Court judgment in T v Home Secretary [1996] AC 742 at 7787 F-G, which was referred to in LC Paper No. CB(2)809/13-14(01)

[HOUSE OF LORDS]

T. . . . . APPELLANT

AND

IMMIGRATION OFFICER . . . . . RESPONDENT

[On appeal from T. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT]

1995 Nov. 16, 20, 21;
1995 May 22

Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill, Lord Slynn of Hadley and Lord Lloyd of Berwick

Immigration—Illegal entrant—Application for asylum—Applicant involved in terrorist acts in country where persecution feared—Secretary of State refusing asylum—Whether serious reasons for considering applicant guilty of "serious non-political crime"—Whether applicant excluded from asylum—Convention relating to the Status of Refugees (1951) (Cmd. 9171), arts. 1F(b), 33

The applicant, an Algerian citizen who had entered the United Kingdom in 1993 as an illegal entrant, claimed political asylum after he had been arrested on suspicion of theft. The Secretary of State refused the application. The applicant appealed to the special adjudicator under section 8(1) of the Asylum and Immigration Appeals Act 1993 on the ground that his removal would be contrary to the United Kingdom's obligations under article 33(1) of the Geneva Convention relating to the Status of Refugees[1] since, if he were returned to Algeria, his life or freedom would be threatened on account of his political opinions. The special adjudicator accepted that the applicant was a member of F.I.S., a political organisation that intended to secure power in Algeria, was prepared to use violence to achieve its purpose and had been declared illegal in March 1992. The special adjudicator also accepted the applicant's admissions that he had been involved in and had had prior knowledge of a bomb attack on Algiers airport in August 1992 in which 10 people had been killed and that in February 1993 he had been engaged in planning a raid to seize arms from an army barracks in which one person had died. The special adjudicator concluded that both incidents brought him within the scope of article 1F(*b*) of the Convention as a person who "there were serious reasons for considering" had committed "serious non-political" crimes so as to exclude him from the protection of the Convention. The special adjudicator therefore dismissed the appeal. The Immigration Appeal Tribunal, on the applicant's further appeal, directing themselves by reference to the concept of terrorism and its definition in the Prevention of Terrorism (Temporary Provisions) Act 1989, found the applicant to be an active member of a terrorist organisation prepared to advance its cause by random killings and that he had been closely associated in one such incident, which, as an indiscriminate bombing leading to the deaths of innocent people, could not be characterised as a political crime. The appeal tribunal accordingly

[1] Convention relating to the Status of Refugees, art. 1F(*b*): see post, p. 759B–C.
Art. 33: see post, p. 759C–D.

dismissed his appeal. The Court of Appeal dismissed an appeal by the applicant.

On the applicant's appeal:—

Held, dismissing the appeal, that (*per* Lord Keith of Kinkel, Lord Browne-Wilkinson and Lord Lloyd of Berwick) for a crime to be a political crime for the purposes of article 1F(*b*) of the Convention it had to be sufficiently closely and directly linked to the political purpose and not too remote from it, regard being had to the means used to achieve the political end, in particular whether the crime was aimed at a military or governmental target on the one hand or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public; that the means used in the attack on the airport had been indiscriminate and almost bound to involve the killing of members of the public, and therefore the link between the crime and the applicant's political objective had been too remote to constitute it a political crime (post, pp. 752F–G, 786H–787B, C–788A; that (*per* Lord Mustill and Lord Slynn of Hadley) acts of terrorism likely to cause indiscriminate injury to persons having no connection with the government of the state were outside the concept of a political crime within the meaning of the Convention and the attacks on both the airport and the barracks had properly been characterised by the appeal tribunal as terrorist offences; and that, accordingly, the appeal tribunal had been entitled to hold that there were serious reasons for considering that the applicant had committed a serious non-political crime outside the United Kingdom and was therefore excluded by article 1F(*b*) of the Convention from the protection of article 33(1) (post, pp. 755G–H, 772E–773F, 775H–776D).

In re Meunier [1894] 2 Q.B. 415, D.C.; *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, H.L.(E.) and *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931, H.L.(E.) applied.

Decision of the Court of Appeal [1995] 1 W.L.R. 545; [1995] 2 All E.R. 1042 affirmed.

The following cases are referred to in the judgment:

Ahmad v. Wigen (1990) 910 F.2d 1063
Atta, In re (1989) 706 F.Supp. 1032
Carron v. McMahon [1990] 1 I.R. 239
Castioni, In re [1891] 1 Q.B. 149, D.C.
Doherty, In re (1984) 599 F.Supp. 270
Eain v. Wilkes (1981) 641 F.2d 504
Ellis v. O'Dea (No. 2) [1991] 1 I.R. 251; [1991] I.L.R.M. 346
Extradition Act 1870, In re, Ex parte Treasury Solicitor [1969] 1 W.L.R. 12; sub nom. *In re Gross, Ex parte Treasury Solicitor* [1968] 3 All E.R. 804
Folkerts v. Public Prosecutor (1978) 74 I.L.R. 498
Gil v. Canada (Minister of Employment and Immigration) [1994] F.C.J. No. 1559
McGlinchey v. Wren [1982] I.R. 154
Mackin, In re (1981) 668 F.2d 122
McMullen v. Immigration and Naturalization Service (1981) 658 F.2d 1312; (1986) 788 F.2d 591
Meunier, In re [1894] 2 Q.B. 415, D.C.
Ornelas v. Ruiz (1896) 161 U.S. 502
Quinn v. Robinson (1986) 783 F.2d 776

Reg. v. Governor of Brixton Prison, Ex parte Kolczynski [1955] 1 Q.B. 540; [1955] 2 W.L.R. 116; [1955] 1 All E.R. 31, D.C.

Reg. v. Governor of Brixton Prison, Ex parte Schtraks [1964] A.C. 556; [1962] 3 W.L.R. 1013; [1962] 3 All E.R. 529, H.L.(E.)

Reg. v. Governor of Pentonville Prison, Ex parte Budlong [1980] 1 W.L.R. 1110; [1980] 1 All E.R. 701, D.C.

Reg. v. Governor of Pentonville Prison, Ex parte Cheng [1973] A.C. 931; [1973] 2 W.L.R. 746; [1973] 2 All E.R. 204, H.L.(E.)

Reg. v. Governor of Winson Green Prison, Birmingham, Ex parte Littlejohn [1975] 1 W.L.R. 893; [1975] 3 All E.R. 208, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay [1987] A.C. 514; [1987] 2 W.L.R. 606; [1987] 1 All E.R. 940, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Chahal [1995] 1 W.L.R. 526; [1995] 1 All E.R. 658, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Sivakumaran [1988] A.C. 958; [1988] 2 W.L.R. 92; [1988] 1 All E.R. 193, H.L.(E.)

Rodriguez-Coto, In re (unreported), 21 February 1985, United States Board of Immigration Appeals

Wisconsin (State of) and Armstrong, In re (1973) 32 D.L.R. (3d) 265

The following additional case was cited in argument:

Garcia-Mir v. Smith (1985) 766 F.2d 1478

APPEAL from the Court of Appeal.

This was an appeal by the applicant, T., by leave of the Court of Appeal (Nourse, Glidewell and Simon Brown L.JJ.) from their decision given on 3 November 1994 dismissing his appeal under section 8(1) of the Asylum and Immigration Appeals Act 1993 from the Immigration Appeal Tribunal. The tribunal, on 11 May 1994, had dismissed his appeal under section 20 of the Immigration Act 1971, as applied by Schedule 2 to the Act of 1993, from a special adjudicator who on 28 March 1994 had dismissed his appeal under section 8(1) of the Act of 1993 against the refusal by the Secretary of State for the Home Department, by letter dated 3 September 1992, of his application for political asylum.

The facts are stated in the opinions of Lord Mustill and Lord Lloyd of Berwick.

Nicholas Blake Q.C. and *Richard Scannell* for the applicant. The concept of "political crime" for the purposes of the United Kingdom extradition laws applies to the interpretation of the Geneva Convention relating to the Status of Refugees (1951) (Cmd. 9171). The Convention is referring not to some universally acceptable definition of "political offence" or the lowest common denominator between signatory states but to the development of the concept in the national law system. The extradition concept of "political offence" is not broader than the Convention concept as suggested by the United States Court of Appeals in *McMullen v. Immigration and Naturalization Service* (1981) 658 F.2d 1312; (1986) 788 F.2d 591 and cases following it. Not all political offenders necessarily face persecution, and it would be illogical if in the definition of "political offence" criminals facing specific extradition requests received greater protection than refugees who had established that in addition to prosecution they faced persecution. The Convention was drafted against

the background of article 14 of the United Nations Declaration of Human Rights 1948, 42 A.J.I.L. (1949) Supp. 127 and the Statute of the Office of the United Nations High Commissioner for Refugees ("U.N.H.C.R") (see Annex to the U.N.H.C.R. *Handbook on Procedures and Criteria for Determining Refugee Status,* 2nd ed. (1988), published by the office of the High Commissioner), paragraph 7(d). It is not surprising, therefore, that the commentators on the travaux préparatoires to the Convention are clear that the drafters intended to bring refugee law into harmony with extradition law.

Although the application of the exclusion clause (article 1F(*b*) of the Convention) may not require an actual request for extradition under a treaty, it is for the receiving state to consider whether the exclusion applies by reference to its extradition-based definition of "political offence." The receiving state should thus bear the burden of proof where there is an issue as to the application of the clause.

It is apparent from the English authorities (the most useful source) that murder and the commission of other politically motivated common law crimes does not preclude an offence from being political in character for the purposes of extradition (and therefore the Convention): see *In re Castioni* [1891] 1 Q.B. 149 and *Reg v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931. The Anglo-American conception of "political offence" originated in the locus classicus of insurrection, civil war, or conflict over the control of the state: see *Quinn v. Robinson* (1986) 783 F.2d 776, 792–803; *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 583, 589–592; *Ex parte Cheng,* pp. 944–946, 949–960 and *Eain v. Wilkes* (1981) 641 F.2d 504, 518–522. Other legal systems have been concerned with violence directed against non-combatants in the absence of a general insurrection or civil war and have developed a proportionality approach in dealing with common law crimes committed for a political motive: see *Quinn v. Robinson,* at pp. 794–795, and paragraphs 152 and 156 of the U.N.H.C.R. *Handbook.* There is some division at the level of the Federal Court of Appeals as to whether the proportionality test is consistent with the *In re Castioni* uprising approach as developed in Anglo-American jurisprudence: see *McMullen's* case, at pp. 597–598, and *Eain v. Wilkes.* Those cases are distinguishable in that they did not raise questions of insurrection and uprising internal to the country of feared persecution or return. In any event, the English courts have found other means of limiting an undesirably broad definition of the insurrectionary approach without seeking too restrictive an interpretation (see *per* Lord Reid in *Ex parte Schtraks*) in cases (i) where the participants act for personal rather than political motives; (ii) where the offence is against all societies rather than particular governments (*In re Meunier* [1894] 2 Q.B. 415); (iii) where the offence is committed in a third country rather than the place of conflict (*Ex parte Cheng* [1973] A.C. 931). The English courts have never proceeded along the lines of a proportionality approach to the violence employed in these crimes because to do so would inevitably involve forming political judgments as to the merits of the cause and the justification of particular methods in the light of particular circumstances and to substitute the court's opinion for that of the political actors. Methods cannot be isolated from the political situation in which

they are used; tyrannical regimes offering no possibility of peaceful change may expect more violent opposition than reasonably democratic ones. The court is not to make political judgments once the circumstances for characterising the offence as political arise: see *Quinn v. Robinson*, 783 F.2d 776, 789, 803–810; *Ex parte Schtraks* and *Ex parte Cheng.*

Remoteness may play some role in establishing the connection between political motive and a common law crime committed in circumstances where there was no general uprising or upheaval against a particular government. In England motive is always relevant and may be decisive (*Ex parte Schtraks*, at p. 583) but is not per se decisive. The use of remoteness is confined to making a connection between the offence and the political aim; it is not to pass judgment on the political aim and its methods. Robbing a bank to gain funds to support by lawful means a lawful political party in a political context where such support is possible may well be too remote (*Ex parte Cheng*, at p. 945c), but obtaining the material means to conduct an armed struggle would not be. The actual decision in *Reg. v. Governor of Winson Green Prison, Birmingham, Ex parte Littlejohn* [1975] 1 W.L.R. 893 may be doubted since no reference was made to the drafting history of the Backing of Warrants (Republic of Ireland) Act 1965 and the relevance of the European Convention on Extradition 1957 (see the European Convention on Extradition Order 1990 (S.I. 1990 No. 1507), Sch. 1), which inspired extradition legislation in the United Kingdom and Ireland in the 1960s. "Political offence" in article 3(1) of that instrument included an offence related to a political offence.

