Dag (Nationality – Country of Habitual Residence –TRNC) Cyprus * CG
[2001] 00002
Appeal No: HX/70783/98
(01 TH 0075)

IMMIGRATION APPEAL TRIBUNAL

Dates of hearing: 7 and 28 November 2000

Date of determination notified: 14/03/01

Before:
Mr C. M. G. Ockelton (Deputy President)
Mr J. R. A. Fox
Mr G. Warr

Between

VEYSI DAG

Appellant

and

The Secretary of State for the Home Department

Respondent

DETERMINATION AND REASONS

Introduction

1. The appellant describes himself variously as a citizen of Cyprus and a Turkish Cypriot. He holds a document purporting to be a passport issued by the 'Turkish Republic of Northern Cyprus'. He appeals, with leave, against the determination of a special adjudicator (Mr D. J. Jefferson) dismissing his appeal against the decision of the respondent on 18 November 1997 refusing him leave to enter having refused him asylum. The removal directions set by the respondent are for Cyprus by Turkish Airlines. The appellant's appeal is under section 8(1) of the 1993 Act and is accordingly on the ground that his removal in consequence of refusing him leave to enter would be contrary to the United Kingdom's obligations under the Refugee Convention. Before the Tribunal he is represented by Mr E. Grieves of counsel, instructed by Howe & Co, and the respondent is represented by Mr R. Tam of counsel, instructed by the Treasury Solicitor.

2. This is a ‘starred’ determination. We have heard full argument from both counsel on issues relating to the status of the ‘Turkish Republic of Northern Cyprus’ in so far as that status may affect the determination of refugee appeals. This determination will be followed by other divisions of the Tribunal and by adjudicators on legal questions arising in appeals by individuals claiming to be, or who are alleged to be, nationals of the ‘Turkish Republic of Northern Cyprus’.

History

3. Cyprus was a British colony: it became independent as the Republic of Cyprus on 16 August 1960. On that date two treaties were also made. The first, made between the United Kingdom, Greece and Turkey of the one part and the Republic of Cyprus of the other part, is the Treaty concerning the Establishment of the Republic of Cyprus (Cmnd 1252). It provides amongst other things, that the territory of the Republic of Cyprus shall comprise the Island of Cyprus together with the islands lying off its coast, with the exception of two United Kingdom military bases. The second treaty, made between the Republic of Cyprus of the one part and Greece, Turkey and United Kingdom of the other part, is the Treaty of Guarantee (Cmnd 1253). By that Treaty the Republic of Cyprus undertakes, amongst other things, to ensure the maintenance of its independence, territorial integrity and security (Article I) and the other High Contracting parties (who are referred to in the Treaty as the three guaranteeing Powers) ‘recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus’ and ‘undertake to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island’ (Article II). With the unity of the Republic of Cyprus (particularly in Annex B, Section 4 (7), relating to applications for citizenship), and the Constitution of the newly-established Republic, recognise the existence of both a Greek and a Turkish community in the Island. In particular, the Constitution provides for power and offices to be shared between members of the two communities in proportion to their prevalence in the population – approximately 70 percent Greek and 30 percent Turkish, and for the President of the Republic always to come from the Greek community while the Vice-President is to come always from the Turkish community.

4. The Turkish community withdrew from central government in December 1963. There was serious fighting between the two communities, culminating in intervention by the United Nations Force in Cyprus (UNFICYP) in March 1964. UNFICYP remains in the Island to this day, enforcing separation between the communities and patrolling a buffer zone. Militant Greek Cypriots waged a campaign against the government of the Republic of Cyprus and in July 1974 the Cypriot government was overthrown in a coup inspired by Athens. An extremist Greek Cypriot was appointed president: he also controlled the National Guard. In reaction to these events, and at the request of the Turkish Cypriot leader, Denktash, Turkey landed troops in Northern Cyprus and soon took control of the northern third of the Island. The dividing line runs from Morphou through Nicosia to Famagusta. The revolutionary government in the south soon collapsed, and the lawful President, Makarios, returned. But the Turkish community now had de facto control of the north and in February 1975 the ‘Turkish Federated State of Cyprus’ was declared. There were numerous unsuccessful attempts at providing a solution to the division of the Island. On 15 November 1983 Northern Cyprus made a unilateral declaration of independence as ‘Turkish Republic

