[HOUSE OF LORDS]

BUGDAYCAY . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT

NELIDOW SANTIS . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT

NORMAN . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT

[CONSOLIDATED APPEALS]

[On appeal from REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* BUGDAYCAY; REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* NELIDOW SANTIS; REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* NORMAN]

In re MUSISI

1986 Nov. 10, 11, 13;
1987 Feb. 19

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman, Lord Griffiths and Lord Goff of Chieveley

Immigration—Illegal entrant—Refugee—Limited leave to enter on basis of false statement—Non-disclosure of intention to stay as refugee—Admission on arrest—Application for asylum—Secretary of State refusing application—Whether illegal entrant—Whether review of decision on refugee status within court's jurisdiction—Immigration Act 1971 (c. 77), s. 4(1)[1]

Immigration—Refusal of entry—Intention to stay as refugee—Application for asylum—Secretary of State refusing application—Whether right of appeal before removal—Applicant arriving from country other than that where persecution feared—Possibility of refusal of re-entry at country of embarkation and removal to country feared—Whether relevant factor to be taken into account

The appellants B. and N. arrived in the United Kingdom on different dates and gave, unknown to immigration officers,

[1] Immigration Act 1971, s. 4(1): "The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(*a*) (whether as regards duration or conditions), shall be exercised by the Secretary of State; and, unless otherwise allowed by this Act, those powers shall be exercised by notice in writing given to the person affected, except that the powers under section 3(3)(*a*) may be exercised generally in respect of any class of persons by order made by statutory instrument."

S. 13(3): ". . . and a person shall not be entitled to appeal against a refusal of leave to enter so long as he is in the United Kingdom, unless he was refused leave at a port of entry and at a time when he held a current entry clearance or was a person named in a current work permit."

untrue reasons for their coming here. Both were granted temporary leave to stay but stayed on without making any application for an extension. After they were arrested they admitted that they had not told the truth and had, in fact, hoped to stay here. Neither of them wanted to return to his country for fear of being arrested for political activities. The chief immigration officer decided to treat them as illegal entrants within section 33(1) of the Immigration Act 1971. They applied for asylum but after inquiries the Secretary of State decided that they did not have a valid claim to asylum. The appellant, S., told the immigration officer on entry that he wanted to spend 15 days in the United Kingdom on holiday, but eight days later he made an application for asylum. He admitted during subsequent interviews that he had not told the immigration officer the truth because from the outset his intention was to apply for asylum. The Secretary of State refused his application and he was treated as an illegal entrant by immigration officers. B., N. and S. applied for leave to apply for judicial review under R.S.C., Ord. 53, r. 3(2), seeking certiorari to quash those decisions. Taylor J. and Woolf J. dismissed those applications. Their appeals, which were heard together, were dismissed by the Court of Appeal.

The appellant M. was temporarily admitted to the United Kingdom pending a decision upon his application for leave to enter as a visitor from Kenya. His application was refused but he thereupon applied for asylum as a refugee from Uganda. He alleged that he would not be allowed to re-enter Kenya but would be removed to Uganda where he believed that he would be killed. His advisers informed the Minister of State that they had received confirmation from a senior diplomatic representative of Kenya that M. was unlikely to be permitted to re-enter that country and in that event would be removed to Uganda. The Secretary of State did not seek to verify that statement but refused M. leave to enter on the grounds that he was not a genuine refugee. M.'s application for judicial review of the decision was dismissed and his appeal against that refusal was dismissed by the Court of Appeal.

On the appeals, which were heard together:—

Held, (1) dismissing the appeals of B., N. and S., that the question whether an applicant was a refugee entitled to asylum was a matter to be determined by the immigration officers or the Secretary of State when exercising their powers under section 4 of the Immigration Act 1971 in deciding whether to grant an applicant leave to enter or remain; that a claim to refugee status was only one of many questions to be determined in granting or refusing leave and there was no ground for treating it as an exception to the statutory provision in section 13(3) of the Act that decisions refusing leave to enter were not subject to appeal while the applicant remained in this country; that if the United Nations' recommendations required an applicant for refugee status to remain pending an appeal against a refusal of leave to enter that would be contrary to the express provisions of section 13(3) of the Act and an illegal entrant could not be in any different or better position than one who had been refused entry and that, accordingly, B., N. and S. were not entitled to remain in the United Kingdom pending appeals against refusal of refugee status (post, pp. 522D—523B, 524F—525B, 537A–E); that, further, where entry had been gained

on the basis of untrue statements of facts, the immigration officers were entitled to treat such persons as illegal entrants upon discovery of the true facts and it was not open to them to contend that had they given the true facts to the immigration officer he might have given them leave to enter (post, p. 525B–F).

Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74, H.L.(E.) considered.

(2) Allowing the appeal of M., that although the question whether there was a danger that the removal of a person claiming refugee status to a third country would result in his return to the country where he feared persecution lay exclusively within the jurisdiction of the Secretary of State, that question had not been adequately considered by him in relation to M. and the decision to remove him having been made without considering the evidence adduced of such danger, the order would be quashed (post, pp. 533G—534B, 537G—538B).

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, C.A. applied.

Decision of the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1986] 1 W.L.R. 155; [1986] 1 All E.R. 458 affirmed.

Decision of the Court of Appeal in *In re Musisi* reversed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74; [1983] 2 W.L.R. 321; [1983] 1 All E.R. 765, H.L.(E.)

The following additional cases were cited in argument:

Reg. v. Immigration Appeal Tribunal, Ex parte Enwia [1984] 1 W.L.R. 117; [1983] 2 All E.R. 1045, C.A.

Reg. v. Immigration Appeal Tribunal, Ex parte Muruganandarjah, (unreported), 16 July 1984; Court of Appeal (Civil Division) Transcript No. 300 of 1984, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Jayakody [1982] 1 W.L.R. 405; [1982] 1 All E.R. 461, C.A.

Simsek v. Minister for Immigration and Ethnic Affairs (1982) 40 A.L.R. 61

APPEALS from the Court of Appeal.

These were consolidated appeals by (1) Huseyin Bugdaycay, Michael Nelidow Santis and Daniel Tawiah Norman from the order of the Court of Appeal (Oliver, Neill and Balcombe L.JJ.) [1986] 1 W.L.R. 155 dismissing their appeals, which were heard together, against orders of Woolf J. dated 24 January 1984 in Norman's case and of Taylor J. dated 28 June 1985 in Bugdaycay and Nelidow Santis's cases, refusing their applications for judicial review of decisions of the Secretary of State for the Home Department refusing each of the appellants asylum and of decisions of immigration officers in each case to treat the appellants as illegal entrants under the Immigration Act 1971 and (2) Herbert Crispian Musisi from the order of the Court of Appeal (Watkins, Purchas and Dillon L.JJ.) on 24 May 1985 dismissing his appeal against the refusal of

Mann J. on 1 November 1984 to grant judicial review of a similar decision of the Secretary of State for the Home Department.