In any event, breaking into an arms depot was part of the political acts in *In re Castioni* [1891] 1 Q.B. 149 and in the present case; stealing arms from the Algerian military would both deprive the enemy of military resources and promote the ongoing insurrection then in place in Algeria. Remoteness could not be used to import a judicial supervision of the degree of appropriate violence in a political context of insurrection or quasi-civil war. The Convention had already incorporated its own balancing or delimiting considerations by excluding war crimes, genocide and crimes against the principles of the United Nations: see article 1F(*a*) and (*c*). A judgment as to the extent of legitimate violence to be used in a formal struggle for power between one party and another was unlikely to have been a general consideration in the minds of the drafters. It would have rendered those specific exclusions superfluous if disproportionality was to be generally construed. There was no international consensus in 1951 about the exclusion of acts that are considered by some to be "terrorist" today. At the very least it was left to the national system to define. Equally, the drafters of the European Convention on the Suppression of Terrorism (1977) (Cmnd. 7031) were aware that crimes of violence, including those directed against non-governmental targets, could amount to political crimes in the national law systems of signatory states. The object of the Convention of 1977 was to preclude such crimes from being political crimes in the context of certain extradition agreements between democratic and law-abiding countries: see articles 1, 5 and 13 and the explanatory note, paragraphs 1–30. There would have been no need for the specific exclusion of such offences in the limited context of

A Convention (1951) and designated extraditions if a common law concept of proportionality automatically excluded them. The United Kingdom clearly thought that legislation was necessary to exclude them: see the Suppression of Terrorism Act 1978 and the modifications that it made to the Extradition Acts (now the Act of 1989).

A person fearing persecution may seek asylum in another country. The commission of a political offence does not per se grant refugee status. B There must be a well founded fear of persecution for a Convention reason, but politically motivated or contaminated prosecution may establish or form part of the persecution feared. Equally, the commission of a politically motivated offence does not exclude the asylum-seeker from international protection. If the offence is committed in a third country it may be irrelevant to the question of asylum status or may exclude the C offence from being political: see *Ex parte Cheng* [1973] A.C. 931. If the offence is not political and serious, then, the relevant considerations having being balanced, the conclusion may be exclusion from protection or vulnerability to an extradition request. If the offence is excluded from being considered political because of the Act of 1978 or other measures designed to narrow the political offence exception for particular purposes, the refugee may still avoid return by demonstrating that the purpose of D the request is a disguised persecution or that there will be discrimination and prejudice for a Convention reason in any ensuing prosecution. Disguised motive or collateral purpose is (see *per* Lord Radcliffe in *Ex parte Schtraks* [1964] A.C. 556) part of the reason why a politically motivated offender should not be returned, but it is not the comprehensive rationale of "political offence," which indeed in English extradition E legislation occupies a separate sub-head of section 6 of the Act of 1989.

The extradition and Convention protections are complementary, and a person who can demonstrate a well-founded fear of persecution for a Convention reason will not be returned to face prosecution in the country of feared persecution. Where a person is present in the receiving state, this follows irrespective of whether the offence for which extradition is sought is a political offence within the meaning of section 6(1)(*a*) of the Act of F 1989, and any possible narrowing of the meaning in certain circumstances, if paragraphs (*c*) and (*d*) are made out. A person seeking protection may be precluded from admission if the offence is "non-political" in the broadest sense of the term.

Gil v. Canada (Minister of Employment and Immigration) [1994] F.C.J. No. 1559 should not be followed in the United Kingdom. 1. The drafters G of the Convention cannot have intended that extradition treaties relating to common criminals should take precedence over the Convention where there is a valid claim to political asylum. 2. The Canadian court erred in suggesting that a different construction might be given to "political offence" in the extradition cases where the consequence is not necessarily to return the offender to the place of feared persecution. The issue of "political offence" only arises in the case of common law offences H committed for a political purpose where the activity is political vis-à-vis the requesting state: see *Ex parte Cheng* [1973] A.C. 931. 3. The United Kingdom has adopted in its laws and case law other and more appropriate means for narrowing the protection given to those who use

violence in support of political ends: see the Act of 1978, the requirement of an insurrection applied in *In re Castioni* [1891] 1 Q.B. 149. 4. The question of remoteness in the use of force and its justification would inevitably lead the court to make a political judgment on foreign regimes that it is ill-equipped to do. 5. The Canadian court's acceptance that the consequence of a broad exclusionary interpretation is irrelevant and that even expulsion to face the death penalty does not contravene Canada's international obligations is misconceived and does not reflect the international obligations of the United Kingdom under the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1985) (Cmnd. 9593).

The problems that arise where a political organisation uses violence in a democratic country abiding by international human rights norms do not arise in the present case.

All violent acts are offensive to the judicial discourse, but a decision on the proper interpretation of the Convention is not a justification or vindication of those acts. It merely does not exclude an asylum seeker from protection per se. The "floodgates of terrorism" argument is not applicable and should not distort the interpretation of the Convention. International terrorists taking actions against targets outside the field of conflict will not face persecution and will not be immune from extradition. Taking up arms against a repressive regime is not or may not be a badge of bad character. There is independent provision in the Convention for the protection of the host country's national security (i.e., against the export of insurrectionary violence): refugees who represent a danger to the national security of the host country are excluded from protection under article 33 of the Convention (subject to a balance in that case: see *Reg. v. Secretary of State for the Home Department, Ex parte Chahal* [1995] 1 W.L.R. 526).

Both article 1F(*b*) and article 33(2) of the Convention are apparently absolute in excluding a person from protection. Indeed article 33(2) in dealing with the specific contemplated consequence of refoulement would appear to be more absolute in character. Nevertheless, the travaux, the commentators and the Court of Appeal in *Ex parte Chahal* are clearly of the opinion that a balance arises. Article 33 is not restricted to deportations or removal of persons lawfully within the territory (article 32 covers such decisions) and is also concerned with the removal of illegal entrants (such as the applicant) and any other expulsion from the territory.

Despite the views of the commentators, the Court of Appeal here and some United States courts have held that proportionality does not apply to article 1F(*b*) of the Convention. This is an error. The fact that a person has a well-founded fear of persecution (article 1A(2)) does not necessarily mean that his life or liberty will be threatened (article 33(1)). Where the consequence of refusal of recognition is to return the asylum seeker to a frontier where life or liberty will be threatened, the evidence establishing the legal culpability should at least be examined with care to see if exclusion should follow: see the European Community's draft guidelines on harmonised asylum procedure ("Guidelines for the application of the

criteria for determining refugee status in article 1A of the Geneva Convention"). Logically, a balance should follow, since the Secretary of State is not precluded from granting exceptional leave to remain as a result of the adjudicator's findings of facts; indeed, if article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd. 8969) and article 3 of the United Nations Convention Against Torture (Cmnd. 9593) prohibit any return to torture he may be obliged to grant such de facto asylum. The balance should consider the antiquity of the offence, the age of the offender at the time and mitigating circumstances, personal or compassionate (see the commentators and paragraph 156 of the U.N.H.C.R. *Handbook*), all of which would be precluded if a strict construction were adopted that exclusion followed automatically once any serious reason existed for considering that an offence had been committed. The balance should consider the strength of the evidence against the applicant and the likelihood of a sound conviction. "Serious reasons for considering" is broad enough to engage a wide variety of circumstances casting significant suspicion, but persecution and death, where the evidence is thin, should not be contemplated with equanimity.

There are evidential issues between the parties as to (a) what the applicant's group originally planned to do at the airport; (b) what the reason was why the civilians died as a result of the plans; (c) what the applicant's involvement in the airport crime was; (d) what the purpose of attacking the airport was, and what political benefit and furtherance of the cause were to be obtained; and (e) whether the violence adopted by the applicant's group was a rational response to the repressive conditions in Algeria in 1992. None of these issues has been properly ventilated and determined, and they have an impact on the ultimate conclusion.

If the answer to the principal question posed is not clear, the case should be remitted, as the asylum procedure should be in no way flawed so that the applicant is not erroneously sent to persecution and death.

Scannell followed.

David Pannick Q.C. and *Neil Garnham* for the immigration officer. As to the burden of proof, the proper approach to adopt in relation to article 1F(*b*) of the Convention is simply to ask whether, on the relevant material, "there are serious reasons for considering" that the applicant has committed "a serious non-political crime," not whether he did commit such a crime. Therefore article 1F(*b*) can only apply if there are "serious reasons" for so concluding. In any event, it was not necessary for the special adjudicator or the tribunal (or the Court of Appeal) to decide where the burden of proof lay. The factual basis for the application of article 1F(*b*) is the applicant's own statements: see [1995] 1 W.L.R. 545, 552H–553A.

There are no English authorities on the meaning of "non-political," but English courts have considered whether offences are "of a political character" for the purposes of section 3(1) of the Extradition Act 1870. There are two main requirements that must be satisfied if a crime is properly to be characterised as "political" for the purposes of article 1F(*b*). (1) The offence must have been carried out for a political purpose, that is, with the object of overthrowing or changing the government of a

state or inducing it to change its policy: see *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 583 and *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931, 943B, 944H–945D, 960D. (2) There must be a close and direct causal link between the crime committed and the alleged political purpose, having regard in particular to the crime's proportionality to its political objective and its degree of atrocity: see *Ex parte Cheng*, 945B–C; *McMullen v. Immigration and Naturalization Service*, 788 F.2d 591, 596–598; paragraph 152 of the U.N.H.C.R. *Handbook on Procedures and Criteria for Determining Refugee Status*; *Eain v. Wilkes*, 641 F.2d 504 and *Goodwin-Gill, The Refugee in International Law* (1983), pp. 60–61. The same approach has been adopted in Canada: see *Gil v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1559. The *Handbook* has no binding legal effect, but to the extent that the terms of the Convention are ambiguous it is of persuasive value in considering the obligations that the contracting states have undertaken.

The Court of Appeal was correct to conclude that the applicant's crime in relation to the bombing of the airport was a non-political offence because it failed the second criterion.

None of the English extradition cases addresses the question of the extent to which indiscriminate acts of violence or terror that kill or injure innocent civilians can constitute political offences. They are all concerned with focused crimes directed against political figures. The English courts should be cautious about bringing across to asylum a principle developed in the different context of extradition law. The mere fact that a person was acting for a political motive is not sufficient. There must be a point at which crimes are too remote to be political crimes. Only the plainest language in the Convention and only the strongest authorities in other jurisdictions should lead to the conclusion that the United Kingdom is obliged to define "non-political crimes" without regard to whether the crime targets innocent civilians or involves atrocious acts disproportionate to the political goal. The majority judgments in *Quinn v. Robinson*, 783 F.2d. 776 are inconsistent with *Eain v. Wilkes* and were not followed in *McMullen*. They were rejected in later decisions of the United States federal courts: see *In re Atta* (1989) 706 F.Supp. 1032, 1038–1041 and *Ahmad v. Wigen* (1990) 910 F.2d 1063. Whether a crime is political cannot depend on *how much* chaos it causes. All the cases except *Quinn v. Robinson* exclude this, deciding on the ground of either remoteness or targeting civilians. As to the latter, see *In re Meunier* [1894] 2 Q.B. 415, 416–417, 419, *In re Castioni* [1891] 1 Q.B. 149 and *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556.