of Northern Cyprus'. Since that date, within Cyprus, the functions of government have, in practice, been exercised in the north by organs of the 'Turkish Republic of Northern Cyprus', although the Republic of Cyprus has not in any sense ceded its claim to the whole of the Island.

5. The general assembly of the United Nations had in May 1983 voted for Turkish Troops to be withdrawn from Cyprus. Following the unilateral declaration of independence, the United Nations Security Council passed Resolution 541 in the following terms, on 18 November 1983.

> The Security Council,
> *Having heard* the statement of the foreign minister of the government of the Republic of Cyprus,
> *Concerned* at the declaration by the Turkish Cypriot authorities issued on 15 November 1983 which purports to create an independent state in Northern Cyprus,
> *Considering* that this declaration is incompatible with the 1960 Treaty concerning the Establishment of the Republic of Cyprus and 1960 Treaty of Guarantee,
> …
> 1. Deplores the declaration of the Turkish Cypriot authorities of the purported succession of part of the Republic of Cyprus;
> 2. Considers the declaration referred to above as legally invalid and calls for its withdrawal;
> …
> 6. Calls upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus;
> 7. Calls upon all States not to recognise any Cypriot states other than the Republic of Cyprus;…'

6. That resolution continues to represent the United Nations' position. Only Turkey has afforded any recognition to the claimed independence of Northern Cyprus.

7. The geographical border between the two communities is an exceptionally accurate reflection of settlement patterns: there are about 600 Greek Cypriots and Maronites in the North and about 300 Turkish Cypriots in the South. That is to be seen in the context a total population of rather over 830,000.

8. Most of those resident in Cyprus in 1960 will have become nationals of the Republic of Cyprus on 16 February 1961 by the operation of the provisions of Annex 1, section 2 to the Treaty of Establishment. No doubt the law of the Republic of Cyprus provides for succession to such citizenship by birth: but no such provisions are in evidence before us. It suffices to say in general terms that many inhabitants of Northern Cyprus may be nationals of the Republic of Cyprus, whatever other nationality they may have as well.

9. The Turkish community apparently declined in numbers between 1960 and 1974, but Northern Cyprus has been settled from Turkey in the years since 1974. By 1983 the Turkish community was little under one-fifth of the population of Cyprus; it is now nearly a quarter. Turkish nationals do not lose Turkish nationality by settling in Northern Cyprus, even if they adopt, and use, nationality documents issued by the 'Turkish Republic of Northern Cyprus'.

The Convention context

10. Article 1A of the Convention reads, as amended, and so far as relevant for present purposes, as follows:

> For the purposes of the present Convention the term 'refugee' shall apply to any person who:
>
> …
> (2)… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
> In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he has a national.

11. Three consequences follow immediately from that formulation. The first is that a person's refugee status has to be assessed by reference to the country or countries of which he is a national. The second is that it is only if a person has no nationality that his country of residence can become relevant in assessing his status as a refugee. The third is that the more countries a person is a national of, the less likely he is to be able to establish that he is a refugee, because he will need to show a lack of protection in each of the countries in question.