The facts are set out in the opinion of Lord Bridge of Harwich.

Michael Beloff Q.C., Alper Riza and *Andrew Nicol* for the appellants Bugdaycay, Nelidow Santis and Norman. These appeals raise issues as to the impact upon the system of immigration control of the United Kingdom being a party to the Geneva Convention Relating to the Status of Refugees 1951 (Cmd. 9171) and Protocol (1967) relating to the Status of Refugees (Cmnd. 3906) ("the Convention"), and the requirement not to act contrary to those obligations; in particular, whether in consequence thereof, a person who asserts that he is a refugee is entitled to have his claim to be and to be treated as if he were such a refugee examined by the High Court or under the appeals system established by Part II of the Immigration Act 1971. The decisions not to recognise the appellants' status as refugees so as to permit them to remain in the United Kingdom under section 3(1)(*b*) of 1971 and to treat them as illegal entrants and to direct their removal under paragraph 9 of Schedule 2 to the Act of 1971 were unlawful for the following three alternative reasons:

(1) By virtue of the Convention and the Immigration Rules it is a precondition of the exercise by an immigration officer of the power to remove that the intended object of that power is not a person who has the status of a refugee and accordingly fears relevant persecution in the country to which he would be removed. In the case of a dispute as to whether a person is such a refugee it is for the court to determine if his claim to refugee status is well-founded.

(2) A person is an illegal entrant by deception and hence liable to removal only if the immigration authorities would have been bound to refuse leave to enter had he told the truth. If the appellants are refugees (which it is for the court to determine), the falsehoods which it was found they had told (concerning their length of stay and intention to work) would not have precluded them being granted leave to enter and so were not material. Alternatively refugees (unlike other persons subject to immigration control) who enter by deception are not illegal entrants. If the appellants are refugees (which is for the court to determine) their deception in any case would not have made them illegal entrants. [Reference was made to *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 and *Reg. v. Secretary of State for the Home Department, Ex parte Jayakody* [1982] 1 W.L.R. 405.]

(3) The immigration authorities, by deciding to remove the appellants as illegal entrants and not to seek to effect their departure by other means which would have given them a right of appeal, misdirected themselves. The immigration authorities are not obliged to exercise their powers of removal in respect of persons who have obtained leave to enter by means of false representations. They had a discretion to treat the appellants as overstayers or (in relation to the appellant Santis) as an applicant for variation of the terms of his leave to enter. In as much as the appellants claimed to be refugees, that discretion could only reasonably be exercised in the manner set out above. Under article 35 of

the Convention, at the very least the Secretary of State in treating cases of refugees is obliged to take account of the precepts of the Handbook on Procedures and Criteria for Determining Refugee Status (1979) U.N.H.C.R. paragraph 192, which would lead to an appeals procedure.

Andrew Collins Q.C. and *Christa Fielden* for the appellant Musisi. Musisi was on the Home Office's own finding a refugee from Uganda, the country of his nationality, and therefore he cannot be expelled: article 32 of the Convention. Alternatively, the Secretary of State manifestly has not applied his mind to the right question, namely, was the appellant a Ugandan refugee, in which case the matter should be heard again by him. [Reference was made to *Simsek v. Minister for Immigration and Ethnic Affairs* (1982) 40 A.L.R. 61.] There is in any event a right of appeal against both the refusal of leave to enter and the direction that the appellant be removed to Kenya (from where he had arrived in the United Kingdom) by virtue of section 17(1) of the Act of 1971. If the right of appeal by virtue of section 17 is to have any validity, it must be exercisable *before* the relevant would-be entrant has departed: otherwise, it will be too late because he will already have been removed to the country to which he does not want to go. Refugees or asylum seekers will be especially concerned not to be returned to a particular country, so that for them the section 17 appeal is of the greatest importance. Parliament would have recognised this and the dangers of "refoulement" if such an appeal did not exist. The words "unless . . . he is also appealing under section 13(1) [of the Act of 1971]" in section 17(5) must in the circumstances look to the future, a perfectly natural meaning of the phrase. This construction is supported by rule 4(10)(*a*) of the Immigration Appeals (Procedure) Rules: rules 7(3), 14(2)(*b*) and 17(3) recognise the importance of conformity with the Convention and the need to examine very carefully any claim to be treated as a refugee. The words "if at all" in section 17(1) recognise that an appellant may contend that he should not be removed at all if, for example, he is unable to specify an alternative country but can only say that he must not be removed to the proposed country. The decision of the Court of Appeal in *Reg. v. Immigration Appeal Tribunal, Ex parte Muruganandarjah* (unreported), 16 July 1984, is wrong because it fails to appreciate the difference between an appeal against (in that case) a decision to deport and an appeal against removal directions. If leave to enter is refused or it is decided to deport *but* the Secretary of State is unable to find anywhere he can properly send the person in question (see paragraphs 8(1)(*c*) and 10(1) of Schedule 2 to the Act of 1971), he may have to let him stay, not because the refusal of leave or the decision to deport was wrong but because there is no place to which he can be removed. This approach is in accord with that of the Court of Appeal in *Reg. v. Immigration Appeal Tribunal, Ex parte Enwia* [1984] 1 W.L.R. 117. If that proposition is wrong, an appellant can specify any country (whether or not he could in fact ever hope to get there) and would then have a clear right of appeal in which he could raise the refugee issue. Accordingly, the appellant ought to have been given a right of appeal which he could now exercise. (In any event, the removal directions are bad because none of the notices informing the appellant

of them included information about his rights of appeal—whatever the extent of those rights—under section 17.)

John Laws and *Philip Havers* for the Secretary of State. It is accepted that rights of appeal under section 17 of the Act of 1971 are exercisable from within the United Kingdom, but section 17(5) does *not* contemplate that an appeal under section 13(1) against refusal of leave to enter may always be coupled with a section 17 appeal when removal directions have been made, with the consequence that it may be launched and determined while the appellant remains in the United Kingdom. Section 17(5) *bars* removal directions appeals where the directions have been given on refusal of leave to enter *save where the appellant has a right of appeal exercisable from within the United Kingdom in any event*: compare the closing words of section 17(5) with the closing words of section 13(3). The *Muranandarjah* case (unreported), 16 July 1984, was correctly decided. The specification of a destination to which an appellant has not the remotest prospect of travelling as an artificial means of putting an asylum appeal within section 17(1) would be a colourable device. On the point as to any of the removal directions failing to comply with the notices regulations, the point is entirely academic since all the directions have long been spent and the appellant could not in any event be removed without the making of new removal directions.

