CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43844/98
by T.I.
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 7 March 2000 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens,
Mr K. Jungwiert,
Mrs H.S. Greve, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 28 September 1998 and registered on 8 October 1998,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by the German Government and the United Nations High Commissioner for Refugees,

Having regard to the oral submissions of the parties and of the German Government at the hearing on 7 March 2000,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Sri Lankan national, born in 1969 and currently held in Campsfield House Detention Centre, Kidlington, Oxon.

He is represented before the Court by Ms Shabana Khan, a lawyer practising at Sri Kanth & Co., in Wembley, Middlesex.

A. Particular circumstances of the case

1. Facts as presented by the applicant

The applicant lived in Jaffna until May 1995. This area was, and is, controlled by the LTTE, a Tamil terrorist organisation, engaged in an armed struggle for independence.

From 1993 until June 1994, the applicant was forcibly taken by LTTE members, 3-4 times each month, for periods of 2-3 days, to mend their radio equipment. In June 1994, LTTE members came to the applicant's house to search for his cousin who had escaped from the organisation. When they could not find him, they turned their attention to the applicant. They interrogated him but he was unable to tell them of his cousin's whereabouts. He was taken to an LTTE settlement in Vasavilan, where he was held prisoner for more than 3 months. He was made to repair radio equipment, dig bunkers, cook food and on one occasion was beaten when he asked to return home.

In April 1995, the applicant escaped from the LTTE settlement. He left Jaffna with his father, arriving by train in Colombo on 1 May 1995. On 5 May 1995, the applicant was arrested by the Sri Lankan army which raided the rented house where they were staying. They suspected him of being an LTTE member. When his father tried to intervene, he was forcibly restrained by the soldiers. Following this incident, his father died of a heart attack on 6 May 1995.

After being beaten by the soldiers at the house, he was held in detention until 20 September 1995. He was photographed and his measurements taken. He was questioned regularly about his links with the LTTE and referred to as being a “Tiger”. During that time, he was tortured and ill-treated by the soldiers. He was hit about the head by the soldiers, who also banged his head on the wall. He was whipped with an electric cable and, on at least one occasion, he was strung up by his feet with chains from a bar in the ceiling. While he was hanging, the soles of his feet and lower back were beaten with an S-LON pipe (a plastic pipe filled with cement). While in detention, the applicant developed a skin disease which was diagnosed as psoriasis resulting from the overcrowding and poor hygiene in the prison. The applicant was finally released from detention when his uncle paid a bribe.

On release, the applicant went to a skin clinic for treatment. This was in an area controlled by the ENDLF, a pro-Government Tamil group. He was picked up twice by the ENDLF and taken to their camp for questioning about his involvement with the LTTE, being held for one day and seven days respectively. He was beaten on both occasions.

Following the explosion of an oil tanker near his home, the applicant was arrested on 23 October 1995. He was taken to the police station where he was questioned. He was pulled by the hair, chained to the wall by the arms and beaten with truncheons. A heated iron rod

was pressed against his arm which caused him to lose consciousness. He was taken to a different room and questioned by officers of the Criminal Investigation Department who took turns in questioning him while two officers kicked and beat him. He was released on about 25 January 1996 when his uncle bribed a police officer.

2. Asylum proceedings

Shortly after his release, the applicant left Sri Lanka. He arrived in Germany on 10 February 1996. He claimed asylum on 13 February 1996.

In its decision of 26 April 1996, the Federal Office for the Recognition of Foreign Refugees ("the Federal Office") did not make any findings as to whether the applicant had been tortured as alleged, but considered that this was "not relevant regarding the right of asylum. These are excesses of isolated executive organs and cannot be imputed to the Sri Lankan State." In that regard, new Government orders had made clear that such practices were not to be tolerated. It was also found that there was no ground for the applicant to fear persecution as a consequence of his having claimed asylum in Germany.

The applicant's appeal was heard on 21 April 1997 by the Bavarian Administrative Court, Regensburg, and rejected after an oral hearing. The Administrative Court noted that the actions of the LTTE could not be attributed to the State and that the applicant would be sufficiently safe from political persecution if he returned to the south of Sri Lanka. It referred to various measures adopted by the Sri Lankan Government including the ratification of the United Nations Convention against Torture, which was made domestic law in November 1994. While it noted that there was a risk of long term detention for persons suspected before their emigration of membership of the LTTE, an actual terrorist should not be granted asylum. Also, though a risk of detention and ill-treatment by the security forces and army existed in respect of persons suspected of supporting the LTTE, it concluded that the Sri Lankan security forces and army had no reason to suspect the applicant of supporting terrorist activities or LTTE military activities. Any arrests made for the purpose of extorting money did not disclose political persecution but were cases of excesses by individual officials. Furthermore it was of the opinion that the entire presentation of the applicant was a completely fabricated tissue of lies. He was not credible having regard, *inter alia*, to his lack of detail as to his activities as a student in Colombo, the way in which he left all his personal papers behind when he emigrated, and the fact that the letter which he presented in court from his mother was contained in an envelope on which the address was written by another person. It further concluded that there was no obstacle to deportation under Article 53(4) of the Aliens Law, in conjunction with Article 3 of the European Convention on Human Rights, as the pre-condition for this was that there was a threat of individually-specific and serious danger of treatment unconnected with political persecution, which was contrary to human rights or degrading, deriving from State organisations, or that such treatment was attributed to State organisations.

The applicant did not apply for leave to appeal against this decision. He states that his lawyer advised him not to appeal as there were clearly no prospects of success.