12. There are many asylum claimants who, like the present appellant, describe themselves, or are described by the respondent, as nationals of 'The Turkish Republic of Northern Cyprus'. Many, perhaps most, of those individuals are nationals of another country as well. Some are nationals of the Republic of Cyprus; some are nationals of Turkey. Their link with Northern Cyprus might therefore have one of a number of consequences. If they are in law capable of being nationals of Northern Cyprus, it might render them persons of more than one nationality. Or, if they have no other nationality, it might constitute their sole nationality. Alternatively, if they are in law incapable of being nationals of Northern Cyprus, and if they have no (other) nationality, it might establish their country of former habitual residence. But that will be relevant only if they are nationals of no other country for, if they have a country of nationality, that is what counts, and their country of former habitual residence is irrelevant for refugee status determination. It is therefore crucial to determine whether 'The Turkish Republic of Northern Cyprus' is capable of being the country of a person's nationality for the purposes of the Convention. The fact that in numerous decisions in this jurisdiction, as well as in Kadiroglu and others v MIEE [1998] 1656 FCA, which Mr Tam cited to us, it has been tacitly assumed that a person may be a national of Northern Cyprus, is no assistance.

Northern Cyprus as a State in English Law

13. Although our prime concern is with the interpretation of the Convention, an international instrument, our determination is made in an English forum, exercising jurisdiction under statutory powers. For that reason it is appropriate to begin by

considering the status of the 'Turkish Republic of Northern Cyprus' in English law, for the result of that investigation provides the context for our determination of the questions at issue in this appeal.

14. The process for deciding whether a body purporting to exercise power over an area of the world outside the United Kingdom is the government of a sovereign State is well established. The rule was stated by Scrutton LJ in Aksionairnoye Obschestvo dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther v James Sagor & Co [1921] 3 KB 532, 556:

> The courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction. As we said by this court in Mighell v Sultan of Johore [1984] 1 QB 149, 158: 'When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive'.

15. The certificate of the Queen is given by a properly authorised official of the Foreign and Commonwealth Office. This is elegantly demonstrated by the decision of the House of Lords in The Arantzazu Mendi [1939] AC 256. AT first instance Bucknill J. had been asked to set aside the writ as one impleading a foreign sovereign state. He would be right to do that if the Nationalist government rather than the Republican government was the sovereign government of Spain at the time the writ was issued in 1938. In order to decide that question he directed a letter to be written to the Foreign Office. Commenting on that procedure, Lord Atkin (with whom the other members of the House of Lords agreed) said this:

> I pause here to say that not only is this the correct procedure, but that it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State. This, I think, is made clear by the judgments in this House in the Kelantan case [1934] AC 797. With great respect I do not accept the opinion implied in the speech of Lord Sumner in that case recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow Sovereign in the family of states; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.

16. In the context of this appeal it is of some interest that in Mighell v Sultan of Johore it was specifically argued that the government's statement might apply to only part of Spain. That argument was met by pointing out that the letter from the Foreign Office indicated that His Majesty's Government recognised Spain as a foreign sovereign state, that is to say, as a single state with a single government.

17. There is before us a statement by Mr P.J.O. Hill, the head of the Southern European Department of the Foreign and Commonwealth Office, made under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs. Paragraph 2 of the statement reads, in part, as follows:

> Her Majesty's Government have not accorded any form of recognition to the so-called 'Turkish Republic of Northern Cyprus (TRNC)'. To the best of my knowledge no other State, with the exception of Turkey, has recognised the 'TRNC'. Her Majesty's Government recognise only one State in the island of Cyprus, that is the Republic of Cyprus established in 1960 under the Treaties of Guarantee and Establishment to which the United Kingdom, Greece, Turkey and the Republic of Cyprus are parties.

> Under Article II of the Treaty of Guarantee, the United Kingdom, together with Greece and Turkey, 'recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus'.

18. That statement constitutes the certificate of the sovereign. It is not open to any United Kingdom court or tribunal to give any degree of recognition to the 'Turkish Republic of Northern Cyprus' as a sovereign State. As an English tribunal we have to bear that in mind in reaching any conclusions on the status of Northern Cyprus for the purpose of the Convention as interpreted in this jurisdiction. In determining the autonomous meaning of the Convention and its application to the present situation, we, a United Kingdom Tribunal with a limited jurisdiction, must avoid any conclusion that would import United Kingdom recognition to the 'Turkish Republic of Northern Cyprus'.