Turning to the argument that the appellants can rely on article 32 of the Convention as being "lawfully in [the contracting state's] territory," that provision must mean that the person's claim to enter the United Kingdom has been accepted and cannot refer to a person who is merely in the United Kingdom under a temporary arrangement pending a decision or under sufferance pending removal: see paragraph 16 of Schedule 2 to, and sections 1(1), (2) and 11 of, the Act of 1971; and therefore the Convention cannot assist the appellant Musisi.

With regard to paragraph 192 of the 1979 handbook as to the procedures to be adopted by states adhering to the Convention for determination of applications for refugee status, the procedures that are in place for reconsideration by M.P.s' letters clearly are within the spirit of the paragraph 192 recommendations; so it is not accepted that anything in the Secretary of State's treatment of these appellants has been other than loyal to and consistent with the guidance given by the Office of the United Nations High Commissioner for Refugees through the handbook.

Beloff Q.C. replied.

Collins Q.C. in reply. If there is a case where as a matter of fact there is some doubt in the minds of the administrators, there ought to be the granting of formal leave to enter until the matter is resolved, though the Secretary of State undoubtedly has a discretion. The decision whether the appellant Musisi was a refugee was central to the Secretary of State's decision as to whether or not he should be removed. If he is a refugee then article 33 of the Convention will apply and the Secretary of State is bound to consider whether there would be a breach of the terms of the Convention. There is a breach of the Immigration Rules in the

failure to decide whether he was a refugee when the evidence was there to clearly infer that he was.

Their Lordships took time for consideration.

19 February. LORD BRIDGE OF HARWICH. My Lords, these four appeals were heard together by consent of all parties. All are concerned with questions as to the treatment in domestic law of those who claim to be refugees under the Geneva Convention relating to the Status of Refugees 1951 (Cmd. 9171) and Protocol (1967) relating to the Status of Refugees (Cmnd. 3906) ("the Convention"). The background material in the Immigration Act 1971 ("the Act"), the rules made thereunder and the Convention itself is common to all four appeals. The issues which arise in the first three appeals are identical. The issues raised in the appeal of Musisi overlap to some extent with the issues in the first three appeals. The appeal of Musisi, however, raises difficult and entirely distinct issues which will require examination in some detail of the facts peculiar to that case. At the outset it will be convenient to give a brief outline of the facts so far as necessary for the proper examination of the common issues.

The first three appellants separately obtained leave to enter the United Kingdom under the Act. Bugdaycay was granted leave to enter as a student, Santis as a holiday visitor, Norman as a business visitor. In due course each claimed to be entitled to asylum in this country as a refugee from his country of origin. The claim in the case of Santis was made before the expiry of his temporary leave to enter, but the other two only made their claims after the expiry of their leave to enter and after they had been arrested as overstayers. The Secretary of State refused each of the claims to asylum and directions were given in each case for the removal of the appellant as an illegal entrant pursuant to paragraph 9 of Schedule 2 to the Act. Each applied for judicial review. The applications of Bugdaycay and Santis were refused by Taylor J., that of Norman by Woolf J. Their appeals were heard together by the Court of Appeal (Oliver, Neill and Balcombe L.JJ.) and dismissed. A fuller account of the facts which I have very briefly summarised will be found in the judgment of Neill L.J. [1986] 1 W.L.R. 155, 157–158. The appellants now appeal by leave of your Lordships' House.

The appellant Musisi applied for leave to enter as a visitor from Kenya. Pending a decision upon that application he was temporarily admitted to the United Kingdom pursuant to paragraph 21 of Schedule 2 to the Act. His application for leave to enter was refused, but he thereupon immediately applied for asylum as a refugee from Uganda. His temporary admission was extended indefinitely pending consideration of that application. I shall later have to examine the history of his case in detail but at this stage it suffices to say that a final decision was made refusing him leave to enter and directions were given for his removal and return to Kenya in January 1984. His application for judicial review was refused by Mann J. and his appeal against that refusal was dismissed by the Court of Appeal (Watkins, Purchas and Dillon L.JJ.). He too now appeals by leave of your Lordships' House.

A This is the first time your Lordships' House has had to consider the Convention. The questions arising from its impact on domestic law are of undoubted importance both to those claiming refugee status and to the authorities responsible for the operation of the system for the control of immigration established by the Act and rules made thereunder.

The relevant definition of "refugee" in the Convention is

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

The provisions in the Convention of primary importance are the C following:

"Article 32. 1. The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

"Article 33. 1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account D of his race, religion, nationality, membership of a particular social group or political opinion."

The relevant rules laid down by the Secretary of State pursuant to section 3(2) of the Act "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the E United Kingdom of persons required by this Act to have leave to enter" are found in the Statement of Changes in Immigration Rules (1983) (H.C.169). The rules are divided into two sections: Section One, Control on Entry; Section Two, Control after Entry. Paragraph 16 in Section One and paragraph 96 in Section Two, each headed "Refugees," are in identical terms as follows:

F "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 [Cmd. 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."

The paragraphs headed "Asylum" in Sections One and Two are G respectively paragraphs 73 and 134 and provide as follows:

"73. 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 politicial opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person H 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.

"134. A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country 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 such claim is to be carefully considered in the light of all the relevant circumstances."

The primary submission made on behalf of the first three appellants is that the immigration rules prohibit their removal and return to their own countries whence they came unless and until the courts have adjudicated upon and rejected their claim to be refugees from those countries. The argument proceeds by stages. Each claims to be a refugee from the country of his nationality. To return him to that country, therefore, would contravene article 33.1 of the Convention. Paragraph 73 of H.C.169 prohibits removal contrary to the provisions of the Convention. It follows, so it is said, that the Secretary of State cannot give himself power to make a decision leading to a person's removal contrary to the rules by finding as a fact that he is not a refugee, if in truth he is. The conclusion, it is submitted, is that, if the Secretary of State has purported to make such a decision, the court, on an application for judicial review, is not confined to considering whether there was evidence to support the decision of the Secretary of State, but must examine the evidence and make its own decision. Only if the court is satisfied on a balance of probabilities that the person claiming asylum is *not* a refugee, can the decision to remove him to his country of origin be affirmed.