As to proportionality, the applicant contends that the special adjudicator was required to balance the gravity of the crime against the risk to the applicant's life if he were returned to Algeria. The applicant's contentions are impossible to reconcile with the terms of the Convention. Article 1F excludes from the scope of the Convention any person in respect of whom there are serious reasons for considering that the conditions stated in article 1F(*b*) are met. Such persons are not considered to be refugees: see *McMullen v Immigration and Naturalization Service*, 788 F.2d 591, 595. If the conditions are met, then it is not a breach of the

United Kingdom's obligations under the Convention to remove the person from the United Kingdom, even though that person may face persecution abroad. Article 1F does not say that, if its criteria are satisfied, a person has a lesser degree of protection, or that a balancing act must be performed. It states, unequivocally, that, where its criteria are satisfied, "the provisions of this Convention shall not apply." Indeed, article 1F only has effect in those cases where the individual would otherwise be entitled to asylum (because he does have a well-founded fear of persecution). The criteria of article 1F themselves impose a test of proportionality to the extent that the contracting states considered it appropriate to do so. The contracting states agreed that the protection of the Convention should be enjoyed by all persons, with specific exceptions in cases where the circumstances were such that the acts of the individual (as defined in article 1F) were so serious a breach of internationally accepted principles that it would be inappropriate to impose any obligation on the contracting state to grant asylum. The intention of article 1F(*b*) is to take out those who are "beyond the pale." If a person has a right of asylum, he cannot be removed even if he could otherwise be extradited. Extradition depends on the treaty between the two countries, whereas asylum depends on the Convention. A person cannot be extradited if he is going to be persecuted, because the purpose of extradition is to get him back for a proper prosecution.

The Court of Appeal [1995] 1 W.L.R. 545, 554H–555B correctly addressed the issues. *Reg. v. Secretary of State for the Home Department, Ex parte Chahal* [1995] 1 W.L.R. 526 does not assist the applicant, since in that case the obligation to balance competing considerations was imposed by the immigration rules. In the present case, the relevant obligation of the Secretary of State is to comply with the Convention, and article 1F excludes what would otherwise be the obligations of the contracting state to grant asylum where the criteria set out in article 1F are satisfied. Paragraph 156 of the U.N.H.C.R. *Handbook* finds no support in the text of the Convention when it suggests that article 1F requires a balancing exercise between the circumstances of the crime and the circumstances of the persecution feared by the applicant. The court is not obliged to accept the approach contained in the *Handbook* which conflicts with the plain meaning of article 1F: see *Reg. v. Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] A.C. 958, 999H–1000F and *Gil v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1559. The United States has also rejected that approach: see *Garcia-Mir v. Smith* (1985) 766 F.2d. 1478 and *In re Rodriguez-Coto* (unreported), 21 February 1985, United States Board of Immigration Appeals.

As to whether the Court of Appeal should have remitted the matter for further consideration by the tribunal, see Schedule 2 to the Asylum and Immigration Appeals Act 1993; section 15(3) of the Supreme Court Act 1981 and R.S.C., Ord. 59, r. 10(4). Once the Court of Appeal had decided the proper interpretation of article 1F(*b*) of the Convention, it was entitled to apply that provision to the facts as found by the special adjudicator and the tribunal. There was no need for further facts to be found. The facts came from the applicant's own admissions. The issue under article 1F(*b*) of the Convention is not whether he can be proved

guilty of serious political crimes but whether there are serious reasons for considering that he has committed them, so there is no need for facts to be found as to what *actually* happened.

Blake Q.C in reply. The question is as to the definition of "political offence" in circumstances where there has been a bid for state power after the electoral route has been blocked. Unlike the applicant in *In re Meunier* [1894] 2 Q.B. 415, the F.I.S. are not anarchists against all states; they wanted to be the government.

Three strands emerge as to the reason why political offences are excluded from article 1F(*b*) of the Convention. 1. To permit extradition in appropriate cases. But the Act of 1989 excludes extradition for either political offences or where persecution is feared. A common criminal should not be better off than a refugee. 2. The clause obviates the duty on a state to offer protection where the crime is unconnected with political purposes. The connection with political purpose is much wider than stated in *Gil v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1559. 3. Article 1F as a whole also excludes those wholly undeserving of protection having regard to existing treaties, etc. This does not extend to those who commit criminal offences in a political role even where there are civilian casualties as an unintended result of an attack on government property.

Proportionality applies in the application of the exclusion clause as a whole. It is not a question of saying that once one is excluded from protection one can get back in because of the disproportionate consquences. If a balance is necessary in the application of article 33(2) of the Convention it is even more so in the application of article 1F(*b*).

As to remittal and the burden of proof, this was a political offence that, on the proper interpretation of article 1F(*b*), does not exclude the applicant from protection. If there is any uncertainty as to whether he is protected because of the precise nature of what might be excluded by article 1F(*b*), the findings of fact hitherto made (regarding whether there was the intent to kill or cause grevious bodily harm and the political aspirations of the F.I.S.) are insufficient to determine whether the special adjudicator would have excluded the applicant.

Their Lordships took time for consideration.

22 May. LORD KEITH OF KINKEL. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Lloyd of Berwick, which I have read in draft and with which I agree, I would dismiss this appeal.

LORD BROWNE-WILKINSON. My Lords, for the reasons given by my noble and learned friend, Lord Lloyd of Berwick, I, too, would dismiss the appeal.

LORD MUSTILL. My Lords, during the 19th century those who used violence to challenge despotic regimes often occupied the high moral ground, and were welcomed in foreign countries as true patriots and democrats. Now, much has changed. The authors of violence are more

ruthless, their methods more destructive and undiscriminating; their targets are no longer ministers and heads of state but the populace at large; and their aims and ideals are frequently no more congenial to the countries in which they take refuge than those of the regimes whom they seek to displace. The unsympathetic call them terrorists, and their presence is seen as both an affront and a danger. These fundamental changes in method and perception have not been matched by changes in the parallel, although not identical, laws of extradition and asylum. These laws were conceived at a time when political struggles could be painted in clear primary colours largely inappropriate today; and the so-called "political exception" which forms part of these laws, and which is the subject of this appeal, was a product of Western European and North American liberal democratic ideals which no longer give a full account of political struggles in the modern world. What I regard as the exceptional difficulty of this appeal is that the courts here, as in other legal systems, must struggle to apply a concept which is out of date.

The appeal arises as follows. The appellant, identified throughout as Mr. T., is an illegal immigrant, having entered the United Kingdom under a false name and papers. He is a national of Algeria, and a member of a group named "F.I.S." which, according to the account given in evidence on his behalf, was cheated of success in a democratic election and had recourse to violent means aimed at displacing the ruling powers. Amongst the activities of this group in which the appellant played a part was the detonation of a bomb at an airport in Algeria. Ten people were killed, none of them having, so far as is known, any connection with the opponents of the appellant's group, or with the struggle in which the group was engaged. Unfortunately the way in which this apparently random violence might have served the ends of the group was not explored in these proceedings. We have little more than one or two statements by the appellant in evidence that the objective of the bomb was to hit the national economy rather than to kill people. He also admitted to some degree of involvement in an attack on an army barracks.

These were the circumstances in which the appellant, having been arrested and served by the Secretary of State with a notice that he would be returned to Algiers, appealed to a special adjudicator, and thence to the Immigration Appeal Tribunal and the Court of Appeal. He has failed at each stage, and now appeals to your Lordships' House.

I. *Preliminary*

Four points of cardinal importance must at once be made. The first is that the appeal is concerned with asylum, not with extradition. Algeria does not demand the return of the appellant. There is no treaty of extradition which would permit such a demand, and the United Kingdom would be in breach of no international obligation owed to Algeria if it allowed the appellant to remain within its territories, or sent him somewhere else.

Secondly, and this is a most unusual feature, there is here no dispute, of the kind which has become a common feature of the present flood of applications for asylum, about the treatment which the asylum-seeker can expect if removed to another country. It is no longer questioned that if

the appellant is returned to Algeria his life or freedom would be threatened "on account of his . . . membership of a particular social group or political opinion" (article 33(1) of the Geneva Convention relating to the Status of Refugees (1951) (Cmd. 9171)).

Third, although it is easy to assume that the appellant invokes a "right of asylum," no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries. Under the law of asylum the United Kingdom can choose to allow the appellant to reside here, rather than return him to Algeria to face the consequences of his admitted crimes. Conversely, it can expel him and cause him to be transported to whatever country is willing to accept him. The Secretary of State has made it plain that if the appellant can find a country other than Algeria which will accept the appellant he will be sent there. No such country has been suggested by the appellant. The Secretary of State does not wish to send the appellant back to Algeria, but as things now stand there is nowhere else for him to go.

Fourth, although a refugee has no direct right to insist on asylum there are certain statutory restrictions on the Secretary of State's freedom of choice as to the destination to which a person refused permission to remain may be sent, which may in practice achieve the same result. I will presently come to the statutory provisions in detail. For the moment it is sufficient to say that the United Kingdom is under an international and municipal duty derived from article 33(1) of the Convention not to return a fugitive to a place (like Algeria in the present instance) where he is liable to be persecuted. This duty, to which effect is given in English municipal law by rule 334(ii) of the Statement of Changes in Immigration Rules (1994) (H.C. 395), is subject to an exception, whereby the protection against "refoulement" (as it is called) is disapplied where the fugitive has, before coming to this country, committed a "serious non-political crime," within the meaning of article 1F(*b*) of the Convention. This expression is the source of the present appeal. That the bombing at the airport was a serious crime, and that the appellant took part in it, is beyond doubt. The question is whether the crime was "political" in character. If it was, the appellant must be given leave to remain. If not the Secretary of State may return him to Algeria, if all else fails.

II. *The appellant's case*

On these simple facts the appellant founds a simple argument. If the elections had been allowed to run their course the incoming government would have been chosen by a contest between two or more parties or factions, plainly a political process. The undemocratic interference with this process left the appellant's associates with no choice but to adopt radically new methods to achieve the same political ends. True, these methods did not resemble those of the Western democracies, but Algeria is not a democracy, and the Western model is not, and never has been, the only way of conducting politics. True also, that the methods were criminal, but an act may be none the less political for being criminal, as

A the expression "non-political crime" itself recognises. And the degree of criminality is material only to the "serious" element of the description "serious non-political." For the latter purpose it can logically make no difference how many people suffered, or who they were. No doubt this bears on the acceptability of the fugitive's conduct to the ethical and social ideals of the receiving nation, but the test is not moral, and in any event is not to be judged by conditions and concepts remote from those of the B place where the offence took place. Nor does it help to characterise the appellant as a terrorist, since as often remarked yesterday's terrorist is today's freedom fighter and perhaps tomorrow's head of state. In reality, so the argument concludes, the general character of the activities of F.I.S. was unchanged. It was as political after the abortive election as it had been before, and this character invests crimes committed under the aegis C of F.I.S. with a character different from that which they would have had if committed, for example, in the course of criminal gang warfare.

This is a powerful argument, the more so because it warns against the assumption that political action should be equated with the activities permitted to rival parties or groups seeking power under a parliamentary system of government such as exists in Europe and North America, and under other systems based on the same model. This being acknowledged, D I believe that the appellant's argument goes too far, for it assumes that society, and the struggles within it, have stood still for more than a century. Those who were intended to benefit from the political exception had taken up arms, having no other means, to relieve from oppression those who could not fend for themselves. The human rights of the individual who sought refuge in fear of persecution therefore coincided E with those of the oppressed, and the evil of violence could be tolerated without threat to the world order in the greater interests of making the world a better place. Whether this was sound thinking no longer matters, for the scene has changed. Those who use violence and fear to struggle against oppression may themselves be oppressors, causing as much suffering to the defenceless as those whom they seek to displace. When they flee to a foreign country the impulse to protect them from persecution F remains, but it is muted. The community as a whole has a moral right to protection, which should not be compromised by offering too ready a refuge to those who, having embroiled the population in violence, find themselves on the losing side. It must be acknowledged that although the words of the exception remain the same the world has changed round it, and tests which may in the past have sufficed to settle the comparatively G few cases where a criminal act required classification as political or non-political are too inflexible, now that the motives and means of destructive violence have become so greatly enlarged.

For this reason I would reject the simple logic of the appellant's primary argument, and also its exclusive reliance on the earlier authorities to which I shall come in due course. To my mind, the whole trend of the more modern decisions and writings is towards an acceptance that certain H acts of violence, even if political in a narrow sense, are beyond the pale, and that they should not be condoned by offering sanctuary to those who commit them. Equally, the materials brought before the House concur in a very general ideal of where the boundary lies. The problem is to find a

precise and intellectually sustainable test which will enable a line to be drawn in practice by those who are required to make decisions, often under pressure of time with meagre factual materials. For this purpose I will examine the legislative background of the comparatively few authorities brought forward in argument, but must first set out the evidence and the proceedings leading to this appeal.