Northern Cyprus as a Country of Nationality for the Purposes of the Convention

19. As we observed in paragraph 11, and subject to our conclusions in the preceding paragraph, the question is primarily one of international law. It will be apparent, from the historical summary in paragraphs 3-6, and the terms of Mr Hill's statement set out in paragraph 15, that the international community's position on Northern Cyprus is the same as that of the British Government. The Treaties emphasise the integrity of the Republic of Cyprus as established in 1960; SCR 541 declares the 'Turkish Republic of Northern Cyprus' illegal; and with the sole exception of Turkey no other State recognises Northern Cyprus as an autonomous or lawful State. Mr Tam nevertheless submits that Northern Cyprus might (although not a State in international law and not capable of being recognised as a State in an English tribunal) be capable of being the country of a person's nationality for the purposes of the Convention.

20. He puts his case on two alternative footings. The first is an argument based on the 'Namibia principle'. The second argues that as the 'Turkish Republic of Northern Cyprus' does so many acts characteristic of a lawful government, it should be regarded as having some of the powers of a lawful government. Those arguments are inter-related, for both attempt to attribute legal effect to the acts of an unlawful government.

21. The 'Namibia principle' is a reference to the advisory opinion of the International Court of Justice Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) [1971] ICJ Rep 16. The background of that opinion is sufficiently indicated by its title: we need only add that Security Council Resolution 276 declared illegal South Africa's occupation of Namibia. We have been referred in particular to the following passages of the Court's opinion.

> 117. … As this Court has held, referring to one of its decisions declaring a situation as contrary to the rule of international law: 'This decision entails a legal consequence, namely that of putting an end to an illegal situation' (ICJ Reports 1951, p. 82).
>
> 118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a

> continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States…
>
> 125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

22. There are material differences between Namibia and Northern Cyprus. In the case of Namibia, there was no doubt that the occupying power was itself a State. It was therefore possible, in international law, for the acts of the illegal government to be imputed to the occupying State. That is not the situation in Northern Cyprus. If acts of the illegal government in Northern Cyprus 'such as, for instance, the registration of births, deaths and marriages' are to be given validity, it must be by allowing the illegal government to be regarded as empowered to do acts characteristic of a State. We are far from confident that the International Court of Justice would have taken the same view of such acts in Namibia if there were not an occupying State, itself possessing the powers of a State, to which the illegal acts could be imputed. Thus an argument based on 'Namibia principle' needs first to establish that the illegal government in question has the powers alleged. Simply to cite the principle without more begs the question of vires.

23. In any event, however, the argument based on the 'Namibia principle' was met by Mr Grieves, who pointed out that nobody has identified any disadvantage which would accrue to the appellant by reason of the international non-recognition of the 'Turkish Republic of Northern Cyprus'. That point appears to us to be a good one. We do not consider that the 'Namibia principle' ought, without more, to be extended to cases where the illegal government is not itself a State; but, if we are wrong about that, this is not a case where the principle is shown to apply.

24. We pass to Mr Tam's alternative argument. This is that despite the status of the 'Turkish Republic of Northern Cyprus' as illegal in international law and not recognised as a State in English law, we should nevertheless consider that it is capable of granting nationality so as to be capable of being the country of a person's nationality for the purposes of the Convention. That argument is to an extent based (although not expressly so) on Article 31 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). The principle is that the Convention is to be given a purposive interpretation and is not to be treated like an English statute. Phrases such as 'the country of his nationality' or 'not having a nationality' are, according to Mr Tam's argument, to be given a non-technical interpretation. The illegal government in Northern Cyprus is for practical purposes in power; it fulfils, for the inhabitants of that part of the island, many of the functions of government; it is regarded by those inhabitants as the lawful government and they claim nationality of the Turkish Republic of Northern Cyprus'. Northern Cyprus is, moreover, their

home. Why should the Convention be interpreted in such a way as to deny them nationality of Northern Cyprus?