This line of reasoning is said to be supported by analogy by the decision in *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 that when directions given pursuant to paragraph 9 of Schedule 2 to the Act for the removal of an illegal entrant are challenged on an application for judicial review, it is for the immigration officer or the Secretary of State, as the case may be, to establish the fact of illegal entry.

The reason why this argument cannot be sustained is that all questions of fact on which the discretionary decision whether to grant or withold leave to enter or remain depends must necessarily be determined by the immigration officer or the Secretary of State in the exercise of the discretion which is exclusively conferred upon them by section 4(1) of the Act. 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 required by paragraph 73 of H.C.169 to be referred to the Home Office, of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine in dealing with applications for leave to enter or remain in accordance with the rules, as, for example, whether an applicant is a bona fide visitor, student, businessman, dependant etc. Determination of such questions is only open to challenge in the courts on well known

Wednesbury principles [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223]. There is no ground for treating the question raised by a claim to refugee status as an exception to this rule. For the reasons explained at length in the speeches in *Khawaja's* case the court's fundamentally different approach to an order for removal on the ground of illegal entry is dictated by the terms of the statute itself, since the power to direct removal under paragraph 9 of Schedule 2 is only available in the case of a person who is in fact an "illegal entrant."

All four appellants next submit that before their claims to asylum as refugees can be finally refused and before they can be required to leave this country they are entitled, by one route or another, to appeal to the appellate authorities under Part II of the Act. Section 13(1) gives a right of appeal to an applicant against refusal of leave to enter, but section 13 prevents its exercise, subject to exceptions not presently relevant, so long as the intending appellant is in the United Kingdom. Section 14(1) gives a right of appeal to a person who has a limited leave to enter or remain against refusal to vary that leave. Section 15 gives a right of appeal against a decision of the Secretary of State to make a deportation order. Section 17 gives a right of appeal against directions for a person's removal to a particular country on the ground that "he ought to be removed (if at all) to a different country or territory specified by him." At one time Mr. Collins, for Musisi, presented an ingenious argument that section 17 gives to a person claiming asylum who objects to removal to the country named in the directions appealed against, but can specify no other, an effective opportunity to appeal while still in the United Kingdom even though he has been refused leave to enter. A careful reading of section 17(5), however, shows, as Mr. Collins in due course accepted, that, in the case of a person refused leave to enter, an appeal against removal directions lies only in three exceptional cases, none of which is applicable to Musisi.

A further argument advanced in the written case for Musisi, of which Mr. Collins was not the author, but which he did not feel he could properly abandon, was that the necessary reference to the Home Office for decision pursuant to paragraph 73 of H.C.169 of a claim to asylum should be taken as the grant, by implication, of temporary leave to enter, giving the person claiming asylum a right of appeal under section 14(1) against a refusal to extend that leave. This is, however, wholly inconsistent with the language of the concluding sentence of paragraph 73: "Leave to enter will not be refused . . . etc."

The main argument on this aspect of the case was advanced on behalf of the first three appellants by Mr. Beloff. He draws attention to article 35 of the Convention, whereby "contracting states undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions." The Office of the United Nations High Commissioner for Refugees (U.N.H.C.R.) published in 1979 a "Handbook on Procedures and Criteria for Determining Refugee Status." From paragraph 192 of that publication we learn that in 1977 the Executive Committee of the High Commissioner's Programme recommended that the procedures to be adopted by states adhering to

the Convention for determination of applications for refugee status should satisfy certain basic requirements. The relevant recommendations read as follows:

> "(iii) There should be a clearly identified authority—wherever possible a single central authority—with responsibility for examining requests for refugee status and taking a decision in the first instance. . . .
> "(vi) If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
> "(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending."

It is submitted that the basic requirements set out in paragraphs (vi) and (vii) can only be satisfied if an unsuccessful applicant is accorded a right of "appeal . . . according to the prevailing system," which in the United Kingdom must mean an appeal to the appellate authorities under Part II of the Act, exercisable before he is required to leave the country. Removal of the appellants as illegal entrants would deprive them of any such right of appeal. On the other hand the alternative course of making deportation orders in the case of Bugdaycay and Norman and simply refusing to extend leave to remain in the case of Santis, would have opened an avenue of appeal in each case in which the decision of the Secretary of State could have been challenged. In deciding to proceed against them as illegal entrants and neglecting the alternative, the Secretary of State, it is submitted, must have failed to have regard to the recommendations of the Executive Committee of the High Commissioner's Programme.

My Lords, there was some discussion in the courts below of the question whether the practice of the Home Office complied with recommendation (vi). I express no opinion on that question, since it is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law.

The fact that the first three appellants are proposed to be removed summarily as illegal entrants obscures the true implication of the argument advanced by Mr. Beloff on their behalf. If the effect of the 1977 recommendations were to require the Secretary of State to treat every applicant for refugee status in such a way as to enable the application, if initially unsuccessful, to be tested by way of an appeal under Part II of the Act while the appellant remained in the United Kingdom, this would apply not only to those who had secured entry illegally, but to every applicant for refugee status who, on arrival in this country, was refused leave to enter. The result would then be that the Secretary of State's duty to act in conformity with the obligation of the

A United Kingdom under the Convention to co-operate with the Office of the U.N.H.C.R. and to have regard to the recommendations made by the Executive Committee in 1977 would override the express terms of section 13(3) of the Act, which prohibits an appeal against refusal of leave to enter so long as the intending appellant is in the United Kingdom. This is plainly untenable. It is equally plain that a person who has secured entry illegally can be in no better position in this regard B than a person refused leave to enter. Mr. Beloff's argument must therefore be rejected.

The first three appellants finally challenge the decision to remove them summarily by direction under paragraph 9 of Schedule 2 on the ground that they are not illegal entrants. It is common ground that each committed an offence under section 26(1)(*c*) by misrepresenting to an C immigration officer on arrival in this country the true nature and purpose of his visit. It is submitted, however, that the misrepresentations were not material, since the appellants would not necessarily have been refused leave to enter if they had originally claimed to enter as refugees.

After setting out the argument and the citations from authority on which this submission relies for support, Neill L.J. disposed of it in the following paragraphs [1986] 1 W.L.R. 155, 160–161:

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> "In my judgment it is impermissible to extend the concept of material facts so as to allow an intending entrant to seek leave to enter for a particular purpose on the basis of a statement of particular facts and then later, on admitting that the purpose had been misrepresented and the facts had been misstated, to contend he was not an illegal entrant because if he had told a different story E and had put forward a different reason for his visit he might well have been given leave.
>
> "The question whether facts are material or decisive has to be answered in the context of the leave which was in fact given. The Act of 1971 makes this clear. Thus the appellants were seeking to enter the United Kingdom by making statements or making representations to the immigration officers which they knew to be F false or did not believe to be true. The misstatements or misrepresentations were not on matters of detail but constituted versions of the appellants' intentions which were in fundamental respects at variance with the truth. The decisions that these appellants were illegal entrants appears to me to be unassailable."