On 16 September 1997, the applicant left Germany and travelled to Italy. After one day in Italy, he travelled to the United Kingdom hidden on board a trailer where he arrived on 19 September 1997 and was discovered by immigration officers. On 20 September 1997, he claimed asylum.

On 15 January 1998, the United Kingdom Government requested that Germany accept responsibility for the applicant's asylum request pursuant to the Dublin Convention. On 26 January 1998, Germany agreed. On 28 January 1998, the Secretary of State issued a certificate under section 2 of the Asylum and Immigration Act 1996 and directed the applicant's removal to Germany. He refused to examine the substance of the applicant's asylum claim.

On 10 February 1998, the applicant applied for judicial review. On 19 March 1998, Mr Justice Jowitt refused leave. On 17 April 1998 the applicant was released from detention.

On 28 April 1998, the applicant applied to the Court of Appeal, complaining of the approach of the German authorities to the standard of proof and application of the Geneva Convention. His renewed application was granted by the Court of Appeal which decided to determine the substantive application. In its judgment given on 10 June 1998, the Court of Appeal held that the Secretary of State was entitled to conclude that the German authorities do not adopt an approach which was outside the range of responses of a Contracting State acting in good faith to implement its obligations under the Convention. It noted that care had to be taken not to subject the approach adopted in other States to an over technical comparison. The higher recognition rate in Germany for Sri Lankan asylum-seekers undoubtedly supported the Secretary of State's opinion. Since he had taken reasonable steps to inform himself of the position in Germany by obtaining the opinion of Professor Dr Kay Hailbronner, a distinguished German lawyer who had been legal counsel for the Federal Government in asylum and immigration law and a judge of an administrative appeal court and Director of the Centre for International and European law on immigration and asylum, no more was required of him.

On 22 July 1998, the applicant's application for leave to petition the House of Lords was refused. On 6 August 1998, the Secretary of State refused to exercise his discretion to grant leave to remain in the applicant's favour on compassionate grounds. On 13 August 1998, the applicant was again placed in detention.

On 19 August 1998, the Secretary of State informed the applicant that he was satisfied that Germany was a safe third country. He noted that it was well-established that the German authorities were under a legal obligation to look at any new material placed before them. On 19 August 1998, removal directions to Germany were issued.

On 22 September 1998, Dr Michael Peel of the Medical Foundation for the Care of the Victims of Torture, London, issued a medical report in which he concluded that:

1. Two 1 cm scars on the right side of the head were consistent the applicant's account of his head being hit against the wall;
2. Scarring of the right eardrum was consistent with the surgical repair of a traumatic rupture of the eardrum;
3. Psoriatic plaques on his upper back confirmed the diagnosis of psoriasis (The condition was not infectious but was made worse by stress);
4. A linear 4 cm scar on his right upper arm was consistent with his account of being whipped with electric cable;
5. Two linear scars inside the left fore-arm, 5 x 1 cm and 4 x 2 cm, were consistent with his account of being burned by a heated metal rod;

6. An irregular scar on the back of the left hand, 1cm in diameter, was consistent with his account of a cigarette being pressed against his hand;
7. An irregular scar, 1cm long, behind the right heel was consistent with his account of a chain cutting into his ankles when he was suspended.

Dr Peel concluded that the details given by the applicant of his detention were completely consistent with the descriptions of Sri Lankan detention centres given to him by other asylum seekers, that the scars on his body were fully consistent with his story and that he described some psychological symptoms found in persons who have been detained and beaten.

The applicant made a second application for judicial review, submitting the above medical evidence and challenging the certification of Germany as a safe third country as, *inter alia*, Germany failed to recognise persons as refugees where the persecution emanated from non-State agents. Leave was refused by Mr Justice Latham on 2 October 1998. Counsel advised that there were no grounds on which to appeal to the Court of Appeal. Removal directions were set for 8 October 1998 and then deferred.

A further medical report was prepared by Dr Colin Livingston of the Medical Foundation (Caring for victims of Torture) after two examinations of the applicant on 28 June and 9 July 1999. He stated:

> "My professional view is that particularly in regard to the neck, jaw and burn scars ... that there is a serious possibility and I would go beyond that <to conclude that there is> very little doubt that what has been observed and recorded above results from physical injuries inflicted upon him during periods of detention in the past. ... Though there are symptoms of a physical nature which have been described which persist, I find also that there are psychological ill effects of his past ill treatment which are present and likely to remain for a long period in the future … there can be little doubt, if any doubt, that [the applicant's scars] have been caused in the way he describes."

On 11 August 1999, following the decision of 23 July 1999 of the Court of Appeal in the case of *Adan, Subaraskan and Aitsegeur* (see domestic law and practice below), the applicant's representatives requested that the Secretary of State reconsider his decision to issue a certificate under section 2(2) of the Asylum and Immigration Act 1996 authorising the removal of the applicant to Germany, and to consider the merits of his claim for asylum. On 12 August 1999, the Secretary of State stated that he was not willing at this stage to consider the merits of the applicant's claim as he was pursuing an appeal to the House of Lords in respect of Adan and Aitsegeur. He also expressed the view that it would be premature to do so as the applicant's application to the Court concerned Convention issues not considered by the Court of Appeal in the *Adan, Subaskaran and Aitsegeur* case.

The applicant has submitted material from members of his family supporting his account of events, e.g. a statement from his mother dated 3 June 1999, an affidavit from his mother dated 1 August 1999, a letter from his uncle dated 24 May 1999 and a letter from his sister dated 3 June 1999. He has also provided the Court with colour photographs showing various marks on his head, legs, arm and torso.