25. As Mr Tam recognised, that argument has a formidable task in dealing with the dicta of Tamberlin J in Tjhe Kwet Koe v MIEA [1997] 912 FCA.

That is one of the few decided cases on this area of the law. It is authority for the proposition that a person's country of … former habitual residence need not be a State. It is also authority for the proposition that 'country' in that phrase is to be interpreted differently from 'country' in the phrase 'country of …nationality'. This second proposition does appear to be part of the ratio, because it was only by making the distinction between the two phrases that Tamberlin J found himself able to conclude that Hong Kong (although not a State) was the claimant's country of former habitual residence. He said this:

> The language of Article 1A of the Convention itself draws a distinction between 'the country of nationality' and 'the country of former habitual residence'. The word 'country' in each of these expressions is used in a different sense. In the first phrase it is used to designate a country capable of granting nationality. In the second it is used to denote a country which need not have this capability but in which the individual resides. The concept of 'country' is broader than the concept of a State.

26. The learned judge drew that distinction after reminding himself of the principle enunciated in Jong Kim Koe v MIMA (1997) 143 ALR 695, 706, that 'to interpret 'nationality' … as something of a 'merely formal' character … instead of something effective from the viewpoint of a putative refugee, would be liable to frustrate rather than advance the humanitarian objects of the Refugees Convention'. But Jong Kim Koe was a case in which the claimant was of dual nationality, and the effect of the interpretation there set out was to enable the court to ignore one of his nationalities on the ground that it was not effective. Nothing in Jong Kim Koe suggest that a person may be a national of a country that does not have status as a State.

27. Mr Tam made the bold submission that Tamberlin J was simply wrong in drawing a distinction between the meaning of the word 'country' in the two phrases. He argued that the interpretation adopted for the phrase 'country of …nationality' was too restrictive and formal. He cited the decision of the Canadian Court of Appeal in Ahmed Ali Zalzali v MEI [1991] 3 CF 605 in support of his argument that an authority may be effectively able to grant nationality for the purpose the Convention without itself being a State. That again, however, was a different and, in our view, distinguishable situation. The court found that that claimant was a refugee because he was able to establish that he would be at risk of persecution from warring armies in Lebanon. But there was no doubt that he was as national of Lebanon. It was for that reason that his claim was to be assessed by reference to Lebanon. The position was that the national government of Lebanon exercised effective control over no part of the country. Nevertheless, there seems to have been no doubt that it was the national government of Lebanon that had the power to grant nationality. The case is of interest for the discussion (at pp 614-5) of the effect, for the purposes of the Convention, of a country's official government's having lost control of its territory. The court recognises not only that the existence of civil war is not of itself a bar to refugee status, but also that it is practical protection that counts, rather than the protection of the official government. Thus, as Décary JA (giving the judgment of the court) says at P615:

> The 'country' the 'national government', the 'legitimate government', the 'nominal government' will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition. I will simply note here that I do not rule out the possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them, protection which may be adequate though not necessarily perfect.

28. Everything in that paragraph, and, indeed, everything in the judgment of the court, has reference to a situation where the claimant's nationality was beyond doubt. In the passage we have quoted, Décary JA indicates that there may be various entities capable of providing protection within a specified country. Nothing in that passage, or in the rest of the judgment, suggests that there may be various entities capable of granting nationality.

29. No authority cited to us favours Mr Tam's argument and Tjhe Kwet Koe is against it. Quite apart from authority we should not have accepted it, for a number of reasons. It appears to us to be self-evident that a distinction is being drawn in Article 1A(2) between persons who have a nationality and persons who do not have a nationality. (It also goes without saying that 'nationality' is to be taken in a different sense where it occurs, later in the definition of a refugee, as one of the 'Convention reasons'.)