G I cannot improve on this reasoning with which I agree and which I gratefully adopt.

I would, therefore, dismiss the first three appeals.

The case of Musisi raises first a distinct issue of law. The decision to refuse him leave to enter was not based on the denial of his claim to refugee status quoad Uganda, which is the country of his nationality, but on a conclusion by the Secretary of State that, even if he is properly to H be treated as a refugee from Uganda, within the definition of "refugee" under the Convention, this presents no obstacle to his return to Kenya whence he came to this country. The primary submission made by Mr. Collins on his behalf is that, if he is a refugee, as is to be assumed, he is

protected not only by article 33.1 of the Convention against return to the country where he fears persecution, but also by article 32.1 against return to any other country because he is now "lawfully in [the] territory" of the United Kingdom and cannot, therefore, be expelled save on grounds of national security or public order. The temporary admission pursuant to paragraph 21 of Schedule 2 to the Act of an applicant for leave to enter pending a decision on his application has the effect, it is submitted, of making the applicant's presence in the United Kingdom lawful for the purpose of his entitlement to the protection of article 32.1 of the Convention.

Section 11(1) of the Act provides:

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

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

The United Kingdom was already a party to the Convention when the Act was passed and it would, to my mind, be very surprising if it had the effect contended for. But I am satisfied that the deeming provision enacted by section 11(1) makes Mr. Collin's submission on this point quite untenable.

My Lords, I now turn to the most difficult issue, which arises from the unusual facts in the case of Musisi. The question is whether there is any available ground on which the discretionary administrative decision to remove the appellant to Kenya can properly be challenged in judicial review proceedings. Not the least surprising feature of the case is that this question was raised for the first time in your Lordships' House. The different counsel who appeared for the appellant in the courts below advanced only a single argument which has now been abandoned, but, furthermore, the very experienced counsel appearing before Mann J. expressly disclaimed any challenge to the decision of the Secretary of State on *Wednesbury* principles ([1948] 1 K.B. 223). Nevertheless, a

A detailed examination of the way in which the application made by the appellant for asylum was dealt with by the immigration authorities gives cause for grave concern.

The appellant Musisi arrived at Heathrow airport on a flight from Nairobi on 23 January 1983. He sought leave to enter the United Kingdom for the purpose of visiting his two half sisters, both now settled in the United Kingdom and one of whom was his sponsor. He and his B sponsor were both interviewed by an immigration officer on the day of his arrival. There were discrepancies in what they told the officer, who was not satisfied and decided to make further inquiries. The appellant was granted temporary admission until 26 January. On that day he was again interviewed by another immigration officer and the decision was then taken to refuse him leave to enter as a visitor. His temporary C admission was extended to the following day when he was to be removed by the airline with which he had arrived.

On the morning of 27 January, however, a claim by the appellant to political asylum as a refugee from Uganda was communicated to the Home Office on his behalf by the United Kingdom Immigration Advisory Service. This resulted in a further extension of the appellant's temporary admission "pending further consideration of your case" which remains in D operation to this day.

Nothing, I think, now turns on any inaccuracies or discrepancies in the account which the appellant gave of himself when posing as an intending visitor, save that his omission to claim political asylum in the first instance has naturally engendered a degree of scepticism about the claim. But the appellant has always put forward the explanation that he E had been advised to try to gain entry as a visitor and then to seek asylum through the "refugee office" in London, which seems not to be wholly implausible and which, so far as the evidence shows, has not been rejected by the Home Office as untrue.

On 27 January 1983 the appellant was interviewed in connection with his claim to asylum by an immigration officer at Heathrow. This was an interview of first importance, since it was the only occasion in these F protracted proceedings when the appellant was ever questioned face to face by an official acting on behalf of the Secretary of State. The immigration officer gives an account of this interview in an affidavit sworn in the proceedings and also exhibits his contemporary notes in a document entitled "Political Asylum Interview Questionnaire." I shall endeavour to extract from these discursive documents a summary of the G relevant factual information presented by the appellant. He was born on 30 June 1960. He was educated in Uganda until 1973. In 1973 his father fled from Uganda to Kenya, but was arrested there and returned to Uganda. He was never seen again and was believed to have been murdered by the Ugandan Secret Police. The appellant and his mother were in Kenya from 1974 to 1979 where the appellant continued his schooling. They both returned to Uganda in 1979. The mother left in H 1980 to return to Kenya once more where she has since remained. Other siblings are also in Kenya. The appellant's two half sisters, now in England, had been harrassed by soldiers in Uganda. I interpolate that, according to the appellant's own affidavit, he was in 1982 living in

Uganda with an aunt and two cousins. At about this time he told the immigration officer that he was himself accused of being a guerilla and beaten up. One of his cousins was arrested and taken to a barracks where he died of injuries inflicted on him. Before he died he gave the authorities particulars of his friends and relatives including the appellant. His other cousin had since been arrested and killed. The appellant feared the same fate awaited him in Uganda if he returned. The appellant last left Uganda in June 1982. He claimed that he had applied or attempted to apply for political asylum in Kenya but had been unsuccessful. His temporary permit to remain in Kenya would expire on 5 March 1983.

In his contemporary note of the interview with the appellant the immigration officer writes:

> "The passenger is an educated, intelligent, plausible individual who comes from the upper strata of Ugandan society. He would have me believe that Uganda is still a turbulent and violent country and should he return there he feels his life would be in danger. Significantly he did not claim political asylum upon his arrival in the U.K. but sought to pass himself off as a bona fide visitor who was coming for a three week visit to see his sisters."

In the final paragraph he concludes:

> "The passenger appeared in good health, was alert and confident at interview. My feelings are that he is moving away from Uganda because a better life awaits him somewhere else. Perhaps our people in Kampala can give a report on the current political, social and law and order position at present pertaining in Uganda."

In his affidavit sworn 18 months later the immigration officer expresses his conclusion differently in the following paragraph:

> "I formed the view that the applicant, who appeared to be in good health, was alert and confident at interview, was moving away from Uganda because a better life awaited him somewhere else and that this was not a genuine application for asylum."