B. Relevant domestic law and practice

1. Applicable international texts

The United Kingdom and Germany are parties to the 1951 Geneva Convention relating to The Status of Refugees. Article 33(1) provides:

> "No contracting state shall expel or 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."

The Dublin Convention (the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990) provides for measures to ensure that applicants for asylum have their applications examined by one of the Member States and that applicants for asylum are not referred successively from one Member State to another. Articles 4 to 8 set out the criteria for determining the single Member State responsible for examining an application for asylum. Pursuant to Article 7, the responsibility for examining an application for asylum is incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States. The United Kingdom and Germany are both signatory States.

2. United Kingdom immigration statutes and rules

Section 2 of the Asylum and Immigration Act 1996 provides:

> "(1) ... a person who has claimed asylum [may be] removed from the United Kingdom if -
>
> (a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled; ...
>
> (2) The Conditions are:
>
> (a) that the person is not a national or citizen of the country or territory to which he is to be sent;
>
> (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group or political opinion; and
>
> (c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the [Geneva] Convention."

Paragraph 345 of the Immigration Rules states:

> "If the Secretary of State is satisfied that there is a safe country to which an asylum applicant can be sent, his application will normally be refused without substantive consideration of his claim to refugee status. A safe country is one in which the life or freedom of the asylum applicant would not be threatened (within the meaning of Article 33 of the [Geneva] Convention) and the government of which would not send the applicant elsewhere contrary to the principles of the [Geneva] Convention...."

Paragraph 347 of the Immigration Rules provide:

> "When an asylum applicant has come to the United Kingdom from another country which is party to the [Geneva] Convention..... and which has considered and rejected an application for asylum from him, his application for asylum in the United Kingdom may be refused without substantive consideration of his claim for refugee status. He may be removed to that country, or any country meeting the criteria of paragraph 345, and invited to raise any new circumstances with the authorities of the country which originally considered his application."

The Secretary of State has power to grant exceptional leave to enter or remain in cases which do not fall within the Act or the Rules. His policy is to grant such leave:

> "... Where the [Geneva] Convention requirements are not met in the individual case but return to the country of origin would result in the applicant being subjected to torture or other cruel, inhuman or degrading treatment, or where the removal would result in an unjustifiable break-up of family life... A person should never be disqualified from exceptional leave to enter or remain if there are substantial reasons for believing that he or she would be tortured or otherwise subjected to inhuman or degrading treatment if they were to be returned to their country of origin."

A refusal to grant exceptional leave is subject to judicial review. The courts can rule that the particular exercise of the Secretary of State's discretion is unlawful on the ground that it was tainted with illegality, irrationality or procedural impropriety. The courts could quash a decision if it was established that there was a serious risk of inhuman treatment on the ground that no reasonable Secretary of State could take such a decision.

4. United Kingdom case-law

The domestic courts' approach under Section 2 of the Asylum and Immigration Act 1996 prior to July 1999 was summarised as:

(i) The Secretary of State cannot simply rely upon the fact that the third country is a signatory to the Geneva Convention: he must be satisfied that in practice it complies with its obligations (*Re Musisi* [1987] AC 514).
(ii) The issue is whether the third country adopts an approach within the range of responses of a Contracting State acting in good faith to implement its obligations under the Geneva Convention (*R. v. Secretary of State for the Home Department Ex parte Iyadurai* [1998] INLR 472).
(iii) The Secretary of State must be satisfied that there is no real risk that the third country would send the applicant elsewhere in breach of the Geneva Convention (*R. v. Secretary of State for the Home Department Ex parte Canbolat* [1997 1 WLR] 1569).

In its judgment of 23 July 1999 in the case of *R. v. Secretary of State for the Home Department ex parte Adan, Subaskaran and Aitsegeur*, the Court of Appeal examined as a question of general importance whether the Secretary of State was entitled to return asylum seekers to France and Germany under section 2 (2) c of the Asylum and Immigration Act 1996, as being countries which did not recognise as refugees those who feared persecution from non-State agents. Adan was a citizen of Somalia who had been refused asylum in Germany prior to her arrival in the United Kingdom; Subaskaran was a Sri Lankan national

who claimed asylum in the United Kingdom on account of his ill-treatment by both the LTTE and the Sri Lankan army but whose claims had been rejected by the German authorities; and Aitsegeur was a citizen of Algeria whose asylum application had been rejected by French authorities. The Court of Appeal held that the Geneva Convention extended protection to persons who feared persecution by non-State agents, where, for whatever cause, the State was unwilling or unable to offer protection itself. As the German and French authorities subscribed to the "accountability theory" - ie. refugee status was limited to those who feared persecution emanating from State or quasi-State authorities or persecution from non-State agents where it was shown that it was tolerated or encouraged by the State, or at least that the State was unwilling to offer protection - the Secretary of State could not as a matter of law certify the claimants for return to these countries as safe third countries because these countries did not give effect to the Convention's core values:

> "If a party to the Geneva Convention were to take a position which was at a variance with the Convention's true interpretation, and act upon it, it could not be regarded as a safe third country; not merely because the "real risk" test is not breached (though certainly it would be) but because in the particular case the Convention was not being applied at all." (§ 68)

The Secretary of State has petitioned the House of Lords for leave to appeal against this decision as regards Adan and Aitsegeur, no separate petition being pursued in respect of Subaskaran due to the similarity of the issues.