30. Our first impression was that nationality is a concept in international law recognising the relationship between a person and a State. We have not been persuade to change our initial view and we therefore hold that nationality can be granted only by a State recognised as such by the international community.

31. In the context of the Refugee Convention there are in fact at least two reasons why we should prefer this, albeit formal, interpretation of the phrase 'country of … nationality'. One is that, being formal, it tends to promote consistency in interpreting the Convention between various jurisdictions. If a particular territory is not a State, then none of the parties to the Convention will treat it as the country of anybody's nationality for the purposes of the Convention.

32. The other reason lies in the function of the Convention to provide protection for those who need it. Here particularly we do invoke the purposive interpretation of Article 31 of the Vienna Convention. A territory that has no formal or legal existence as a State (particularly one whose existence, or whose government, has been declared illegal) cannot be a signatory to an international convention, and it may be more than a little difficult to secure its compliance with internationally recognised or prescribed norms of conduct. It is surely not right to regard such an entity as equivalent to a State for the purposes of defining and, more to the point, returning refugees. Of course, if a person has no nationality, it is necessary to consider him by reference to his country of former habitual residence. No country owes him duties as its citizen, and, against that background, the contrast between returning him to a State and to a territory that is not a State is less damaging. But for a person who has a nationality it cannot be appropriate to treat a State on the one hand and a power illegally occupying a territory on the other as equal partners or parallel alternative guardians of his future safety.

33. We mentioned a further consideration at the hearing, and it is right to record it here, although it has, in the end, played no part in our decision. The British government's

view of the 'Turkish Republic of Northern Cyprus' as having no lawful identify or power lay at the heart of Mr Tam's submissions. If an individual is capable of being regarded as a national of Northern Cyprus, he is, for reasons which we have set out in paragraph 9 above, less likely to qualify for protection as a refugee. Mr Tam's argument seeks to persuade us that (while denying recognition for all other purposes) we should recognise the 'Turkish Republic of Northern Cyprus' in one sole context, whose sole effect would be that of hindering its inhabitants from establishing status as refugees. We do not find that argument attractive.

Northern Cyprus as a Country of Former Habitual Residence

34. Given that Northern Cyprus cannot be the country of a person's nationality, can it be the 'country of his former habitual residence' for a person who has no nationality? In Tjhe Kwet Koe, Tamberlin J. noted that Hong Kong at the relevant date had a distinct area with identifiable borders, its own immigration laws, and was inhabited by a permanent identifiable community. Those factors may be useful pointers, but, for the reasons we are about to state, we do not consider that they are necessary or sufficient conditions for the existence of a 'country' for these purposes.

35. We agree, with respect, with Tamberlin J in Tjhe Kwet Koe that 'country' bears a wider, less formal meaning in the phrase 'country of … former habitual residence' than it does in 'country of … nationality'. To some extent our reasons for that view have been given in our discussion of the latter phrase. But there is a further consideration.

36. If the Convention is to be universal in application, it must be capable of affording protection to all those who cannot avail themselves of protection in the part of the world from which they come (to use a neutral phrase). It does so by providing a definition of refugee that applies to those of several nationalities, of one nationality, and of no nationality. But, even for those in the last category, there remains a condition, which is that the applicant establish (broadly speaking) a well-founded fear of persecution in the relevant part of the world. It cannot have been intended that those whose home is a part of the world that cannot formally claim to be a 'country' should be for this reason excluded from the benefits of the Convention. 'Country of … former habitual residence' must therefore be capable of being understood to include not only a State of which the claimant could have been a national, but also a territory area whose status is in that sense doubtful. Hong Kong, governed from the United Kingdom at the time when Tjhe Kwet Koe was decided, but not in any real sense a part of the United Kingdom, is an obvious case in point. The phrase must also be capable of being understood to include areas of the world where there is civil war and where, as result, the allocation of territory between different 'countries' is not yet clear. The breakup of the Socialist Republic of Yugoslavia is an example. At the time we make this determination Bosnia-Herzegovinia and Croatia are separate States, recognised as such; but during the war, people coming from those areas needed to be able to establish that they might be refugees without having first to establish that their country of former habitual residence was in a position to grant nationality. In the interests of universality, the phrase 'country of … former habitual residence' must even be capable of applying to a new island arising in the sea, although, as Justinian points out, 'this rarely happens'.