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III. *Proceedings and evidence*

When the Secretary of State first came to consider the appellant's application for asylum attention was concentrated on a number of issues no longer material, such as the questions whether the appellant had been in real peril before leaving Algeria; whether as he claimed he was concerned in the organisation of F.I.S.; why he had not claimed asylum in Italy and France on leaving Algeria; why he had not claimed asylum immediately on arrival in England if he was a genuine asylum-seeker; whether he had been arrested in Algeria for a conspiracy to cause explosions; and whether he would be in danger if returned to Algeria. The scepticism of the Secretary of State on all these questions led him to decide that the appellant did not qualify for asylum, quite apart from whether he forfeited any protection which he might otherwise have enjoyed because the attacks of which he had spoken were serious non-political crimes. Consequently this point was mentioned only in passing by the Immigration and Nationality Department of the Home Office in its letter dated 3 September 1993 giving the Secretary of State's reasons for refusing asylum.

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It is not surprising therefore that the appellant had comparatively little to say about it in his grounds of appeal to the special adjudicator. According to this document, when the explosion took place the appellant had been present at the airport. He did not give any orders for the bombing to be carried out, but was simply the political organiser of the group. He was aware that the bombing was to take place, but was unaware of its exact details. The original plan had been for the bomb to be placed outside and simply cause damage to the airport building, with the aim of causing economic damage to the government. But he became aware on the evening before that the group had been infiltrated by the government, with the result that F.I.S. would be classed as a terrorist organisation and exposed. It was too late for him to prevent the explosion from taking place.

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As regards the attempt to get arms from the army barracks, the appellant planned the operation. One person was killed. Another was captured and gave the name of the appellant's cousin who was arrested.

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The appellant gave a further account in his oral evidence before the special adjudicator. The note of evidence is not verbatim, and may have suffered from difficulties of interpretation. At all events, it is very difficult to follow. The gist seems to have been that although the appellant knew in advance that a bomb would be set off and that people would be injured he was not "fully aware it was to be." He was not involved in the planning of the explosion, and did not know where it was to be, except at the airport. By the time he reached the airport, where he was "only passing

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by," the bomb had already been set off. The target for the bomb was the economy of the state, since:

> "After the anti-constitutional dissolution of the F.I.S. 80 per cent. of the population lost its voice. The council of F.I.S. noticed the only way was to hit the state economy in a way to disturb it."

The infiltration of the group by the security services caused F.I.S. to be regarded as a terrorist group.

The hearing before the special adjudicator concluded on 14 March 1993. His conclusions were as follows. He did not find the appellant to be a credible witness. Nevertheless, on balance of probabilities he accepted that the appellant was a member of F.I.S. Also on balance of probabilities the appellant "was involved in the planning of the bombing at the airport and the raid to obtain arms." If the account of the appellant was to be believed he was aware of the planning of the bombing at the airport and he knew that the group had been infiltrated. If the special adjudicator accepted that account the matter fell within article 1F of the Convention. Similarly the appellant had said in his grounds of appeal that he was involved in the arms raid on the military establishment; one person was killed and another arrested. On this account the appellant again fell within article 1F. Accordingly, the appeal was dismissed.

The appellant appealed to the Immigration Appeal Tribunal. By this time the Secretary of State had accepted that apart from the exclusion in article 1F(*b*) the appellant had a valid claim to asylum. Most of the issues of fact which had preoccupied the immigration officials, the special adjudicator and the appellant's advisers thereupon ceased to matter. The Tribunal looked again at the facts which were now crucial, and made the following findings

> "We find as a fact, on the basis of that evidence, that the appellant was involved directly in the planning of an attack that led to the death of one person, and he was involved in, and had prior knowledge of, a bomb attack in which 10 people were killed. We do not accept [his counsel's] submission that his degree of involvement was such that he was not personally and knowingly involved. We conclude that the appellant, in common parlance, was actively involved in a terrorist organisation, one that was prepared to advance its aims by random killings, and the appellant was closely associated with one such incident."

After a brief discussion of the relationship between terrorism and the Convention the tribunal concluded that it would be against common sense and right reason to characterise indiscriminate bombings which led to the deaths of innocent people as political crimes so as to remove them from the exclusion clause, and that it could not have been the intention of the Convention to accord protection to those who engaged in the "terrorist activities" in which the appellant engaged. The appeal was therefore dismissed.

The appellant appealed to the Court of Appeal (Nourse, Glidewell and Simon Brown L.JJ.) [1995] 1 W.L.R. 545. After anxious consideration and not without some initial hesitation the court dismissed the appeal. The

thoughtful judgment, to which all members of the court contributed, examined the authorities and in the light of them found the reasoning of the tribunal unsatisfactory because it proceeded simply on the basis that this was a case of "terrorism" and as such must be outwith the political exception (a proposition which the court did not accept), and gave no consideration to whether the relevant offences were too remote from their alleged objective or otherwise disproportionate to it. The court considered, however, that it was unnecessary to remit the matter to the tribunal since the findings of fact were sufficient to lead to a conclusion. This the court expressed as follows at pp. 559–560:

> "We, too, think it inappropriate 'to characterise indiscriminate bombings which lead to the deaths of innocent people as political crimes.' Our reason is not that all terrorist acts fall outside the protection of the Convention. It is that it cannot properly be said that these particular offences qualify as political. In our judgment the airport bombing in particular was an atrocious act, grossly out of proportion to any genuine political objective. There was simply no sufficiently close or direct causal link between it and T.'s alleged political purpose. It offends common sense to suppose that F.I.S.'s cause of supplanting the government could be directly advanced by such an offence. Indeed, on the facts, T. himself appears implicitly to recognise this when he claims that the F.I.S. group was infiltrated by the security services (that is, the government) and seeks to dissociate himself from the yet graver offence which he acknowledges (indeed asserts) resulted from the infiltration—the particular atrocity that led here to the deaths of 10 innocent people. Despite therefore the deficient reasoning contained in the tribunal's own decision and the real possibility that they asked themselves the wrong questions in deciding whether the supposed offences were or were not political, we accordingly dismiss this appeal."

IV. *National and international legislation*

That being the state of the dispute I turn next to the international and national legislation, which is relevant directly because it is the source of the problem, and indirectly because it demonstrates to my mind a shift in the perceptions of the international community about the degree of protection which should be given to refugees who have committed violent crimes to the harm of the public at large. It is convenient to arrange this material under the headings of asylum, extradition, the "depoliticising" of offences and the prosecution in one country of crimes committed elsewhere.

1. *Asylum*

The legislation must be viewed against the background of a complete absence of any common law right, either national or international, for a refugee to insist on being admitted to a foreign country. For present purposes the starting point is the Convention which provides:

> "1 (*Definition of the term 'refugee'*). A. For the purposes of the present Convention, the term "refugee" shall apply to any person

A who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation; ... (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 B nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; ... F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision C in respect of such crimes; (*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations ... 33 (*Prohibition of expulsion or return ('refoulement')*). 1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened D on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to E the community of that country."

It is evident from the literature, which I need not cite, that the rather puzzling expression "un crime de droit commun," often rendered as "common crime," has nothing to do with the common law, but is equivalent to "ordinary crime," or conduct recognised as criminal by the common consent of nations. Murder is a common crime; treason is not.

F Turning to the United Kingdom legislation, effect is given to the Convention by the Asylum and Immigration Appeals Act 1993 which provides, so far as material:

"1. In this Act—'the 1971 Act' means the Immigration Act 1971; 'claim for asylum' means a claim by a person ... that it would be contrary to the United Kingdom's obligations under the Convention G for him to be removed from, or required to leave, the United Kingdom; and 'the Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to that Convention. 2. Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.... 6. During the period beginning when a person makes a claim for asylum and ending when the H Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom.... 8(4) Where directions are given as mentioned in section 16(1)(*a*) or (*b*) of the 1971 Act for a person's removal from

the United Kingdom, the person may apply to a special adjudicator against the directions on the ground that his removal in pursuance of the directions would be contrary to the United Kingdom's obligations under the Convention."

The Act of 1993 operates by way of qualification on the Immigration Act 1971, paragraphs 8 and 9 of Schedule 2 to which provide:

"8(1) Where a person arriving in the United Kingdom is refused leave to enter, an immigration officer may . . . (*c*) give [to the owners or agents of the ship or aircraft in which he arrives] directions requiring them to make arrangements for his removal from the United Kingdom in any ship or aircraft specified or indicated in the directions to a country or territory so specified, being either— (i) a country of which he is a national or citizen; or (ii) a country or territory in which he has obtained a passport or other document of identity; or (iii) a country or territory in which he embarked for the United Kingdom; or (iv) a country or territory to which there is reason to believe that he will be admitted. . . .

"9. Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8(1)."

Finally, practical effect is given to the Convention by Part I of the Immigration Rules, set out in the Statement of Changes in Immigration Rules, laid before Parliament on 23 May 1994 (H.C. 395). The relevant provisions are:

"328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees. . . . 329. Until an asylum application has been determined by the Secretary of State, no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom. . . . 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and (ii) he is a refugee, as defined by the Convention and Protocol; and (iii) refusing his application would result in his being required to go . . . in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group. 335. If the Secretary of State decides to grant asylum to a person who has . . . entered without leave, the Secretary of State will . . . grant limited leave to remain. 336. An application which does not meet the criteria set out in paragraph 334 will be refused."

From what has already been said it will be plain that the appellant prima facie meets the criteria for non-refoulement to Algeria, and that in the absence of anywhere else to go he is entitled under rule 334 to be given limited leave to enter the United Kingdom. But if his crime was

non-political he is not protected against refoulement, his removal to Algeria would not be contrary to the United Kingdom's obligations under the Convention, and he may be so removed under paragraph 8(1)(*a*) of Schedule 2 to the Act of 1971.

2. *Extradition*

There is no need to prolong this opinion by setting out the history in detail, for it is comprehensively described in the speech of Lord Simon of Glaisdale in *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931 (dissenting, but not on this aspect).

As I see it, the history discloses a series of oscillations. In earliest times one sovereign was most likely to ask that another should render up an offender when the offence was directed at the sovereign and his apparatus of state; and the interests of comity made it most likely that a favourable response would be given when the offence was of that character. The changing face of political life in Europe, and later in the United States, brought about a reversal, so that whilst "common crimes" now became the staple of formal extradition, there was a need for certain of such crimes to be exempt, when impressed with a political character.

The result was a broad division, established by a series of bilateral treaties and a handful of decisions, into (a) "common" crimes, (b) purely political crimes such as treason, and (c) "relative" political crimes which are common crimes with a political overlay. This endured for a century with little strain. Conceptually, it defied the commentators, but for so long as the only societies where in practice these questions were determined subscribed to the same broad principles of liberal democracy, there were few instances where the demand for extradition came close enough to the line to call for accurate judicial analysis.

In course of time this imprecision ceased to answer. A group of conflicting impulses began to take effect. The first was the humanitarian impulse of hospitality to refugees, fuelled by the revealed horrors of totalitarian excess and by the acute political tensions of the post-war years. This impulse was repeatedly acknowledged by the United Nations in its early days, and was put into practice by the Convention. The second impulse was to the contrary. Not all refugees were worthy of compassion and support. As article 1F of the Convention recognised, war criminals and offenders against the law of nations could properly be sent home to answer for their crimes, and there were others whose criminal habits made it unreasonable for them to be forced on to a host nation against its will. Such persons could not claim to be protected against refoulement, even where their lives or freedom were at risk. Significantly, they are referred to in the *Handbook on Procedures and Criteria for Determining Refugee Status*, 2nd ed. (1988), published by the office of the United Nations High Commissioner for Refugees (hereafter "the *Handbook*") as "*Persons considered not to be deserving of international protection*:" p. 35. Another, and rather different, impulse was also opposed to the universal reception of refugees: namely the acknowledgement that terror as a means of gaining what might be loosely described as political ends posed a danger not only to individual states but also to the community of nations.

Thus, as long ago as 1937 the promoters of a League of Nations Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937) made a concerted attempt to reconcile the conflicting humanitarian impulses, calling on states to collaborate in the punishment of what were called acts of terrorism. This Convention was unusual, and perhaps unique, in containing a useful definition. It was as follows:

> " 'acts of terrorism' means criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public:" article 1.2.