5. German law concerning asylum-seekers and persons claiming protection

The Federal Office for the Recognition of Foreign Refugees considers claims for asylum or whether there are obstacles to the deportation of aliens. Its decisions to issue deportation orders may be reviewed by the Federal Administrative Court.

Pursuant to Article 16a(1) of the Basic Law, a person persecuted on political grounds has the right of asylum. Persons entitled to asylum enjoy legal status pursuant to the Geneva Convention on Refugees and are issued with an unlimited residence permit (section 68 of the Asylum Procedure Act).

Section 51 of the Aliens Act prohibits the deportation of aliens to a State where they would face political persecution. Aliens granted protection against deportation under this provision enjoy legal status under the Geneva Convention but are merely issued with limited residence for exceptional purposes.

According to the constant case-law of the German Constitutional Court, recognition as a political refugee requires a risk of persecution emanating from a State or quasi-State like authority. Persecution by private organisations or persons qualifies only if it can be attributed to the State in that the State supports or passively tolerates the persecution by private groups or exceptionally if the State does not provide adequate protection due to its inability to act as a consequence of existing political or social structures. This does not cover situations where a State has factually lost control of parts of its territory (FCC of July 2, 1980, vol. 54, 341, 358).

Ill-treatment by a State officer considered as an isolated event in excess of his functions and prohibited and sanctioned according to the regular administrative and penal

procedures is not attributed to the State. A practice of torture by police or prison authorities, either in the form of political persecution or in the context of Article 3 of the Convention, is attributable to the State. State complicity may be shown where torture is practised as part of the police or military structure of a State.

If an asylum claim for protection against political persecution does not meet the necessary requirements under Article 16a(1) of the Basic Law or section 51(1) of the Aliens Act, the Federal Office is obliged to examine whether an applicant faces a serious risk of treatment contrary to Article 3 of the Convention if he were returned. Section 53(4) of the Aliens Act prohibits expulsion in such circumstances.

In a decision of 15 April 1997 (Vol. 104, 265), the German Federal Administrative Court decided that an applicant, in order to meet the requirements of section 53(4) of the Aliens Act, must show a serious risk of inhuman or degrading treatment or punishment by a State or a State-like authority. It therefore declined to follow the interpretation of Article 3 of the Convention adopted by the European Court of Human Rights in Ahmed v. Austria (judgment of 17 December 1996, *Reports* 1996-V1).

If the preconditions for the application of section 53(4) are not met, protection may be granted under section 53(6) of the Aliens Act, which grants a discretion to the authorities to suspend deportation in case of a substantial danger for life, personal integrity or liberty of an alien. This applies to concrete individual danger resulting from either State or private action. It does not require an intentional act, intervention or State measure and covers risks for life resulting from adverse living conditions, lack of necessary medical treatment, etc. (FAC 9 September 1997, InfAusIR 1998, 125). This provision has also been applied to civil war or war situations where the threat derived from a non-State source (Administrative Appeal Court of Baden-Württemberg decision of 11 May 1999, 6S 514/99). Persons afforded protection under this provision are granted temporary permission to remain for periods of three months, renewable by the authorities.

In the first six months of 1999, section 53(6) was applied to 24 Sri Lankan nationals in respect of serious individual risks of ill-treatment which could not be attributed to the Sri Lankan State. This included the case of a Tamil whose scars placed him a real danger of being apprehended by the security forces and submitted to renewed torture as a person suspected of LTTE involvement (Dresden Administrative Court decision of 16 November 1998, 5 K 30493/96)

Unsuccessful applicants are entitled to have their case re-examined in a new asylum procedure (follow up application, section 71 of the Asylum Procedure Act) subject to section 51(1)-(3) of the Administrative Procedure Act. This only applies where the factual or legal situation has changed in favour of the applicant, where there is new evidence or there are reasons to resume proceedings analogous to those relevant to section 580 of the Code of Civil Procedure (false evidence, fresh witnesses etc). In addition, the applicant must show that such new facts or evidence, which have to be submitted with a three months time-limit, are suitable to support a favourable result and that he/she was unable to deliver such facts or evidence in the previous asylum procedure.

However, even where these conditions are not met, the competent authorities would be obliged to examine whether the applicant, if removed, was facing a serious individual risk for life and personal integrity, in particular a grave danger within the meaning of the Federal

Administrative Court's jurisprudence relating to section 53(6) (see e.g. FAC of September 7, 1999, 1 C 6.99).

An applicant filing a follow-up application or claiming protection under section 53 cannot be removed immediately upon return to Germany on the basis of the previous rejection of an asylum claim and deportation order. If the applicant does not meet the requirements for a resumption of the procedure or a re-examination of his case, the authorities have to issue a new deportation order, which may be subject to judicial review. Only where an unfounded application ensued within two years would the original deportation order remain in force. An applicant has a week to file a complaint against the deportation with the Administrative Court. Deportation cannot take place pending the court's decision. The applicant may ask the court to grant suspensive effect to the appeal.

6. Relevant Reports

In the part of the Amnesty International Report for 1998 concerning Sri Lanka, it was reported that 'no member of the security forces has been brought to justice for committing torture'. In June 1999 Amnesty International published a report entitled "Sri Lanka Torture in Custody". That report noted:

> "..[T]orture... continues to be reported almost (if not) daily in the context of the ongoing conflict between the security forces and the Liberation Tigers of Tamil Eelam (LTTE) fighting for an independent State, Eelam, in the north and east of the country...
>
> The pattern of arrest, detention and torture in Colombo is closely linked to the occurrence of LTTE attacks in the city, the discovery of materials for such attacks or any major public events in Colombo such as Independence Day. High numbers of arrests are reported after explosions, assassinations and arm-finds."

