test of "irrationality" on

the basis of the "Wednesbury principles" would be that no reasonable Secretary of State could have made an order for surrender in the circumstances. Further, according to the United Kingdom Government, a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.

124. The Court does not consider that there are any material differences between the present case and the Soering case which should lead it to reach a different conclusion in this respect.

125. It is not in dispute that the English courts are able in asylum cases to review the Secretary of State's refusal to grant asylum with reference to the same principles of judicial review as considered in the Soering case and to quash a decision in similar circumstances and that they have done so in decided cases (see paragraphs 89-91 above). Indeed the courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk (see paragraph 91 above). Moreover, the practice is that an asylum seeker will not be removed from the United Kingdom until proceedings are complete once he has obtained leave to apply for judicial review (see paragraph 92 above).

126. While it is true that there are limitations to the powers of the courts in judicial review proceedings (see paragraphs 89-92 above) the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13 (art. 13).

127. The applicants thus had available to them an effective remedy in relation to their complaint under Article 3 (art. 3). There is accordingly no breach of Article 13 (art. 13).

FOR THESE REASONS, THE COURT

1. Holds by eight votes to one that there has been no violation of Article 3 (art. 3);

2. Holds by seven votes to two that there has been no violation of Article 13 (art. 13).

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 October 1991.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) the partly dissenting opinion of Mr Walsh joined by Mr Russo;

(b) the dissenting opinion of Mr Russo.

J. C.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE WALSH JOINED BY JUDGE RUSSO

1. In my opinion the applicants' claim that there has been a breach of Article 13 (art. 13) of the Convention is well founded. The comparison of the present case with the Soering case is not well founded. In the latter case there was no disputed question of fact whereas in the present case the facts were in dispute. Judicial review does not exist to resolve such disputed issues. The purpose and extent of judicial review in the English courts is exclusively a matter for English law. I believe that the principles governing the exercise of that remedy are clearly set out in the following decisions of the English courts.

The Chief Constable of North Wales Police v. Evans (1982) 1 WLR p. 1155, per Lord Brightman at pp. 1173-1174:

> "Judicial review is concerned, not with the decision, but with the decision making procedure. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power .... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

In the same case the Lord Chancellor, Lord Hailsham, said at p. 1160:

> "But it is important to remember in every case that the purpose of the remedies (of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

One of the grounds on which the decision making process may be subject to judicial review is where it exercises a power it has in so unreasonable a manner that the exercise becomes open to review on what in English law are known as the "Wednesbury principles" and frequently have been referred to with approval in the House of Lords and the Court of Appeal. The case from which they derive their name was Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948 1 KB 223, Per Lord Greene M.R. at pp. 230, 233):

> "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could have ever come to it, then the courts can interfere."

In the Council of Civil Service Unions v. Minister for the Civil Service (1984 3 A.E.R. 935) Lord Diplock said of the Wednesbury test:

> "It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." (at p. 921)

In short the decision must be one which is indefensible for being in the teeth of plain reason and common sense and is plainly and unambiguously

so. In the Wednesbury case it was stated that to prove a case of that kind "would require something overwhelming".

In the present case the claim of the U.K. Government that judicial review "controls" the decision of the immigration authorities must be qualified by the fact that in English law judicial review controls only the procedure and not the merits of the impugned decision.

This case was ultimately decided by the Adjudicator in favour of the applicant by an examination of the merits. Judicial review could not have entered into any examination of the merits for the purposes of deciding on the merits. An examination of the merits could only have been undertaken for the purposes of dealing with any claim that the immigration decision fitted within the criteria of unreasonableness or outrage referred to in the English cases above cited. That "would require something overwhelming" and nobody has claimed that any such overwhelming evidence of unreasonableness or outrageousness exists in the present case.

2. The national authority envisaged by Article 13 (art. 13) of the Convention is one before which an effective remedy can be obtained for a violation of the rights and freedoms set forth in the Convention. Judicial review cannot grant any relief simply on the grounds that the facts of any given case disclose a breach of the Convention. It may well be that in some cases in which there has in fact been such a breach judicial review may be available to set aside the decision impugned on the grounds that a fatal procedural defect in English law has been proved but this latter ground would be the sole ground. In such a case the existence of a breach of the Convention would be simply a coincidence. The English courts will not review a decision by reason only of the fact that the deciding authority failed to consider whether or not there was a breach of the Convention (see the Soering judgment of 7 July 1989, Series A no. 161, pp. 18-19, para. 35). The view of the Court on the effectiveness of judicial review expressed at para. 121 of the latter judgment can only be understood in the light of the circumstances of that case because there was no essential question of fact in issue and if there had been judicial review it would not have involved any disputed question of fact or any of the merits of that case. It was theoretically possible, but never put to the test, that the English courts would, as a matter of English law, regard "the death row phenomenon" as being so barbarous that any Secretary of State permitting such an extradition would have (in the words of Lord Diplock) reached a decision which was "so outrageous in its defiance of ... accepted moral standards" that it would have to be set aside as a matter of law on the grounds that it was one that no reasonable authority could have arrived at it. If such an event had occurred in the English courts that would have been the end of the affair and there would have been no breach of Article 3 (art. 3) and the matter would not have reached the Convention organs. If such an application for judicial review had been unsuccessful the matter would ultimately have been

decided by the Court as it did and judicial review would not have been held to satisfy Article 13 (art. 13).

3. It appears to me that a national system which it is claimed provides an effective remedy for a breach of the Convention and which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13 (art. 13).

4. I agree with the majority of the Court that there has been no violation of Article 3 (art. 3).

DISSENTING OPINION OF JUDGE RUSSO

(Translation)

I share the opinion of the minority of the Commission and take the view that there has been a violation of Article 3 (art. 3) of the Convention in the present cases for the following reasons:

Article 3 (art. 3) forms part of the "hard core" of the Convention and does not permit of derogation, even in the circumstances covered by Article 15 (art. 15): it is therefore necessary to make every effort to ensure that the scope of a right of such fundamental importance for the protection of human rights is not restricted.

I am not unmindful of the fact that the refugee question is one which concerns all the countries of Europe and even of the world: my country - Italy - very recently experienced a difficult situation with more than 20,000 Albanians seeking political asylum. A balance has to be struck between the general interest of the host country and the individual interests of asylum seekers.

National authorities cannot be required to accept a group solely because its members belong to a minority; that would generate problems of a dimension far exceeding the real capacities of the States. In the present case therefore, even though they belong to a minority which has in fact been persecuted, it cannot be asserted that all the Tamils have the right to be accepted. However, on the facts of these cases, as indeed the minority of the Commission stressed in its separate opinion, "even on the Government's analysis of the situation in Sri Lanka in February 1988 the applicants faced a real risk of severe ill-treatment on return to that country". This conclusion is confirmed by the opinions of associations or organisations especially well- qualified in this field, such as the British Refugee Council, the Office of the United Nations High Commissioner for Refugees or Amnesty International. The Adjudicator recognised that the applicants' arguments were valid and the Government drew the correct conclusions from this by paying the applicants' travel expenses for their return. They therefore ran a real risk of persecution and threats to their person.

I accordingly have no doubt that there has been a violation of Article 3 (art. 3) of the Convention.

I have also voted for a violation of Article 13 (art. 13), for the reasons given by Judge Walsh in his dissenting opinion.