The Convention never came into force, but in the post-war years advances in technology and transportation have made the image of the lone assassin, with pistol arm outstretched, hurling himself at the tyrant in defiance of an angry crowd, seem out of date. The weapons have become more destructive, and less discriminating; the targets, such as passenger aircraft, nuclear plants and off-shore rigs, are more vulnerable; and the risks to the perpetrator are more easily evaded. Furthermore, the simple world of the bad tyrants and the good patriots has vanished. Those who struggle against odious regimes have now come to seem, by their aims and methods, scarcely less odious than their oppressors. Yet it was (and still is) hard to see why their crimes, however distasteful and heartless, are any the less "political" than those of the heroes of the Risorgimento. International terrorism must be fought, but the vague outlines of the political exception are of no help. Something more clear-cut is needed.

3. *The depoliticising of crimes*

The first response to the problem was to define the boundaries of the political exception by ignoring its intellectual basis and by listing those offences which, without any regard to the factors which would otherwise be material, were not for the purposes of extradition to be exempt. In the language of the text-writers, these offences would be "depoliticised." A series of international conventions has steadily enlarged this list, so that it embraces genocide, torture, the taking of hostages, crimes against internationally protected persons and attacks on and acts compromising the safety of aircraft, aerodromes, ships and marine installations; and these specific instances have been the subject of legislation in the United Kingdom which it is unnecessary to rehearse. Of particular importance, however, is the European Convention on the Suppression of Terrorism (1977) (Cmnd. 7031), to which effect was given in the United Kingdom by the Suppression of Terrorism Act 1978, now re-enacted with enlargements by the Extradition Act 1989. The former Act not only extended (as between the states party to the Convention) the list of extradition crimes but also contained in Schedule 1 a list (now carried into the Act of 1989) of offences which were not to count as political. These offences currently include murder, manslaughter, offences against the person, and causing explosions likely to endanger life or property. Thus, if the appellant's activities had taken place within the territory of a European participating state (or in the United States, to which the

A Convention and the statute have been extended), the anxious and difficult questions raised by this appeal would not have arisen.

4. *Extra-territorial jurisdiction*

Another weapon in the fight against terrorism has been the revival of the doctrine, propounded by Hugo Grotius (*De Jure Belli ac Pacis*, book B II, chapter XXI, sections III and IV), "aut dedere aut punire:" that states are under an international obligation either to return criminals (or at least certain types of criminal) to the place where their crimes were committed, or to prosecute and if appropriate punish them locally. This idea was to a limited extent a feature of the 1937 League of Nations Convention (articles 9 and 10), and has now been given a more general effect by international and national legislation. Thus, by section 4(1) of the Act of 1978 the C United Kingdom has assumed extraterritorial jurisdiction over the long list of crimes contained in Schedule 1: a list which, as already observed, is amply wide enough to cover the crimes of which the appellant is said to be guilty.

The assumption of extra-territorial jurisdiction goes further. In relation to a much smaller group of activities, directed at particularly vulnerable D targets, the United Kingdom has by statute assumed jurisdiction over criminal acts irrespective both of the offender's nationality and of the place where the acts are done. For present purposes the most conspicuous of these is the Aviation and Maritime Security Act 1990, section 1 of which makes it an offence triable in the United Kingdom for any person by means of any device to commit at an aerodrome serving international civil aviation any act of violence (defined in such a manner as to include E murder, manslaughter, offences against the person and the use of explosive devices) which causes or is likely to cause death or serious personal injury, or endangers the safe operation of the aerodrome or the safety of persons there.

This appeal does not arise from a request for extradition by Algeria, and still less with any prosecution by the authorities under the Act of F 1990; and it would be wrong to found any conclusion directly on a statute not examined in argument. Nevertheless the Act does serve to emphasise, in relation to activities resembling those of the appellant, the changed international perception of the relationship between sanctuary and acts of violence committed abroad.

V. *The authorities*

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1. *Materials*

Although arising in the domestic context, this is essentially a case on public international law, a field in which the writings of scholars have always exerted great authority. Given both the intellectual difficulty of the present subject and the practical and moral problems which it presents, it H was no surprise that a superficial survey after the close of the arguments disclosed an extensive literature, in which for more than 50 years writers have explored the political exceptions in depth, often with particular reference to issues arising on the present appeal. Some of this material was indeed brought forward, but the scale of citation was modest. Since it

was neither practical to explore the writings in any depth, nor proper (in the context of an adversarial process) to rely upon them, I have with regret left them out of account; with regret, because I believe that they would have enabled a more systematic analysis than can be founded on the comparatively few, and by no means consistent, decisions of common law courts relied upon before the House.

Nevertheless, that is how the matter stands, and to those decisions I now turn. I include among them cases on extradition as well as asylum. There are significant differences between the two doctrines; I have already mentioned one, and an account of several others may be found in the valuable judgment of Hugesson J. in *Gil v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1559, Canadian Federal Court of Appeal, 21 October 1994. Nevertheless, the reference to the "serious non-political crime" in the Geneva Convention (1951) (Cmd. 9171) must surely be an echo of the political exception which had been a feature of extradition treaties for nearly a century, and one may hope that decisions on the political exception would provide a comprehensive framework for the few and scattered decisions on asylum.

2. *Two categories of decision*

I have been unable to deduce from the cases and the literature any theory which accounts for all the decisions and dicta. It does however appear that the authorities may be arranged in two groups. First, those which look to the connection between the motive and political content of the crime and the criminal act itself; and second those where attention is directed to the nature and degree of the offence. These categories are not exclusive, and indeed one can see both strands of reasoning in the passages quoted from the judgment of the Court of Appeal in the present case.

3. *Context and motive*

This group includes all the English cases. It establishes one general proposition, and a number of qualifications. The general proposition, which I believe is binding on this House as a matter of English law, is known in the literature as the "incidence" theory. The essence of this is that there must be a political struggle either in existence or in contemplation between the government and one or more opposing factions within the state where the offence is committed, and that the commission of the offence is an incident of this struggle. Two cases in this House are in point. First, *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, in which Viscount Radcliffe said, at p. 591:

> "In my opinion the idea that lies behind the phrase 'offence of a political character' is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country."

The second case was *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931 where Lord Diplock said, at p. 945:

> "even apart from authority, I would hold that prima facie an act committed in a foreign state was not 'an *offence* of a political

A character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there."

B This principle underlies the major English decisions on extradition law. Thus, in *In re Meunier* [1894] 2 Q.B. 415 an anarchist who had detonated a bomb in a cafe was refused the political exception because the essence of the anarchist philosophy is a denial of legitimacy to all forms of government and politics. An anti-political gesture could not be political in nature. By contrast, in *In re Castioni* [1891] 1 Q.B. 149 extradition was refused where in the heat of an attack on an arsenal and the municipal C palace of a Swiss canton by persons dissatisfied with the government the fugitive had shot and killed a member of the state council. It is notable that Hawkins J. observed, at p. 167, that things

"may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can D calmly reflect upon it after the battle is over."

In *Ex parte Schtraks*, extradition was sought against the appellant by the state of Israel on charges of perjury and child-stealing. The evidence showed that the appellant had been concerned that his grandchild aged seven would not receive a religious education as an orthodox Jew if returned to his parents, and therefore refused to comply with an order for return made by E the High Court of Israel. Although there was a measure of difference between Lord Reid and Lord Radcliffe about the boundaries of the exception all were agreed that this family quarrel was not within it, even though one political faction had taken up the appellant's cause.

The principle of incidence received emphatic endorsement in *Ex parte Cheng*. The appellant was a member of a Formosan group opposed to the F current regime in Taiwan. The son of the head of state visited the United States, and lodged in a hotel outside which there was a demonstration in which the appellant took part. In the course of the demonstration a pistol was discharged by another man who together with the appellant was indicted for attempted murder. The assailant pleaded guilty and the appellant was convicted. He absconded from bail whilst awaiting sentence, and was apprehended in this country. The United States requested G extradition, and the appellant raised the political exception. By a majority the House held that the exception did not apply. The principal ground was that a political offence must be an incident in a political struggle taking place in the country which requests the extradition: and the appellant had no aim to bring about any changes in the government of the United States. This reasoning does not apply in an asylum case such as the present where there is no requesting state, and indeed the decision H illustrates very well that the word "political" does not have an identical meaning in the contexts of extradition and asylum. Nevertheless, the logic of the decision obviously demands that there cannot be a political crime in the absence of a struggle for power of which the crime is an element.

To a similar effect is the decision of the Divisional Court in *Reg. v. Governor of Pentonville Prison, Ex parte Budlong* [1980] 1 W.L.R. 1110, and the American cases cited in *McMullen v. Immigration and Naturalization Service* (1986) 788 F.2d 591, 595 (9th Circuit).

That the incidence test as applied in these authorities is not necessarily a complete account of the word "political" is however shown by *Reg. v. Governor of Brixton Prison, Ex parte Kolczynski* [1955] 1 Q.B. 540. Seven Polish seamen seized their vessel and sought refuge in an English port. The Polish Government requested extradition for crimes of assault, malicious damage and revolt on the high seas. The court refused to grant extradition, notwithstanding that there was at the time no political disturbance in Poland and that the seamen were not supporters of one party at odds with another, Poland being a one-party state. The court was I believe treating the situation as different from that which had prevailed when *In re Castioni* was decided 60 years before: see *per* Cassels J., at p. 549. In the words of Chapman J. in *In re Extradition Act 1870, Ex parte Treasury Solicitor* [1969] 1 W.L.R. 12, 17:

> "it may still be an offence of a political character if violent measures are taken to get away from a political ordering of society which is regarded as intolerable."

With hindsight it may be thought that the decision could more convincingly have been arrived at by holding that the offences for which extradition was claimed were in reality "pure" political offences, such as sedition, and that the totalitarian regimes existing in Eastern Europe during the 1950s were not really different in kind from those which had prompted the creation of the political exception. However this may be, there is no suggestion in either *Ex parte Schtraks* or *Ex parte Cheng* that *Ex parte Kolczynski* was wrongly decided, and it must be taken to be the English law that an offence may be political even where the possibility of struggle is excluded by the presence of an overwhelmingly authoritative power, if the crime which they commit is, in the words of Cassels J. [1955] 1 Q.B. 540, 549, "the only means open to them."

Thus far, the decided cases appear to lend support to an argument on the following lines. There was at the material time a struggle for power in Algeria which satisfied the requirements of *Ex parte Schtraks* and *Ex parte Cheng*. Unlike the crime in *In re Meunier* the appellant's criminal act was part of this struggle. True, it involved regrettable violence and loss of life, but this (as in *In re Castioni*) will often feature in a fight against repression. F.I.S. would have adopted democratic means if the ruling power had allowed it to do so, but (like the seamen in *Ex parte Kolczynski*) had no choice except to use the only available methods.