A report by the Medical Foundation for the Victims of Torture entitled "No Safe Haven: Nigerian, Kenyan and Sri Lankan Torture Victims in the United Kingdom" dated October 1997 stated:

> "Although the government elected in 1994 has established legal and statutory frameworks with the expressed intent to control human rights abuses by security forces, these have not been very successful in curbing human rights violations by army or police, or in bringing perpetrators to justice. Tamils, especially young men, are frequently detained by security forces in search of Tiger supporters ... many ... are detained, sometimes for long periods, and ill-treated or tortured....
>
> When the security forces detain someone with scarring, they assume the person to be a LTTE member and treat them extremely brutally ..."

The Report of the United Nations Special Rapporteur on extra-judicial and summary executions dated 10 March 1998 stated in respect of his visit to Sri Lanka:

> "Human rights violations are most frequent in the context of operations carried out by the security forces against the armed insurgency ... the violations have been so numerous, frequent and serious over the years that they could not be dealt with as if

> they were just isolated or individual cases of middle and lower-rank officers, without attaching any political responsibility to the civilian and military hierarchy."

The US Department of State "Sri Lanka Country Report on Human Rights Practices for 1998" dated 26 February 1999 stated:

> "Torture remained a serious problem, and prison conditions remained poor. Arbitrary arrests and detentions continued, often accompanied by failure of the security forces to comply with some of the protective provisions of the Emergency Regulations. Impunity for those responsible for human rights abuses remained a serious problem.
>
> No arrests were made in connection with the disappearance and presumed killing of at least 350 LTTE suspects in Jaffna in 1996 and 1997."

COMPLAINTS

The applicant complains that the United Kingdom's conduct in ordering his removal to Germany, from where he will be summarily removed to Sri Lanka, violates Articles 2, 3, 8 and 13 of the Convention.

The applicant submits in particular that there are substantial grounds for believing that, if returned to Sri Lanka, there is a real risk of facing treatment contrary to Article 3 of the Convention at the hands of the security forces, the LTTE and the pro-Government Tamil militant organisations. He submits that the German authorities only treated as relevant the acts of the State and that they did not consider excesses by individual State officials as State acts. This approach is contrary to the jurisprudence of the Commission and Court on Article 3. He submits that the German authorities would not reconsider his asylum application if he was returned to Germany since he has no relevant new evidence for their purposes. The medical evidence, considered by the United Kingdom authorities, would not be regarded as relevant since it has regard to risks from sources not perceived by the German authorities as attributable to the State, such as the LTTE or rogue State officers acting outside the law. He submits that the Dublin Convention, which is aimed at preventing multiple asylum applications under the Geneva Convention on the Status of Refugees, has no relevance where the applicant's complaint is based on Article 3 of the Convention.

As regards Article 13 of the Convention, he submits that judicial review is not an effective remedy since, in the context of a return to an allegedly safe third country under the Dublin Convention, the United Kingdom courts do not subject asylum applications to "the most anxious scrutiny".

THE LAW

The applicant complains that the United Kingdom's conduct in ordering his removal to Germany, from which he may be sent to Sri Lanka, violates Article 2, 3, 8 and 13 of the Convention.

Concerning Article 3 of the Convention

The applicant complains his expulsion to Germany by the United Kingdom would be in breach of Article 3 of the Convention, which provides that:

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

Submissions before the Court

The United Kingdom Government

The United Kingdom Government submit that the substance of the applicant's asylum claim should be assessed in Germany, where his allegations that he risks ill-treatment if returned to Sri Lanka would be assessed by the competent authorities in accordance with their obligations under the 1951 Geneva Convention and Article 3 of the Convention. In these circumstances, they have not made any submissions as to the merits of the applicant's asylum claim, though they do not accept that his statement of facts is true.

They submit that there is no real risk that the applicant would suffer treatment contrary to Article 3 if he was removed to Germany. They point out that the substance of his asylum claim has already been assessed by the German authorities, including the Bavarian Administrative Court, which, after hearing oral evidence from the applicant, concluded that his claim was "a completely fabricated tissue of lies". It would also be open to the applicant to submit further medical evidence or other evidence to the German authorities in support of his claim. They reject the applicant's arguments that German law does not provide proper protection against removal, pointing out that, even if the authorities apply a different approach to non-State agent risks or the actions of rogue officers, the applicant would be entitled to remain in Germany under section 53(6) of the Aliens Law if he could show a serious risk of torture or inhuman treatment in Sri Lanka from whatever source. They refer to the large number of individuals granted protection under this provision and to the lack of any complaints before the Court as to the alleged gap in protection in German law.

They further argue that this Court should be slow to find that the removal of a person from one Contracting State to another would infringe Article 3 of the Convention, as in this case, the applicant would be protected by the rule of law in Germany and would have recourse, if any problems arose, to this Court, including the possibility of applying for a Rule 39 indication to suspend his deportation. It would be wrong in principle for the United Kingdom to have to take on a policing function of assessing whether another Contracting State such as Germany was complying with the Convention. It would also undermine the effective working of the Dublin Convention, which was brought into operation to allocate in a fair and efficient manner State responsibility within Europe for considering asylum claims.