37. We have, however, the gravest doubt whether it is proper to treat an area as a 'country' for these purposes if it clearly forms part of State recognised as such in International Law. Admittedly, we are necessarily dealing with people who have no nationality and who therefore may not have a free right of residence throughout the State in question: this might suggest that their status should be assessed by reference to an area rather than a State. But it must be remembered that recognition of an individual as a refugee must be on the basis of a need for surrogate protection. There is no such need if the State of origin is prepared to provide proper protection within its borders.

38. Consider an example. Suppose that 'Northern Cyprus' could be the country of former habitual residence for a Turkish Cypriot without nationality. Then it must follow that it could be the country of former habitual residence for any Greek Cypriot without nationality who happened to live there. If such a Greek Cypriot fled from Northern Cyprus, claiming a fear of persecution by reason of being Greek, it would surely be wrong to assess him by reference to Northern Cyprus only. His country of former habitual residence must be Cyprus, so that if he could obtain protection in Cyprus (perhaps by being allowed to move to the south) he is not a refugee.

39. Northern Cyprus is, by the clear consensus of international opinion, entirely contained within the Republic of Cyprus, a State recognised in international law through the Treaties and SCR 541. We would therefore tentatively conclude that Northern Cyprus is not capable of being the country of a person's former habitual residence within the meaning of the Convention. In the case of Cyprus, however, we concede that it may not make any difference. Because of the very accurate geographical division of the island between the two sectors of the population, there could be little doubt of the appropriate destination for a former resident of Cyprus.

The position of the appellant

40. We return, rather belatedly it may be thought, to the particular appeal before us. We have decided that the Appellant cannot, for the purposes of the Convention, be regarded as a national of the 'Turkish Republic of Northern Cyprus'. There is, however, no doubt that he is a citizen of Turkey, and no other lawful nationality has been suggested for him. He is therefore not of dual nationality. He is Turkish and his claim to be a refugee within the Convention definition has to be assessed by reference to Turkey alone.

41. The adjudicator, understandably (because he was misled by the description of the appellant on the cover-sheet of the respondent's bundle) treated the appellant as a 'citizen of Northern Cyprus' and assessed his claim by reference only to Northern Cyprus. It follows that the appellant's claim has in fact not yet been assessed by reference to the Convention definition as it applies to him. For that reason it will be necessary for this appeal to be reheard.

Return to Northern Cyprus

42. An appeal under section 8 of the 1993 Act (or section 69 of the 1999 Act) is not an appeal against the refusal of asylum. It is an appeal against the immigration decision, the grounds of appeal being that the appellant's removal or expulsion would breach the Convention. If (but only if) the appellant is a refugee, he is

protected from removal or expulsion by Articles 32 and 33. Article 32 imposes a general prohibition on the Contracting States' expulsion of a refugee 'lawfully in their territory'. As the prohibition is general, destination is irrelevant under this Article. The restriction of its application to those lawfully in the country of reception, however, means that this article only applies to those appealing under section 8 (2) of the 1993 Act (or section 69 (2) or (3) of the 1999 Act). That is the effect, in this context, of the decision of the House of Lords in In re Musisi [1987] Imm AR 250: see the speech of Lord Bridge at 258.

43. Where the appeal is under any of the other subsections of the relevant Acts, the removal or expulsion even of a refugee is not prohibited by the Convention. In such cases the appellant is protected only by Article 33. As interpreted, broadly speaking, that Article prohibits return to a place where the individual would either be at risk of persecution for a Convention reason or would be at risk of being expelled from there to a place where he would be at such risk.