This is a powerful argument, but the cases show that it may be too simple. It may be that another requirement—or perhaps two others, if they are not aspects of the same concept—must be taken into account: namely that there must be a causal link, and an absence of "remoteness," between the political situation of which the refugee forms part and the crime which he has committed. This conception draws its authority, if not

its origin, from a passage in the speech of Lord Diplock in *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931, 944–945:

> "My Lords, the noun that is qualified by the adjectival phrase 'of a political character,' is 'offence.' One must, therefore, consider what are the juristic elements in an offence, particularly one which is an extradition crime, to which the epithet 'political' can apply. I would accept that it applies to the mental element: the state of mind of the accused when he did the act which constitutes the physical element in the offence with which he is charged. I would accept, too, that the relevant state of mind is not restricted to the intent necessary to constitute the offence with which he is charged, for in the case of none of the extradition crimes can this properly be described as being political. The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act. It is unnecessary for the purposes of the present appeal, and would, in my view, be unwise, to attempt to define how remote that object might be. If the accused had robbed a bank in order to obtain funds to support a political party, the object would, in my view, clearly be too remote to constitute a political offence. But if the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet 'political.' For politics are about government. 'Political' as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a 'political act,' whether or not it was done within the territory of the government against whom it was aimed. But the question is not simply whether it is political qua 'act' but whether it is political qua 'offence.' "

This principle was applied in *Reg. v. Governor of Winson Green Prison, Birmingham, Ex parte Littlejohn* [1975] 1 W.L.R. 893; it is one of a battery of tests proposed in the *Handbook*; and it has been adopted (at least as a theory) in North America. Yet I must own to serious problems. Historically, it seems unlikely that common law concepts such as remoteness, which even today are a well-recognised stumbling-block for lawyers from other traditions, should have been intended to play a part in the operation of an exception designed decades before these concepts began to be explored even in England. More importantly, the analysis seems to do no more than replace "political" with another form of words. Leaving aside the trifling cases where the actor is moved only by malice, greed or a simple pathological desire to cause harm, how is the test of causation to be applied? Take the case of an insurgent group which attacks an army post, as part of a campaign to overthrow the government by force. This would plainly be a political offence, and on any ordinary understanding of causation it would be said that the desire to overthrow the government caused the attack to take place. Change the case now so that the soldiers, lacking the weapons needed for the attack, steal them from an arsenal. Would not this in ordinary language be described as a

political offence, all of a piece with the subsequent attack, and would not the cause of the theft still be ascribed to the wish to bring down the government by force? If one changes the case once more, so that instead of stealing arms directly the insurgents steal from a bank the money with which to buy them, I can see that if the raiders intend to keep some of the proceeds for their own personal use it could well be held that the personal element of the crime is both non-political and serious enough to bring article 1F into play. But in the absence of such mixed motives I find it hard to see why the stealing of the money and its subsequent use to buy arms would not be a continuous causal chain of which all the links are political in nature; and if the logic is not clear I can foresee great difficulties in applying this criterion in practice. All the same, one must recognise that *Ex parte Schtraks* and *Ex parte Littlejohn* do recognise a test of causation; and the *Handbook*, which although without binding force in domestic or international law (*Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514) is a useful recourse on doubtful questions, treats causation as one of the material factors: paragraph 152. To a similar effect are statements in *McMullen v. Immigration and Naturalization Service,* 788 F.2d 591 and *Eain v. Wilkes* (1981) 641 F.2d. 504. Reference may also be made to *In re State of Wisconsin and Armstrong* (1973) 32 D.L.R. (3d) 265, where Thurlow J. assumed, at p. 286, that the hypothetical bank robbery would not be a political offence. All this being said however, the difficult decision on whether there is a sufficient discontinuity between the political aim and the crime to mean that the crime is to be treated as "common" is not in my judgment made any easier by using the word "causation" in a very special sense. I think it safer to rely on the words of the Geneva Convention (1951) (Cmd. 9171).

So also with "remoteness." I can see that even where the actor has no motive other than to further his cause, the chain of events between the act and the achievement of the political goal may be so long that the two are disconnected. But to introduce into the international law of asylum and extradition a test derived from the specialist English law of damages seems to me to take the inquiry nowhere.

In short, to say that the political aim must cause the crime, or that the crime must not be too remote from the aim, does no more than assert that the crime must be really political in nature to fall within the exception. This is the point which I understand Lord Diplock to have stressed. But to prescribe causation or remoteness as tests which must as a matter of law be applied, even though the political exception was conceived long before these notions became part even of English law, only multiplies the problems. I prefer to do without them.

This negative opinion still leaves open the necessary connection between the subjective impulsion of the offender and the mental element of the offence. In recent years new criteria have been proposed. The first is one of "proportionality." Whilst there is substantial support for this test, on closer examination it is seen that the decisions and commentaries use the term in more than one sense. The first, relied upon by the appellant, is that a crime cannot be political if the adverse consequences for the fugitive of using it as a basis for extradition or refoulement would

be out of proportion to the gravity of the offence. I see no substance in this and if *Reg. v. Secretary of State for the Home Department, Ex parte Chahal* [1995] 1 W.L.R. 526 supports it I must disagree. The gravity of the offence is relevant to the question whether it is "serious" for the purposes of article 1F(*b*). But the crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned.

Another meaning of proportionality is more sound, but does not apply here. There are indications in the literature that the concept originally applied to what are called "délits complexes," where the same crime is impelled by more than one motive. So understood, the doctrine propounds only that the dominant motive determines the political character of the offence. This is rational, but of no help here, since it has not been suggested that the appellant had any motive for his acts other than to advance the cause of F.I.S. At all events, the House has not had the benefit of considering the relevant Swiss decisions and the matter cannot be pursued.

A different meaning of proportionality is also said to be relevant: namely that an offence will not qualify as political unless its nature and degree are in proportion to its political ends. This theory has academic support, is cited in the *Handbook* as one of the factors to be considered, and forms the centre-piece of the judgment given by the American Court of Appeals in *McMullen v. Immigration and Naturalization Service*, 788 F.2d 591, 596:

> "It appears to us that the [Board of Immigration Appeals'] interpretation of the statute is consistent with the [Geneva] Convention, and thus consistent with congressional intent. A balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity make good sense. . . . Moreover, this approach better recognizes the type of crime involved in this and most such cases. There is a distinction between 'pure' political crimes, such as sedition, treason, and espionage, and 'relative' political crimes, crimes that have both common law criminal aspects and political aspects. . . . An approach that considers the proportionality and atrocity of a particular course of conduct is better suited to the analysis of 'relative' political offences under the Convention and Protocol [(1967) relating to the Status of Refugees (Cmnd. 3906)]."

Notwithstanding its powerful support I must own to real difficulty with this doctrine. In the first place, I do not understand its logic. If the apparent disproportion between ends and means is used simply as evidence that the political motive has been fuelled by some other element, such as personal malice, misanthropy, sadism or mental unbalance, this is no more than a version of the different proportionality doctrine to which I have already referred, which requires a comparison between the political and non-political elements of the motivation. Yet the proponents seem to advance a different theory, which proceeds directly to an evaluation by the judge in the receiving country of whether the fugitive has used more drastic methods than were necessary to achieve his aim. I do not follow

this. Provided that the extrinsic factors of malice, etc., are absent, why should a crime which would have been political in nature be turned into one which is not political simply because the judge deems the offender to have gone too far? A

This leads to a second objection, that it will be hard for the judge of the receiving state to decide whether the ends justified the means without applying the notions of his own upbringing and environment in judging whether the offender has overstepped the bounds of permissible political action. To my mind this parochial approach is wrong in principle, and would yield to absurd results. In the Western democracies the use of assassination as a political instrument is anathema; yet *In re Castioni* [1891] 1 Q.B. 149 shows that it falls precisely within the political exception. (In *In re Atta* (1989) 706 F.Supp. 1032 (United States District Court, Eastern District of New York), District Judge Korman stated, at p. 1040: B C

> "Providing refuge for those who seek political change is one thing, making the United States a haven for those who engage in conduct that 'violates our own notion of civilized strife' is quite another matter."

It may be that this and similar pronouncements can be explained by the additional requirement in the United States–Israel extradition treaty that the offence should be "*regarded by the requested party*" (p. 1038) as one of a political character. If not, I must respectfully disagree.) D

Finally, I can envisage great difficulty in putting this theory into practice. To strike a balance the official or adjudicator in the receiving state would have to evaluate, amongst other facts: (i) the unacceptableness of the state of affairs which the crime is designed to improve; (ii) the extent to which the crime would, or at least might, bring about an improvement; (iii) the conformity or otherwise of the crime with local conceptions of the way in which, if need be, political change can be brought about; (iv) the practicability of achieving the same result by other and less drastic means. Admittedly, there may be extreme cases where the disproportion, or lack of it, is obvious; and others where the foreign state is so close in geography and culture that the judge can make an assessment in the light of his own general knowledge. But it is likely that in other instances an accurate appraisal would be possible, if possible at all, only to a specialist with years of experience. These decisions have to be made with speed, and in the light of the most fragmentary information. Algeria is far from being the most remote of the countries in respect of which questions of asylum may arise, and yet the special adjudicator and the Immigration Appeal Tribunal have had to make do with the evidence of the appellant's own account of the circumstances, events and motives, which the tribunal has found to be unreliable. A reasoned judgment on proportionality in such circumstances is surely out of the question. E F G

Rejecting therefore the test of proportionality I turn to another theme, which has appealed to judges in the United States and Canada, namely that those who have committed unpleasant crimes are unwelcome. This was put robustly in *Eain v. Wilkes*, 641 F.2d 504, 520: H

> "We do not need [terrorists] in our society. We have enough of our own domestic criminal violence with which to contend without

A importing and harboring with open arms the worst that other countries have to export. We recognise the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere."

My Lords, many would agree with these responses, which may be B relevant where the executive branch has an unfettered discretion on whether to allow an asylum-seeker to remain, but the present appeal is concerned with something altogether different: a decision on a mixed question of fact and law on whether the antecedent crime had a political character when and where committed. I am quite unable to see how the fact, if it is a fact, that the foreign crime shows the asylum seeker to be a wicked man of whom the country of refuge would be well rid can have C any bearing on this question. Indeed the shape of the legislation shows that this is not so, for article 1F(*b*) of the Geneva Convention (1951) (Cmd. 9171) assumes that a person who has committed a serious crime, which might make him just as unwelcome in the country of refuge, is immune from refoulement so long as his offence can be characterised as political.

D Moreover, the argument overlooks article 33(2) of the Convention, which it is timely to repeat:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is . . ."

The state of refuge has sufficient means to protect itself against harbouring E dangerous criminals without forcing on an offence, which either is or is not a political crime when and where committed, a different character according to the opinions of those in the receiving state about whether the refugee is an undesirable alien: opinions which may be shaped by considerations which have nothing to do with the political nature of the offence committed elsewhere.

F Setting this argument aside we arrive at what I believe to be the heart of the case. The Secretary of State contends, with much support from decided cases and texts, that the point at which criminal conduct which would otherwise be political loses this attribute is when it can be described as "an atrocity" or "terrorism." The terminology is inexact. The words "atrocity" and "terrorism" reflect a similar impulse of revulsion from inhumanity, and there has for long been a tendency to treat them as G interchangeable. But they are not. The murders at Katyn Forest were atrocities by any standard, but they were not terrorism, for they were kept secret, and secret terrorism is a contradiction in terms. In the absence of any clear consensus in the texts and cases, and indeed any firm choice in the contentions of the Secretary of State, about which word more accurately describes the further exception impliedly superimposed on the political exception, both must be examined.

H I begin with "atrocity." This word reflects an impulse of revulsion which all must share from allowing the perpetrator of a repellent crime to insist on the hospitality and protection of any nation whose borders he can manage to penetrate. By way of illustration only (for they were not

examined in argument) one may instance *McGlinchey v. Wren* [1982] I.R. 154 and *Carron v. McMahon* [1990] 1 I.R. 239. In the former, a group claiming affiliation to the self-styled Provisional Irish Republican Army fired Armalite weapons at a house from a moving car. Some occupants escaped death, but an old lady was, as the judgment put it, riddled with bullets. This crime, aptly described as revolting, was held to lie outside the political exception on the ground that it was contrary to the basic requirements of political activity. In the later case, Finlay C.J. described it as an illustration of the "type of atrocity" which is outside any concept of a political offence. Whilst I respect this impulse, it is hard to accept as a reliable basis on which to apply the exception, for it posits that the community of nations has found it so clear that conduct which is political in the ordinary sense of the word may be deprived of that character by its atrocious nature that international legislation needs no express provision and no attempt to define what an atrocity entails. Can this really be so? When in the years since the Second World War the international community had to grapple with war crimes, genocide and international terrorism it set out to do so explicitly by the exclusions contained in article 1F and in the Conventions regarding depoliticisation and extraterritorial jurisdiction to which I have referred. The respondents invite the House to accept that in addition there is a tacit qualification, the boundaries of which depend entirely on the personal reaction of the official or judge in the receiving state as to whether the act is "atrocious" enough to merit special treatment. In a field which touches not only the life and liberty of the fugitive, but also the social order of the two states and indirectly of the international community as a whole, one must surely look for a test more reliable than this.