The applicant

The applicant submits that he is at a real risk of torture and ill-treatment if he is returned to Sri Lanka, relying on the medical evidence concerning his injuries and the reports as to the widespread and pervasive use of torture in Sri Lanka by the Tamil Tigers and the security forces. Both the United Kingdom and German systems have failed to offer him the requisite protection against removal. The German authorities rejected his asylum claim in a

profoundly flawed procedure which did not take into account his injuries. In its decision of 21 April 1997, the Bavarian Administrative Court took a wholly unreasonable approach to his evidence. For example - as regards the reproach that he had not given any details about the computer course he had hoped to attend in Colombo - this could be explained by the fact that he had been unable to register on the course due to the difficulties he had encountered with the police within five days of his arrival in that city. Nor was there anything incredible about the fact that he left his personal documents behind in Sri Lanka. He could not use them to leave the country as he had had to obtain a false passport in a different name. As regards the allegedly suspicious nature of the letter which he presented from his mother, he has provided the Court with an affidavit from his mother dated 1 August 1999 which explained that she could not write roman script and that she did not write the address on the envelope.

The applicant argues that, if the United Kingdom authorities return him to Germany, he will be unable to obtain any rehearing of his claims due to the strict procedural standards, which exclude consideration of evidence which was previously available but not submitted to the courts. He points to the fact that the authorities would not take into account the non-State agent source of any risk in deciding his claims of political persecution or complaints of Article 3 ill-treatment, in disregard of the proper interpretation of those provisions. He also claims that the standard of proof applied by the authorities is impossibly high and bars meritorious claims.

The applicant rejects the assertion that this position is remedied by the section 53(6) provision. He submits that this is an entirely discretionary and temporary measure and that there are no known cases of failed asylum seekers being afforded protection under this provision. In these circumstances, the United Kingdom Government cannot escape their obligations under Article 3 by relying on Germany's status as a Contracting State and the theoretical possibility that the applicant could apply to the Court from Germany to prevent a real risk of removal from Germany to Sri Lanka.

The German Government

The German Government, which made written and oral submissions at the request of the Court, submitted that German law and practice fully complied with the Convention. They emphasise that, while the Federal Administrative Court has interpreted Article 3 somewhat differently from this Court, this did not result in any "protection gap", as risks for life and personal integrity were covered under section 53(6). It is not, in their view, an accident that no case of a violation of Article 3 of the Convention has been found by the Court involving a proposal by German authorities to deport a rejected asylum seeker. The applicant would be undoubtedly allowed to present new evidence to the authorities in Germany which was suitable to produce a more favourable result. The authorities would also be obliged to grant protection regardless of time-limits. Even though section 53(6) was framed in discretionary terms, the case-law of the German courts made it clear that an applicant would be entitled to protection if he was facing a grave danger involving a serious risk to life and personal intergrity. This applicant could only be deported on the basis of a new deportation order in respect of which he could appeal to the Administrative Court, with the opportunity within one week of lodging a request for interim judicial protection. The order could not be enforced until that request was decided by a court. If the applicant was not satisfied with the review by the courts, he could file a complaint with this Court. In that context, the German authorities would scrupulously comply with any request by this Court under Rule 39 of its Rules to suspend the execution of a deportation order.

The United Nations High Commissioner for Refugees

In her written submissions, lodged at the invitation of the Court, the United Nations High Commissioner for Refugees stated that that, in principle, the Dublin Convention was welcomed as a positive development ensuring that at least one country would undertake responsibility for determining an asylum claim and thus prevent "shuttlecocking". However, the effective application of the Dublin Convention was seriously hampered by diverging interpretations by States of the 1951 Convention, in particular concerning the issue of the source of the persecution. This posed the practical problem that a refugee whose application has been rejected by a State with a restrictive interpretation would no longer effectively be able to claim asylum in a State which might otherwise have granted it according to the generally accepted interpretation. Normally a person whose asylum claim has already been rejected in the "safe third country" will be unable to obtain an effective legal remedy when returned there. Indirect removal in those circumstances could violate the *non-refoulement* principle. No asylum-seeker should therefore be sent to a third country without a reliable assessment in his case of the available guarantees, e.g. that the person will be re-admitted, that he will enjoy effective protection against *refoulement,* that he will have the possibility to seek and enjoy asylum, and that he will be treated in accordance with accepted international standards.

The Court's assessment

The responsibility of the United Kingdom

The Court reiterates in the first place that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. It also notes that the right to political asylum is not contained in either the Convention or its protocols (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, § 102). It is however well-established in its case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 (see, amongst other authorities, the Ahmed v. Austria judgment of 17 December 1996, *Reports* 1996-VI, p. 2206, §§ 39-40).

The Court's case-law further indicates that the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from the consequences to health from the effects of serious illness (see H.L.R. v. France judgment of 29 April 1997, *Reports* 1997-III, § 40, D. v. the United Kingdom judgment of 2 May 1997, *Reports* 1997-III, § 49). In any such contexts, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny.

In the present case, the applicant is threatened with removal to Germany, where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not, as such, threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.

The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, *Reports* 1999, § 67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered. The English courts themselves have shown a similar concern in reviewing the decisions of the Secretary of State concerning the removal of asylum-seekers to allegedly safe third countries (see Relevant Domestic Law and Practice above, United Kingdom case-law).

The Court has therefore examined below whether the United Kingdom have complied with their obligations to protect the applicant from the risk of torture and ill-treatment contrary to Article 3 of the Convention.

Alleged risk of ill-treatment in Sri Lanka

The Court recalls that the applicant claims that he has suffered ill-treatment from the LTTE which forced him to leave his home in the Jaffna area of Sri Lanka and go to Colombo. In Colombo, he claims that he was detained for three months by the security forces as a suspected Tamil Tiger and tortured. This involved being whipped with an electric cable and being beaten on the feet and lower back by a S-lon pipe filled with cement. Following his release, he was picked up twice by the ENDLF - a pro-Government Tamil group - and detained and beaten. He was further arrested by the police in October 1995 and, during questioning, he was beaten and a heated iron rod applied to his arm.