I find it strange that such an important interview as this should be entrusted to an immigration officer at the port of entry with no knowledge of conditions in the country of origin of a claimant for asylum. It seems even stranger that having suggested that local conditions should be investigated, presumably with the object of assessing the background to the claim for asylum, the interviewer should later assert that he was in a position to, and did, reject it as not being genuine. Fortunately this view has never been adopted by the Home Office as the basis for a decision on the appellant's application for leave to enter. The department has, in effect, been content to leave open and undecided the question whether the appellant is a bona fide "refugee" as defined in the Convention. But it does little to inspire confidence in the procedure that the Home Office should have based their further consideration of the case on the immigration officer's report.

The next stage in the consideration of the application for leave to enter is explained in the main affidavit sworn on behalf of the Secretary

of State by Mr. McDowall, a Senior Principal in the Immigration and Nationality Department of the Home Office. Two long paragraphs of his affidavit examine in minute detail various aspects of the appellant's account as reported by the immigration officer casting inferential doubts on various aspects of that account, in particular the appellant's assertion that he had applied for and been refused political asylum in Kenya. The conclusion reached at this stage is expressed in the affidavit as follows:

> "In considering the above mentioned matters due regard was had to the problem of harrassment and intimidation which the applicant and his family had experienced in Uganda, but it was considered to be of significance that the applicant had spent six out of eight years during the period 1974-1982 in Kenya where his mother, a brother and two sisters reside and where he had been living for the six months immediately prior to his departure for the United Kingdom. In these circumstances it was concluded that the applicant had come to the United Kingdom from a safe country and that were he to be refused entry then he would not be required to go to Uganda but could return to Kenya instead and his application for asylum in this country was therefore refused."

The formal refusal of the application for asylum and directions for the appellant's removal to Kenya were communicated to the appellant on 12 March 1983. Before these directions were acted on Mr. John Tilley M.P. intervened on the appellant's behalf writing to the Minister of State and enclosing a long statement by the appellant amplifying in considerable detail the account he had given of the persecution of his family in Uganda and of the difficulties he had encountered in seeking to establish a basis on which to remain in Kenya. The Minister of State, in his reply dated 8 July 1983, summarised the history and expressed his conclusion, confirming the decision to refuse the appellant leave to enter, in the phrases I have already quoted from the affidavit of Mr. McDowall that the appellant had come from "a safe country" and "would not be required to go to Uganda but could return to Kenya instead." Fresh directions for the appellant's removal on 21 July were issued but again were not acted on.

This time the appellant's case was taken up by Mr. Stuart Holland M.P.,, who wrote to the Minister of State on 9 August 1983, enclosing a letter dated 30 July from a Mr. Anthony Rose of the Stockwell and Clapham Law Centre who was now acting for the appellant. Mr. Rose wrote:

> "The Home Office's decision to remove Herbert Musisi to Kenya appears to ignore the fact that Mr. Musisi will not be allowed to enter Kenya and will almost certainly be immediately removed to Uganda where he has a well-founded fear that he will be deliberately killed. This is because the situation in Kenya has changed drastically since the troubles last year as a result of which their immigration control has been considerably tightened up. I in fact spoke on the telephone on Tuesday to the First Secretary of the Kenyan High Commission who confirmed that Mr. Musisi could only be given leave to enter Kenya if he possessed a work permit (obtainable only

in similar circumstances to a work permit for the U.K.) or a student visa in which case he would have to have been accepted by an appropriate educational institution for a course of study which he has paid for. She further confirmed that if Mr. Musisi were to arrive in Kenya without permission to enter he would be removed to Uganda."

In his reply, dated 5 October 1983, the Minister of State comments on this letter as follows:

"The enclosed letter suggests that Mr. Musisi might be in danger of being refused entry on his arrival back in Kenya and removed at once to Uganda, but given his residential and family ties with Kenya and the fact that Kenya is a signatory to the 1951 U.N. Convention Relating to the Status of Refugees and would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there, summary removal to Uganda strikes me as unlikely in the circumstances."

The Minister of State's letter goes on to suggest that the appellant should enlist the assistance through the London representative of the U.N.H.C.R. of the Nairobi office of that organisation.

Mr. Rose acted on this suggestion and in further lengthy correspondence, which was submitted to the Minister of State by Mr. Stuart Holland M.P., set out what he had been told by representatives of the U.N.H.C.R. which he regarded as the reverse of reassuring. In his final reply, dated 13 January 1984, the Minister of State contented himself by saying that he did not "accept Mr. Rose's pessimistic interpretation of the advice given by U.N.H.C.R." He confirmed his previous decisions. Notice was given to the appellant, dated 16 January 1984, directing his removal to Kenya by a flight leaving on 19 January 1984. Presumably notice to the Home Office of an intention to apply for judicial review prevented the implementation of these directions. Leave to apply for judicial review in these proceedings was granted on 1 February 1984.

Following the passage to which I have earlier referred, the affidavit of Mr. McDowall gives a short account of the exchanges between the Members of Parliament who intervened on the appellant's behalf and the Minister of State, and concludes as follows:

"It is international practice that where foreign nationals embark from a country other than their own for a third country and that third country refuses them permission to land that they are returned to and accepted by the country from which they embarked and in such circumstances, it is not open to the Kenyan authorities to refuse this applicant leave to enter and should he satisfy the Kenyan authorities that he is indeed a refugee in that he has a well founded fear of persecution for the reasons referred to above then Kenya as a signatory to both the United Nations Convention on the Status of Refugees 1951 and the African Convention on Refugees 1969 is unlikely to return him to Uganda in breach of such international obligations."

In addition to the evidence originally filed in support of the appellant's application for judicial review, two further affidavits sworn in October 1984 were put in evidence. One is by a Ugandan lawyer, now himself a refugee from that country. He gives a long and detailed account of the difficulties experienced in Kenya by Ugandans seeking to establish their status as refugees from their own country and of their frequent repatriation to whatever fate might await them in Uganda. The second deponent is a former Attorney-General and President of Uganda who testifies to the practice of the Kenyan authorities in arresting and repatriating refugees from Uganda. The reply to this evidence is contained in the affidavit of a Mr. Handley, a senior executive officer in the Immigration and Nationality Department of the Home Office. In this affidavit Mr. Handley states, echoing the language used by the Minister of State in his letter of 5 October 1983, that

> "it is the respondent's belief that Kenya as a signatory to the United Nations Convention relating to the status of refugees would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there."

He refers to the evidence alleging repatriation of Ugandan refugees from Kenya and comments as follows:

> "I can say that although it has been the case that Kenya has returned Ugandan nationals to Uganda in the past the respondent has no evidence that this continues to be the case and indeed earlier this year after representations had been made to it by the United Nations High Commissioner for Refugees the Kenyan Government confirmed its position as a signatory to the said Convention."