I am however more persuaded by the idea of writing "terrorism" into the modern concept of the political crime. To accept this requires, as must any model which involves departure from the concept of incidence, an important step: the recognition that some characteristic of the crime can disconnect it from its political origins, using the word in its widest sense. Once this step is taken, as I believe it must be, I would prefer terrorism to atrocity as a test, because it concentrates on the method of the offence, rather than its physical manifestation. The terrorist does not strike at his opponents; those whom he kills are not the tyrants whom he opposes, but people to whom he is indifferent. They are the raw materials of a strategy, not the objectives of it. The terrorist is not even concerned to inspire terror in the victims, for to him they are cyphers. They exist only as a means to inspire terror at large, to destroy opposition by moral enfeeblement, or to create a vacuum into which the like-minded can stride. It seems to me in a real sense that a political crime, the killing of A by B to achieve an end, involves a direct relationship between the ideas of the criminal and the victim, which is absent in the depersonalised and abstract violence which kills 20, or three, or none, it matters not how many or whom, so long as the broad effect is achieved. I find it hard to believe that the human rights of the fugitive could ever have been intended to outweigh this cold indifference to the human rights of the uninvolved.

There are two further reasons to think that this is the right answer. First, there is detectable in the international legislation and the debates

surrounding it a recognition that terrorism is an evil in its own right, distinct from endemic violence, and calling for special measures of containment. Secondly, the law of asylum fundamentally affects the lives of human beings, and yet must be applied at speed. Whether employed individually or as parts of a battery of tests, criteria such as remoteness, causation, atrociousness and proportionality seem too subjective to found the consistency of decision which must surely be essential in a jurisdiction of this kind. By contrast, once it is made clear that terrorism is not simply a label for violent conduct of which the speaker deeply disapproves, the term is capable of definition and objective application. I quote again from the League of Nations Convention of 1937, article 1.2:

> " 'acts' of terrorism means criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."

The Convention never came into force, but the definition is serviceable, and I am content to adopt it.

VI. *Conclusion*

I return to the present appeal. A substantial point of difference between extradition and asylum is that where the former is in issue the political nature of the offence is an exception to a general duty to return the fugitive, whereas in relation to asylum there is a general duty *not* to perform a refoulement unless the crime is non-political. This distinction may be of great practical importance where reliable information is at a discount. In the present instance however I am persuaded, whilst sharing the hesitations of the Court of Appeal, that the material does show the bombing at the airport to have been a terrorist offence, and that there were grounds on which the tribunal could properly find that the same conclusion applied to the attack on the barracks. Both offences therefore are within the scope of article 1F, and the prohibition of refoulement does not apply.

Accordingly, although I would prefer the test applied by the tribunal to that laid down by the Court of Appeal, I arrive at the same conclusion and would dismiss the appeal.

LORD SLYNN OF HADLEY. My Lords, the Immigration Appeal Tribunal said in this case:

> "We find as a fact on the basis of that evidence that the appellant was involved directly in the planning of an attack that led to the death of one person, and he was involved in, and had prior knowledge of, a bomb attack in which 10 people were killed. We do not accept Mr. Daniels' submission that his degree of involvement was such that he was not personally and knowingly involved. We conclude that the appellant, in common parlance, was actively involved in a terrorist organisation, one that was prepared to advance its aims by random killings, and the appellant was closely associated with one such incident."

Nevertheless it is clear that the Front Islamique du Salut ("F.I.S") was a political organisation seeking to set up a fundamentalist Islamic regime

in Algeria and that, since the second round of elections which was due to follow the first round (in which F.I.S. had gained a majority) was not held, F.I.S. was not able to pursue its aims through democratic election processes. T.'s activities were carried out against this background and in an effort to undermine the existing government; there is no challenge to his claim that if he returns to Algeria he will be prosecuted.

Is he entitled to say that he is a refugee in the sense of one who:

> "owing to well-founded fear of being persecuted for reasons of . . . 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; . . ." (article 1A(2) of the Geneva Convention relating to the Status of Refugees (1951) (Cmd. 9171),

or he is a person to whom the provisions of the Convention do not apply since, pursuant to article 1F thereof:

> "there are serious reasons for considering that: . . . (*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; . . ."

These provisions of the Convention are given effect to by paragraph 334 of the Statement of Changes in Immigration Rules (H.C. 395) laid before Parliament on 23 May 1994.

The meaning of "serious non-political crime" has been considered in relation both to extradition and to asylum (different though they are) in many cases in the courts of this country and in those of other countries in particular of the United States and Canada. These cases have been analysed and considered in depth in the speeches of my noble and learned friends, Lord Mustill and Lord Lloyd of Berwick, which I have had the advantage of reading. It is not necessary for me to repeat that analysis and it is sufficient to indicate the conclusions which I have reached.

It is clear that the events of recent years having produced violent acts which in number, in extent and in character go far beyond the sort of cases which were considered in the 19th century when the concept of treating political acts, albeit criminal, differently from ordinary crimes was developed. It seems that in consequence the international community has been striving to avoid giving the benefit of political asylum to those who can truly be categorised as terrorists. See, for example, the League of Nations Convention for the Prevention and Punishment of Terrorism 1937 and the European Convention on the Suppression of Terrorism (1977) (Cmnd. 7031), given effect to in the United Kingdom by the Suppression of Terrorism Act 1978 and now by the Extradition Act 1989. These provisions are also applicable to the United States. I say "striving to" because no Convention has yet been adopted which deals with this situation on a universal basis (or even in respect of states which are members of the United Nations) and a complete definition of "terrorist act" which takes such act outside the range of political crime may be very difficult to achieve and even more to obtain agreement to on the part of states.

In the course of argument a number of tests have been suggested to indicate whether a crime is or is not a political crime.

Decisions of this House in *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556 and *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931 show that in order to be political an act must be an incident of a dispute existing in a member state. As Viscount Radcliffe said in the former, at p. 591, the fugitive is "at odds with the state that applies for his extradition on some issue connected with the political control or government of the country;" in the latter Lord Diplock said, at p. 945, that the offence could not be political:

> "unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there."

I am for my part not satisfied that in order to be a political offence the act has to be directed against the government of the day; it is in a democratic society no less an attack on the state if the attacker seeks to destroy or to pressurise the opposition party. In any event on either of the ways of expressing the test which I have quoted the present appellant would seem to satisfy them.

I have doubts as to whether the test of remoteness which has been propounded as a means of excluding some crimes from being "political crimes" is satisfactory in itself. Whether there is a sufficiently direct link between the criminal act and a political objective may pose an extremely difficult question to resolve and risks fine lines being drawn. I am not for example at all certain that for a terrorist group to rob a bank for the express and sole purpose of buying Semtex or guns to achieve political ends is clearly too remote or indirect to be regarded as a political crime as has been said in earlier cases.

Nor do I find "proportionality" in this context a suitable test. It may involve the consideration of a situation which is wholly different from any experienced in this country and imports inevitably a subjective element in the task of, and imposes a difficult burden on, the official, tribunal or court considering the matter.

Paragraph 152 of the *Handbook on Procedures and Criteria for Determining Refugee Status* published by the office of the United Nations High Commissioner for Refugees, however, indicates that a number of tests should be considered in each case—i.e., is the crime due to genuine political motives, was there a close and direct causal link between the crime and its alleged political purpose and do the political elements outweigh the common law character of the crime?

This is very much in accord with the judgment of the Court of Appeal in the present case and there may well be cases where it is possible to apply these tests without difficulty. There are, however, likely to be other cases where the test raises issues which it is virtually impossible to decide and it must be remembered that decisions as to asylum often have to be taken quickly.

I do not wish to do anything to undermine the importance of genuine political fugitives, even those who have committed serious crimes, from

being granted asylum here. I consider, however, that without resort to tests like remoteness and proportionality "serious non-political crime" as a matter of interpretation of the Convention and of the Rules includes acts of violence which are intended or likely to create a state of terror in the minds of persons whether particular persons or the general public and which cause, or are likely to cause, injury to persons who have no connection with the government of the state. This is not intended to be a complete definition. There may be other acts which constitute terrorism which are far outside the concept of political crime but in the present case the Immigration Appeal Tribunal was in my view entitled to conclude that:

> "to characterise indiscriminate bombings which lead to the deaths of innocent people as political crimes so as to remove them from the exclusion clause [article 1F(*b*) of the Convention] would be against common sense and right reason. It cannot have been the intention of the Convention to accord protection to those who engage in such activities, and we would not so conclude unless bound by high authority."

Such bombing at the airport killing innocent citizens was "totally beyond the pale" and outside the protection afforded by the Convention. Although the attack on the barracks was more debatable I conclude that the Immigration Appeal Tribunal was entitled to find that this was yet another "random killing."

I, too, would dismiss this appeal.

This does not mean that the appellant must be returned to Algeria; the Secretary of State has already made it plain that if he can find another state which will accept him he may go there. The Secretary of State was, however, entitled to say that he may not stay here.

LORD LLOYD OF BERWICK. My Lords, in this appeal your Lordships are concerned with the meaning of the words "serious non-political crime" in article 1F(*b*) of the Convention relating to the Status of Refugees (1951) (Cmd. 9171), commonly known as "the Geneva Convention." Article 1 of the Convention contains a definition of the term "refugee." Article 1F provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (*a*) he has committed a crime against peace, a war crime, or a crime against humanity . . . (*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The facts are that Mr. T., an Algerian national, arrived in the United Kingdom on 14 March 1993, using a false French identity card. On 8 April he was arrested for theft. He was interviewed the following day by an immigration officer. In the course of the interview he claimed asylum. Thereafter he was interviewed on four occasions between 21 April and 13 August. On 3 September the Secretary of State rejected his asylum

claim, and on 17 September he gave directions for Mr. T.'s removal to Algeria. On 23 September he appealed to a special adjudicator, as he was entitled to do, under section 8(4) of the Asylum and Immigration Appeals Act 1993. The special adjudicator, Mr. John Fox, found on the balance of probabilities that Mr. T. was a member of the Islamic Salvation Front ("F.I.S."), a revolutionary fundamentalist movement, and that he had been involved in the planning of two terrorist incidents.

The first incident was the planting of a bomb at Bône Airport, some 40 kilometres from Algiers, on 26 August 1992. Ten people were killed in the explosion. The second incident was an abortive attempt to steal arms from an army barracks, in the course of which one person was killed. It is not clear whether the casualty was a soldier, or a member of F.I.S.; probably the latter. Mr. Fox held in relation to both incidents that there were "serious reasons for considering" that Mr. T. had committed a serious non-political crime outside the United Kingdom prior to his admission, so as to deprive him of the protection of the Geneva Convention.

Mr. T. appealed to the Immigration Appeal Tribunal. At the hearing the Secretary of State conceded that if the Convention applied then Mr. T. had a valid claim for asylum under rule 334 of the Statement of Changes in Immigration Rules (H.C. 395), on the ground that he had a well-founded fear of persecution if he were to be returned to Algeria. The sole remaining issue for consideration was whether the Convention applied, or whether Mr. T. was excluded by article 1F(*b*).

The Immigration Appeal Tribunal (Mr. Maddison, Mr. Froome and Mrs. Abrahams J.P.), found as a fact that Mr. T. was directly involved in planning the attack on the barracks, and that he was involved in and had prior knowledge of the bomb attack at the airport. The tribunal did not accept a submission on his behalf that his degree of involvement was such that he was not personally and knowingly involved. The tribunal stated its conclusion as follows:

> "We have to ask ourselves whether the terrorist activities in which we have found as a fact he was involved were, in the terms of the Convention, non-political crimes. There is a difficulty there because the only definition of terrorism of which we are aware is that contained in the Prevention of Terrorism (Temporary Provisions) Act 1989 in which it is defined as 'the use of violence for political ends' [section 20(1)]. That might at first sight suggest that a terrorist crime was indeed a political crime. It seems to us, however, that to characterise indiscriminate bombings which lead to the deaths of innocent people as political crimes so as to remove them from the exclusion clause would be against common sense and right reason. It cannot have been the intention of the Convention to accord protection to those who engage in such activities, and we would not so conclude unless bound by high authority."

From the decision of the Immigration Appeal Tribunal there is an appeal to the Court of Appeal with leave, but only on a question of law. The question of law is not very clearly identified. But the principal ground relied on, both on the application for leave to appeal and in the notice of

appeal itself, was that the special adjudicator applied the wrong standard of proof. However, there was a further ground of appeal. The Immigration Appeal Tribunal is said to have concluded, wrongly, that because Mr. T. was actively involved in a terrorist organisation, and because the two incidents in which Mr. T. was involved would ordinarily be described as terrorist activities, it necessarily followed that the crimes were non-political within the meaning of article 1F(*b*).