44. In English law, the possible destinations for a person who is to be removed form the United Kingdom are restricted by the 1971 Act. For those refused leave to enter, or declared to be illegal entrants, the provisions are in paragraph 8(1)(c) of Schedule 2 to the act. For those being deported, the provisions are in paragraph 1 of Schedule 3. In each case removal may be to 'a country or territory to which there is reason to believe that he will be admitted'. Thus, a person being removed from (or being required to leave) the United Kingdom will not necessarily be returned to his country of nationality.

45. In the case of persons coming from Northern Cyprus, and holding travel documents issued by the 'Turkish Republic of Northern Cyprus', the Secretary of State has reason to believe that they will be admitted to Northern Cyprus. The journey to that territory, however, involves travelling through Turkey, because of the internationally-imposed restrictions on flights to Northern Cyprus.

46. If a person from Northern Cyprus establishes that he is a refugee by reference to Turkey as his only country of nationality, he may still be removed to Northern Cyprus, provided that his removal there would not breach Article 33. Whether it would do so is a matter to be determined on the facts of each individual case and it would not be right for us, in the present context, to offer any more than the most general guidance.

47. It may well be that a decision maker can properly reach the conclusion that there is little general risk of persecution for a Convention reason in Cyprus itself, either in the north or in the south. But that, of course, is not the end of the matter. If the appellant has shown that he would be at risk of persecution for a Convention reason in Turkey, then (putting aside for the moment any question of internal relocation) his removal to Cyprus will breach the Convention if it puts him at risk of the same persecution. It appears to us that, in an individual case, an appellant might be able to show either that his passage through Turkey to Cyprus exposes him to risk; or that the Turkish authorities would be able to secure his return from Northern Cyprus to Turkey; or that the Turkish authorities might be able to have access to him in Cyprus.

48. Mr Grieves pointed us to a considerable quantity of materials which, he submitted, established Turkish responsibility for many events in Northern Cyprus. As well as documentary evidence, he referred to proceedings before the European Court of Human Rights in Loizidou v Turkey (preliminary objections and judgement on the merits), and Cyprus v Turkey (fourth application), and Prosecutor v Dusco Tadic, a judgement of the Appeals Chamber of the International tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of the Former Yugoslavia since 1991, dated 15 July 1999. He produced transcripts of all those judgements form the internet. We do not, however, consider that any of the cases cited in this context are authority for any proposition of law that could assist the appellant the case such as the present. The individual risk to an individual appellant will need to be proved as a matter of fact in each individual case.

49. We emphasise that nothing we have said about the status of Northern Cyprus has very much application to a person who actually is a national of the Republic of Cyprus, whether simply by operation of the 1960 instruments (see paragraph 8) or otherwise. Such a person must make his claim to be a refugee by reference to Cyprus as his sole country of nationality or as one of his countries of nationality. Issues relating to any threat of refoulment will, however, remain applicable to such a person.

Conclusions

50. (a) Northern Cyprus is not capable of being the country of a person's nationality for the purposes of Article 1A(2) of the Convention.

(b) It follows that, for a person who has (another) nationality, a link with Northern Cyprus is irrelevant for the purposes of deciding whether he is a refugee.

(c) Northern Cyprus is, it seems, not capable of being the country of former habitual residence of a person who has no nationality. Cyprus, however, undoubtedly is capable of being a country of former habitual residence.

(d) If a person establishes that he is a refugee within the meaning of Article 1(A)(2) of the Convention, care must be taken to ensure that his return to Northern Cyprus will not breach Article 33.

51. For the reasons given in paragraph 41, this appeal to the Tribunal is allowed and we direct that the Appellant's appeal be considered afresh by an adjudicator other than Mr Jefferson.

C. M. G. Ockelton
Deputy President