I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz. that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. 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.

This is not, of course, a case where the claim to refugee status itself is in issue. The decision of the Secretary of State, as already pointed out, proceeds upon the implicit assumption that the appellant has or may have a well-founded fear of persecution in Uganda. Upon this premise to remove him directly to Uganda would be a clear breach of the Convention. The troublesome question is how far the provisions of the Convention, to the extent that they are incorporated in the relevant immigration rules, should be regarded as prohibiting the removal of a

person who is a refugee from the country of his nationality to a third country in the face of an alleged danger that the authorities in that third country will send him home to face the persecution he fears.

My Lords, I can well see that if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the matter. If the person is refused leave to enter the United Kingdom, he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it. This is, I take it, in accordance with the "international practice" of which Mr. McDowall speaks in his affidavit. The practice must rest upon the assumption that all countries which adhere to the Convention may be trusted to respect their obligations under it. Upon that hypothesis, it is an obviously sensible practice and nothing I say is intended to question it. It is not, however, difficult to imagine a case where reliance on the international practice would produce the very consequence which the Convention is designed to avoid, i.e. the return of refugees to the country where they will face the persecution they fear. Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened."

For the sake of illustration, I have necessarily taken cases at opposite ends of a spectrum. In the ordinary case of a person arriving here, from a third country, and claiming asylum as a refugee from the country of his nationality, there will be no ground to apprehend that his removal to the third country whence he comes would put him at risk. But at the other end of the spectrum, the risk may be obvious. Between these two extremes there may be varying degrees of danger that removal to a third country of a person claiming refugee status will result in his return to the country where he fears persecution. If there is some evidence of such a danger, it must be for the Secretary of State to decide as a matter of degree the question whether the danger is sufficiently substantial to involve a potential breach of article 33 of the Convention. If the Secretary of State has asked himself that question and answered it negatively in the light of all relevant evidence, the court cannot interfere.

With these considerations in mind, I return to consider the evidence. Whatever doubts I may entertain as to the sufficiency of the interview by the immigration officer on 27 January 1983 as a basis for subsequent decisions by the Secretary of State, I recognise that the initial decision in March 1983 to return the appellant to the "safe country" from which he had come, could not be faulted. The point in the story at which I first

find grounds to entertain serious doubts as to the basis of the decision, is in the reply by the Minister of State on 5 October 1983 to the representations by Mr. Stuart Holland M.P. In Mr. Rose's letter of 30 July 1983, a senior diplomatic representative of Kenya was reported as stating quite categorically that, if returned to Kenya without permission to enter, the appellant would be removed to Uganda. There is no indication that the Home Office, either directly or indirectly, made any inquiry to verify or controvert this statement or to ascertain whether it was qualified by reference to any possible claim for asylum in Kenya. The statement remains uncontroverted save by implication by the statement in the Minister of State's letter that Kenya is a signatory to the Convention and "would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there."

Even at this stage, however, it would be difficult not to accept the statement by the Minister of State in his letter, effectively repeated in the concluding passage of Mr. McDowall's affidavit, that the appellant's removal to Uganda was "unlikely" as a sufficient and unchallengeable answer to the relevant question which the Secretary of State was bound to ask himself. But it is to be noted in each case that the essential foundation for the assessment was the expressed confidence in Kenya's observation of its obligations under the Convention.

It is the additional evidence filed on behalf of the appellant in October 1984 directly alleging breaches by Kenya of the Convention by the return to Uganda of Ugandan refugees, and more particularly the reply to that evidence filed on behalf of the Seretary of State, which put a different complexion on the matter. The affidavit of Mr. Handley is at worst self-contradictory, at best, ambiguous. He asserts "the respondent's belief" that Kenya, as a signatory to the Convention, "would not knowingly" return Ugandan refugees to Uganda. But the very next sentence seems to amount to an admission that Ugandan refugees have been returned to Uganda by Kenya. If this is not the meaning, I do not understand the relevance, in the context, of the statement that "it has been the case that Kenya has returned Ugandan nationals to Uganda in the past," still less why this should have led to representations to the Kenyan government by the U.N.H.C.R. The inference one is entitled to draw from this obscurely drafted affidavit is that Kenya has at some unspecified time in the past been guilty to an unspecified extent of returning Ugandan refugees to Uganda in breach of article 33 of the Convention and that the breaches were at least sufficient to evoke a protest from the U.N.H.C.R. The reaffirmed belief of the Secretary of State that Kenya "would not knowingly" act in breach of the Convention may perhaps be referable to the Kenyan government's response to the protest "confirming its position as a signatory" to the Convention.

However that may be, I cannot escape the conclusion that the Secretary of State's decisions in relation to the appellant were taken on the basis of a confidence in Kenya's performance of its obligations under the Convention which is now shown to have been, at least to some extent, misplaced. Since Mr. Handley's affidavit does not condescend to particularity we do not know when Kenya's breaches of article 33 in respect of Ugandan refugees occurred or when they came to the

attention of the Home Office. The fact of such breaches must be very relevant to any assessment of the danger that the appellant, if returned to Kenya, would be sent home to Uganda. Since the decisions of the Secretary of State appear to have been made without taking that fact into account, they cannot, in my opinion, now stand.

In point of form the only relief sought by the appellant in his notice of application under R.S.C., Ord. 53, r. 3(2) is an order to quash the removal orders dated 12 March 1983, 13 July 1983 and 16 January 1984. Those orders directed the appellant's removal to Kenya by specified flights on dates now long past. It may be that, even if the appeal had failed, the Secretary of State would have felt obliged to reconsider the issue of the propriety of returning the appellant to Kenya in circumstances which may have changed radically after the lapse of three years. But for the reasons I have given I am of the opinion that the appeal should be allowed and the orders formally quashed.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Templeman. I agree with them, and for the reasons which they give I would dismiss the first three appeals and allow the fourth.

LORD TEMPLEMAN. My Lords, section 1(1) of the Immigration Act 1971 provides that patrials, i.e. persons having the right of abode in the United Kingdom, shall be free to live in, and to come into the United Kingdom without let or hindrance, but by section 1(2) all other persons:

> "may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; . . ."

By section 3(1) a person who is not patrial:

> "(*a*) . . . shall not enter the United Kingdom unless given leave to do so in accordance with this Act; [and] (*b*) . . . may be given leave to enter . . . or . . . remain in the United Kingdom . . . either for a limited or for an indefinite period; . . ."

By section 3(2) the Secretary of State shall from time to time lay before Parliament statements of the rules laid down by him as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the United Kingdom of persons required to have leave to enter.