The United Kingdom have not made submissions concerning the merits of these claims, though they have pointed out that his claims were examined by the German Federal Office and the Bavarian Administrative Court, which rejected them.

The Court notes that Federal Office in its decision rejecting asylum of 26 April 1996 did not base itself on any apparent lack of credibility of the applicant. It relied rather on the fact that, under the German approach to attribution of State responsibility, difficulties from the LTTE could not form the basis of political persecution nor could isolated excesses by soldiers. In its decision of 21 April 1997 however, the Bavarian Administrative Court which

had heard the applicant expressed the opinion that his story was a "completely fabricated tissue of lies." It supported this opinion by referring to elements of his account which were in its view implausible and contradictory.

Before the Court, the applicant has provided two medical reports which strongly support his claims that he was tortured. He has also provided photographs of scars of his injuries on his arm, leg and head. These materials were not before the German authorities and it is not apparent that the German authorities gave any consideration to this aspect of the case. The applicant has also given further clarifications of events in Sri Lanka which explain to some extent the difficulties which the Bavarian Administrative Court found in his account.

The Court has also given consideration to the reports concerning Sri Lanka published by Amnesty International, the United Nations Special Rapporteur and the United States Department of State. This shows that torture and ill-treatment by the LTTE and government forces is a serious problem. Tamils, particularly young men, are at serious risk of detention and ill-treatment by security forces looking for Tamil Tigers. Young men, who bear scars, are at particular risk of being suspected of being involved with the Tamil Tigers.

The Court notes that it has not heard substantial arguments from either the United Kingdom or German Governments as to the merits of the asylum claim. Nevertheless it considers that the materials presented by the applicant at this stage give rise to concerns as to the risks faced by the applicant, should he be returned to Sri Lanka - both from the LTTE if he returned to his family in Jaffna, and from government forces on suspicion of previous involvement with LTTE.

The position of the applicant as a failed asylum-seeker if returned to Germany

The Court reiterates that it is not its function to examine asylum claims or to monitor the performance of Contracting States with regard to their observance of their obligations under the Geneva Convention on Refugees. On this basis, the fact that the German authorities exclude from consideration of asylum claims non-State agent sources of risk of ill-treatment and ill-treatment from individual officers prohibited by the laws of the country is not directly relevant. The Court's primary concern is whether there are effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka.

Following the submissions of the parties, and having particular regard to the explanations provided by the German Government, the Court finds the present applicant could, on his return to Germany, make a fresh claim for asylum as well as claims for protection under section 53(4) and 53(6) of the Aliens Act. It is satisfied by the German Government's assurances that the applicant would not risk immediate or summary removal to Sri Lanka. As the previous deportation order against the applicant was made more than two years earlier, the applicant could not be removed without a fresh deportation order being made, which would be subject to review by the Administrative Court, and to which the applicant could make an application for interim protection within one week. He would not be removed until the Administrative Court had ruled on that application.

The Court recalls that the applicant has argued that these proceedings would not offer him effective protection since they would, in all likelihood, result in a further rejection of his claims and an order of removal. These objections are examined below.

Firstly, it notes that Section 51 of the Administrative Procedure Act places strict limitations on the admission of new evidence which would allow the applicant to obtain a fresh asylum hearing. This requires evidence to be submitted within three months of its becoming available and excludes evidence which was available during the earlier proceedings. This would appear to exclude the medical evidence now provided before this Court as well as letters provided by members of the applicant's family to substantiate his account.

Secondly, even assuming that a fresh asylum hearing was granted, the Court notes that the previous decision of the Bavarian Administrative Court that the applicant lacked credibility would be given significant weight in a further consideration of his claims.

Thirdly, as pointed out, the German authorities would not take into account for the purposes of asylum or protection under Article 3 of the Convention pursuant to section 53(4) that the applicant would be at risk from LTTE members or individual security force members acting outside Sri Lankan law.

Having regard to these three factors, the Court finds that there is considerable doubt that the applicant would either be granted a follow up asylum hearing or that his second claim would be granted. There is, on similar grounds, little likelihood of his claims under section 53(4) being successful.

Nonetheless, the Court notes that the apparent gap in protection resulting from the German approach to non-State agent risk is met, to at least some extent, by the application by the German authorities of section 53(6). It appears that this provision has been applied to give protection to persons facing risk to life and limb from non-State agents, including groups acting in opposition to the Government, in addition to persons threatened by more general health and environmental risks. It has also been applied to a number of Tamils, including a young male Tamil at risk of ill-treatment from security forces due to the presence of scars on his body. The applicant has emphasised the discretionary nature of this provision. The German Government, while accepting that it is phrased in discretionary terms, submit that the courts' interpretation makes it clear that there is an obligation to apply its protection to persons who have shown that they are in grave danger. This submission is supported by the case-law materials referred to. It is also apparent that, notwithstanding the procedural requirements of section 51 of the Administrative Procedure Act, the Federal Administrative Court considers that cases which involve a serious risk to life and personal integrity should be re-examined.