By section 4(1) the power to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers and the power to give leave to remain in the United Kingdom shall be exercised by the Secretary of State. By section 4(2) the provisions of Schedule 2 to the Act shall have effect with respect to the appointment and powers of immigration officers, the examination of persons arriving in or leaving the United Kingdom, the exercise by immigration officers of their powers in relation to entry into the United Kingdom, the removal from

A the United Kingdom of persons refused leave to enter or entering or remaining unlawfully, and the detention of persons pending examination or pending removal from the United Kingdom.

By paragraph 1 of Schedule 2, immigration officers for the purposes of the Act shall be appointed by the Secretary of State and shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given to them by the Secretary of State. By paragraph B 2, an immigration officer may examine any person who has arrived in the United Kingdom, and by paragraph 8 where a person is refused leave to enter, an immigration officer may give directions for his removal from the United Kingdom. By paragraph 9, an immigration officer may direct the removal from the United Kingdom of an illegal entrant. By paragraph 10, powers of removal are also given to the Secretary of C State. By paragraph 16 and 21, any person liable to be examined or removed, may either be detained or temporarily admitted to the United Kingdom.

Sections 13 to 21 of the Act of 1971 enable any person refused leave to enter or directed to be removed from the United Kingdom to appeal to an adjudicator and from the adjudicator to an appeals tribunal but save in specific and limited cases not material in these proceedings, a D person is not entitled to appeal so long as he is in the United Kingdom.

The restrictions and limitations imposed by the Act of 1971 on entry into and stay in the United Kingdom create a control and regulation of individuals and numbers by the decisions of the immigration authorities, i.e. immigration officers and the Secretary of State. An appeal from a decision lies only to an adjudicator and an appeal tribunal established by E the Act, and then only if the appellant has left the United Kingdom. This is not surprising. The numbers of appellants and possible appellants would not permit all appellants to be released into the United Kingdom or detained pending the completion of the appellate process. If it is necessary to control entry into the United Kingdom, immediate effect must in general be given to the decisions of the immigration authorities unless in any individual case the immigration authorities direct otherwise, F if such control is not to break down.

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

The appellants are not patrial. Three of them are illegal entrants liable to be removed from the United Kingdom under the Act of 1971. The appellant, Mr. Musisi, has been refused leave to enter the United

Kingdom and is also liable to be removed under the Act. The appellants are entitled to appeal to an adjudicator or an appeals tribunal once they have been removed from the United Kingdom but this appellate procedure is useless to them because they all seek to remain in the United Kingdom on the grounds that they fear persecution if they are removed from the United Kingdom. Nevertheless, the courts remain powerless to intervene unless the appellants demonstrate that they are entitled to the protection afforded by the process of judicial review.

The United Kingdom is a signatory to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. Article 1 of the Convention defines a refugee as a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Each of the appellants claims to be a refugee. By article 33 of the Convention, the United Kingdom as a signatory to the Convention, has undertaken not to return:

> "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."

By the Act of 1971, a person who is not patrial but claims to be a refugee must nevertheless obtain leave from the immigration authorities to enter or remain in the United Kingdom and is liable to be removed from the United Kingdom if the immigration authorities do not accept his claim to be a refugee.

By paragraph 73 of the Statement of Changes in Immigration Rules (1983) (H.C.169) laid before Parliament on 9 February 1983 under section 3(2) of the Act of 1971:

> "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."

A Paragraph 16 directs that where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol and nothing in the rules is to be construed as requiring action contrary to the United Kingdom's obligations under those instruments.

It follows that any claim by a person to enter or remain in the United Kingdom on the grounds that he is a refugee must be carefully considered and decided by the Secretary of State. No appeal from the B decision of the Secretary of State denying refugee status lies to the courts and no effective appeal lies to the adjudicator or appeals tribunal established by the Act if the person claiming refugee status is denied that status by the Secretary of State and is removed pursuant to the provisions of the Act of 1971 to the country where, contrary to the view formed by the Secretary of State, he is in fact in danger of persecution.

C The claims of the first three appellants to be refugees have been considered and rejected by the Secretary of State and orders have been made for their removal from the United Kingdom. Mr. Musisi claims to be a refugee but has been refused leave to enter the United Kingdom and his removal has been ordered. The appellants now claim judicial review of the orders for their removal.

The first three appellants contend that the court is entitled and D bound to decide whether they are refugees protected by the Convention and the Protocol but this contention is inconsistent with the Act of 1971 which entrusts to the immigration authorities the right and duty to determine whether any person who is not patrial shall be given leave to enter or remain in the United Kingdom.

In the alternative, these appellants contend that they are entitled to E remain in the United Kingdom until their right to refugee status has been considered by the adjudicator and appeal tribunal system created by the Act of 1971. This contention is inconsistent with sections 13(3) and 16(2) which in the present circumstances deny the appellants power to appeal so long as they are in the United Kingdom.

My noble and learned friend, Lord Bridge of Harwich, has dealt in more detail with the contentions adopted by the appellants. The actions F of a statutory decision-making body may be controlled by the court in judicial review proceedings if there has been a defect in the decision-making process. In the case of Mr. Musisi but not in the case of any of the other appellants, the evidence discloses that there may have been such a defect. The action of an authority entrusted by Parliament with decision-making can be investigated by the court:

G > "with a view to seeing whether they have taken into account matters which ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account": *per* Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 233–234.

H 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 the case of Mr. Musisi, a first reading of the evidence filed on behalf of the Secretary of State and Mr. Musisi,

gives rise to a suspicion that the dangers and doubts involved in sending Mr. Musisi back to Kenya have not been adequately considered and resolved. As a result of the analysis of the evidence undertaken by my noble and learned friend, Lord Bridge of Harwich, I am not satisfied that the Secretary of State took into account or adequately resolved the ambiguities and uncertainties which surround the conduct and policy of the authorities in Kenya. With relief I gratefully concur in the reasoning of my noble and learned friend, Lord Bridge of Harwich, and agree that the orders made in respect of Mr. Musisi should be quashed. The appeals of the other appellants against the refusal of the Court of Appeal and the Divisional Court to quash the orders made against them must be dismissed.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that for the reasons he gives the first three appeals should be dismissed and the fourth appeal allowed.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that for the reasons he gives the first three appeals should be dismissed and the fourth appeal allowed.

Appeals of Bugdaycay, Nelidow Santis and Norman dismissed.
Appeal of Musisi allowed.
Secretary of State to pay Musisi's costs.
Order for legal aid taxation.

Solicitors: Winstanley-Burgess; Fisher Meredith & Partners; Treasury Solicitor.

C. T. B.