It is true that the Government have not provided any example of section 53(6) being applied to a failed asylum seeker in a second asylum procedure. The Court acknowledges that the previous court decision heavily impugning his credibility is a factor which would also weigh against a claim for protection in this context. However, on the basis of the assurances given by the German Government concerning its domestic law and practice, the Court is satisfied that the applicant's claims, if accepted by the authorities, could fall within the scope of section 53(6) and attract its protection. While it may be that on any re-examination of the applicant's case the German authorities might still reject it, this is largely a matter of speculation and conjecture. There is furthermore no basis on which the Court could assume in this case that Germany would fail to fulfil its obligations under Article 3 of the Convention to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country. To the

extent therefore that there is the possibility of such a removal, it has not been shown in the circumstances of this case to be sufficiently concrete or determinate.

It is not relevant for the purposes of this application that any permission to remain granted pursuant to section 53(6) would initially be for a three month period and subject to review by the authorities.

Finally, as regards the applicant's arguments concerning the high burden of proof placed on asylum seekers in Germany, the Court is not persuaded that this has been substantiated as preventing meritorious claims in practice. It notes that this matter was considered by the English Court of Appeal and rejected. The record of Germany in granting large numbers of asylum claims gives an indication that the threshold being applied in practice is not excessively high.

In these circumstances, the Court finds that it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention. Consequently, the United Kingdom have not failed in their obligations under this provision by taking the decision to remove the applicant to Germany. Nor has it been shown that this decision was taken without appropriate regard to the existence of adequate safeguards in Germany to avoid the risk of any inhuman or degrading treatment (see e.g. Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, §§ 97-98, Nsona and Nsona v. the Netherlands judgment of 28 November 1996, *Reports* 1996-V, § 102, and D. v. the United Kingdom judgment of 2 May 1997, *Reports* 1997-III, § 52).

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Concerning Article 2 and 8 of the Convention

The applicant further and alternatively asserts that the matters raised above in respect of his claim under Article 3 also give rise to breaches under Article 2, as there are substantial grounds for believing that he may be killed in Sri Lanka, and a breach of Article 8 as there is a threat to his physical and moral integrity within the meaning of private life which is disproportionate to any legitimate aim pursued.

Article 2 of the Convention provides so far as is relevant:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 8 of the Convention provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Having regard to its findings above under Article 3 of the Convention, the Court finds that no separate issues arise requiring examination under these provisions.

3. Concerning Article 13 of the Convention

The applicant complains that he does not have an effective remedy in respect of his complaints, invoking Article 13 of the Convention which provides:

"Everyone whose rights and freedoms as set forth in this 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."

The United Kingdom Government do not accept that the Dublin Convention prevents their courts from giving the "most anxious scrutiny" to asylum cases to prevent any risk to life. The Court of Appeal did give the applicant's substantive claims considerable attention, requiring the Secretary of State to satisfy himself that Germany would comply with its obligations under the Geneva Convention and this provides, they submit, an effective remedy in line with the Court's jurisprudence in other asylum/expulsion cases (e.g. Vilvarajah v. the United Kingdom judgment cited above, and D. v. the United Kingdom judgment cited above).

The applicant argues that judicial review does not provide an effective remedy as it does not permit any "anxious scrutiny" to be given to the merits of his claim, but is confined merely to considerations as to the Secretary of State's application of the Dublin Convention. It does not look at whether the decision to remove was right or wrong or whether the fears of persecution are well-founded but only whether the decision was lawful. It would only be unlawful if no official, properly directing his mind only to the relevant issues, could have reached the decision that he did. He refers to Court's finding in Smith and Grady v. the United Kingdom (judgment of 29 September 1999, to be reported in Reports 1999) in which judicial review was not found to provide an effective remedy.

The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nor does the effectiveness of a remedy for the purposes of Article 13 depend on the certainty of a favourable outcome for the applicant (see the Aksoy judgment cited above, p. 2286, § 95; and the Vilvarahah judgment cited above, § 122).

Assuming that the applicant's complaints disclosed an "arguable" claim for the purposes of Article 13 of the Convention, the Court notes that in previous cases it has found judicial review proceedings to be an effective remedy in relation to complaints raised under Article 3 in the contexts of deportation and extradition (Soering v. the United Kingdom,

§§ 119-124, Vilvarajah v. the United Kingdom, §§ 121-124, and D. v. the United Kingdom, §§ 69-73 cited above). In those cases, it was satisfied that English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of judicial review would have power to quash a decision to expel or deport an individual 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.

The Court finds no reason to differ in the present case. The applicant was able to challenge in judicial review proceedings the reasonableness of the Secretary of State's decision to issue a certificate to remove him to Germany pursuant to the arrangements reached under the Dublin Convention. His arguments concerning, *inter alia*, whether Germany could be regarded as a safe third country due to the authorities' approach to the burden of proof were considered by the Court of Appeal but rejected as unfounded. The recent case of *Adnan, Subaskaran and Aitseguer* also indicates that the English courts will take into account the way in which allegedly safe third countries comply with their obligations under the Geneva Convention in assessing whether the Secretary of State is entitled to order removal to such countries. In this respect, the examination of the English courts will go further than this Court, since under domestic law an applicant may claim a right to asylum which is not guaranteed by the European Convention of Human Rights. While the applicant relies on the Smith and Grady judgment, this concerned an area of discretionary policy in the armed forces where the threshold at which the courts could find the policy irrational was placed so high as to exclude any effective consideration of the key issues in the case. The Court is satisfied that in the present case the substance of the applicant's complaint under the Convention - whether the Secretary of State could order his removal to Germany - did fall within the scope of examination of the courts, which had the power to afford him the relief which he sought.

The applicant's complaint in this respect is, accordingly, manifestly ill-founded and must be rejected pursuant to Articles 35 §§ 4 and 4 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J.-P. Costa
President