The Court of Appeal (Nourse L.J., Glidewell L.J. and Simon Brown L.J.) [1995] 1 W.L.R. 545 dismissed the appeal in a judgment of the court delivered by Glidewell L.J. While criticising the lack of satisfactory reasoning in the decision of the Immigration Appeal Tribunal the court, nevertheless, reached the same conclusion. I quote from the judgment at pp. 559–560:

> "We, too, think it inappropriate 'to characterise indiscriminate bombings which lead to the deaths of innocent people as political crimes.' Our reason is not that all terrorist acts fall outside the protection of the Convention. It is that it cannot properly be said that these particular offences qualify as political. In our judgment the airport bombing in particular was an atrocious act, grossly out of proportion to any genuine political objective. There was simply no sufficiently close or direct causal link between it and T.'s alleged political purpose. It offends common sense to suppose that F.I.S.'s cause of supplanting the government could be directly advanced by such an offence. Indeed, on the facts, T. himself appears implicitly to recognise this when he claims that the F.I.S. group was infiltrated by the security services (that is, the government) and seeks to dissociate himself from the yet graver offence which he acknowledges (indeed asserts) resulted from the infiltration—the particular atrocity that led here to the deaths of 10 innocent people."

I find myself in agreement with the reasoning of the Court of Appeal. There is no English authority on the meaning of "non-political crime" in the Geneva Convention. But it was common ground that the words must bear the same meaning as they do in extradition law. Indeed, it appears from the travaux préparatoires that the framers of the Convention had extradition law in mind when drafting the Convention, and intended to make use of the same concept, although the application of the concept would, of course, be for a different purpose.

So far as English law is concerned the phrase "offence ... of a political character" goes back to section 3(1) of the Extradition Act 1870 (33 & 34 Vict. c. 52), and is now to be found in section 6(1)(*a*) of the Extradition Act 1989. The most helpful English authorities are *In re Castioni* [1891] 1 Q.B. 149, *In re Meunier* [1894] 2 Q.B. 415, *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, *per* Lord Reid and Viscount Radcliffe, and *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931, *per* Lord Diplock.

In re Meunier is particularly helpful since it was the first case in which the court had to consider whether a prisoner charged with indiscriminate violence aimed at members of the public could claim the protection of the political offence exception. It was held that he could not. The case is

important since it concerned a type of terrorist offence which was still relatively uncommon in the 19th century but has regrettably become more widespread in recent years. It has thus been much discussed in the numerous recent decisions in the United States and Canada.

In a case concerning an international convention it is obviously desirable that decisions in different jurisdictions should, so far possible, be kept in line with each other. In the United States, recent cases include *Eain v. Wilkes*, 641 F.2d 504, *Quinn v. Robinson* (1986) 783 F.2d 776, *McMullen v. Immigration and Naturalization Service*, 788 F.2d 591 and *In re Atta*, 706 F.Supp. 1032. In Canada the most recent decision is *Gil v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1559, a decision of the Federal Court of Appeal in Quebec. The Canadian case and *McMullen,* a decision of the United States 9th Circuit Court of Appeals, are especially valuable since they are both refugee cases, and are therefore concerned with a similar background to the present case, and identical language.

I return to the English cases. In *In re Meunier* [1894] 2 Q.B. 415 the defendant was charged in France with causing two explosions. The first was at a cafe. Two members of the public were killed. The second was at a military barracks. The French authorities requested extradition. The defendant was committed by the Bow Street magistrate with a view to his surrender under the Act of 1870. He applied for a writ of habeas corpus. One of the grounds was that the crimes with which he was charged were offences of a political character within the meaning of section 3 of the Act. It was conceded that the explosion at the cafe could not be regarded as a political offence. But it was argued that the explosion at the barracks was on a different footing, since it was aimed at soldiers of the French Government, and designed to destroy government property. The Divisional Court refused the application. The defendant was not seeking to impose his choice of government on the French. He was a member of the anarchist movement, and therefore the enemy of all governments. Cave J. said, at p. 419:

> "Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular government; but anarchist offences are mainly directed against private citizens."

Although the offences in *In re Meunier* bear a strong resemblance to the offences in the present case, the difference is that Mr. T. is not an anarchist. His case is that he was seeking to change the government of Algeria. To that extent his motive was clearly political. The question, as will be seen later, is whether this is enough to bring him within the political exception.

Reg. v. Governor of Brixton Prison, Ex parte Schtraks [1964] A.C. 556 arose out of a dispute concerning the education of a seven-year-old boy in Israel. There were proceedings in the High Court of Israel brought by the boy's parents against his uncle, the appellant, and his grandparents, seeking an order for the boy's return. The uncle gave evidence in the proceedings. He was subsequently charged in Israel with offences of child-stealing and perjury. Meanwhile he had come to England. The Israeli

Government sought his extradition. One of the questions was whether the offences with which he was charged were political offences. There was evidence that in Israel the religious education of children is a political issue. The boy's future was the subject of questions and debates in the Knesset, where the uncle's actions received considerable political support. So the offences were committed in a political context. Nevertheless, it was held that the offences were not political offences. Lord Reid said, at p. 584:

> "I am willing to assume that the accused did what he believed to be right, and that many people, and even a whole political party, agreed with him, but I cannot find any political character in the alleged offences. There is nothing to indicate that he acted as he did in order to force or even promote a change of government, or even a change of government policy, or to achieve a political object of any kind. I do not say that every act done for such purposes would necessarily be of a political character, but without any such purpose it could only be in some exceptional case which I cannot foresee that the act could, in my view, be said to be of a political character."

Viscount Radcliffe said, at p. 591:

> "In my opinion the idea that lies behind the phrase 'offence of a political character' is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country."

The essential idea, in Lord Radcliffe's view, was that of political opposition between the fugitive and the requesting state. That idea would be lost sight of:

> "if one were to say that all offences were political offences, so long as they could be shown to have been committed for a political object or with a political motive or for the furtherance of some political cause or campaign. There may, for instance, be all sorts of contending political organisations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders:" pp. 591–592.

On the facts, the case had become to some extent a political issue, as Lord Radcliffe accepted. But the offences were not committed as part of a demonstration against government policy. They were more in the nature of incidents in a family quarrel.

In *Reg. v. Governor of Pentonville Prison, Ex parte Cheng* [1973] A.C. 931, the appellant was a resident of the United States. He had been convicted of the attempted murder in the United States of the Vice-Premier of Formosa. The United States Government sought his extradition from the United Kingdom. His case was that he was a member of an

A organisation known as the World United for Formosan Independence, and that his crime was therefore a political offence. The argument was rejected. Although the appellant was opposed to the regime in Formosa, he was not opposed to the Government of the United States, where the offence was committed. To extend the concept of a political offence to crimes committed in a third country would, in the words of Lord Hodson, at p. 943, be to "create an impossible situation."

B Lord Diplock, while accepting that the crime in question was a political act, held that it was not a political offence. At p. 945:

> "I would not hold that an act constituted an '*offence* of a political character' in the ordinary meaning of that phrase appearing in a statute dealing with the trial and punishment of crimes committed in a foreign state if the only 'political' purpose which the offender
C sought to achieve by it was not directed against the government or governmental policies of that state within whose territory the offence was committed and which was the only other party to the trial and punishment of the offence."

The importance of the case for present purposes lies in Lord Diplock's
D discussion of the word "political." If the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet "political." For politics are about government. But if the accused had robbed a bank in order to obtain funds to support a political party, the object would be too remote to constitute a political offence. In other words, a crime will only be regarded as a political offence if the relationship between the act and the
E effect on the government is sufficiently close.

This principle was applied in *Reg. v. Governor of Winson Green Prison, Birmingham, Ex parte Littlejohn* [1975] 1 W.L.R. 893. The Government of the Republic of Ireland sought the extradition of a member of the I.R.A. on a charge of armed robbery at a bank. There was an application for a writ of habeas corpus. Lord Widgery C.J., giving judgment in the Divisional Court, held that despite the applicant's connection with the I.R.A. and despite the
F fact that the purpose of those taking part in the robbery was to obtain money for the I.R.A. and not for themselves, the crime was nevertheless a non-political offence.

I come now to some of the United States cases. The early decisions owed much to the English decision in *In re Castioni* [1891] 1 Q.B. 149. An offence was treated as being of a political character if, but only if, it was
G incidental to a political uprising. Applying this test, the United States courts at first refused extradition of members of the I.R.A. accused of murdering British soldiers: see *McMullen v. Immigration and Naturalization Service* (1981) 658 F.2d 1312 and *In re Mackin* (1981) 668 F.2d 122. But by the beginning of the 1980s the traditional and over-rigid approach of the United States courts was beginning to break down. In *Eain v. Wilkes,* 641 F.2d 504, a member of the Palestine Liberation Organisation was
H accused of planting a bomb in a crowded market place in Israel, killing two boys and injuring many others. The State of Israel applied for extradition. The accused relied on the political exception. The 7th Circuit Court of Appeals dismissed his appeal. The court was prepared to accept

that there was a state of conflict in Israel sufficient to lay the foundation for the political exception. But the court went on to hold, at p. 520, that the crime was not "reasonably 'incidental to' " the state of conflict because of the indiscriminate nature of the attack. The court said, at p. 521:

> "The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger 'political' objective of the person who sets off the bomb may be to eliminate the civilian population of a country."

The court then drew an important distinction between the political structure of a state and its social fabric, quoting the English decision in *In re Meunier* [1894] 2 Q.B. 415. The court commented, at pp. 521–522:

> "Anarchy presents the extreme situation of violent political activity directed at civilians and serves to highlight the considerations appropriate for this country's judiciary in construing the requirements of our extradition laws and treaties. But we emphasize that in this case, even assuming some measure of P.L.O. involvement, we are presented with a situation that solely implicates anarchist-like activity, i.e., the destruction of a political system by undermining the social foundation of the government. The record in this case does not indicate that petitioner's alleged acts were anarchist-inspired. Yet the bombing, standing detached as it is from any substantial tie to political activity (and even if tied, as petitioner insists, to certain aspects of the P.L.O.'s strategy to achieve its goals), is so closely analogous to anarchist doctrine considered in cases like *In re Meunier* as to be almost indistinguishable."

Since the bombing was directed at the civilian population, "without regard for political affiliation or governmental or military status of the victims," the accused was not entitled to the benefit of the political exception.

Eain v. Wilkes was followed by the District Court of the Southern District of New York in *In re Doherty* (1984) 599 F.Supp. 270, which concerned an attack by a member of the Provisional I.R.A. on a convoy of British soldiers in Northern Ireland. The court rejected the United Kingdom's request for extradition. But it stated firmly, at p. 275, that the political exception would not protect bombings in public places.

The next important case was *Quinn v. Robinson*, 783 F.2d 776, a decision of the 9th Circuit Court of Appeals. There is a very long and learned judgment of Judge Reinhardt, in which he traces the origin and development of the political exception in the English, French, Swiss and United States legal systems. The case arose out of the activities of the so-called "Balcombe Street Four," who were responsible for a series of terrorist incidents in 1974, directed at civilian targets in Great Britain, culminating in the shooting of P.C. Tibble in February 1975. Judge Reinhardt upheld the United Kingdom's request for extradition, but only

on the narrow ground that, although there was an uprising in Northern Ireland, the uprising did not extend to England, and so the terrorist incidents were not "incidental" to any relevant uprising. This surprising conclusion was rejected by the other two members of the court. However, Judge Fletcher concurred in the result on other grounds. It is the other grounds which are relevant to the present purposes.

The thrust of Judge Reinhardt's judgment, with which Judge Fletcher agreed, was to reverse the trend started by *Eain v. Wilkes*, 641 F.2d 504. He did not accept that there was any distinction between military and civil targets. Nor did he attach any importance to the means used, whether discriminate or indiscriminate. He said, at pp. 804–805:

> "it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal. . . . We believe the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable."

A little later, he said, at p. 810:

> "It is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or changing the government."

Judge Fletcher said, at p. 819:

> "The new limitations imposed by the courts in *Eain v. Wilkes* and in *In re Doherty* unnecessarily break from the traditional test by inquiring into and evaluating the legitimacy of given political objectives and the conduct of internal political struggles."

Not surprisingly, Mr. Blake counsel for the appellant, set much store by *Quinn v. Robinson*. But the minority judge, Judge Duniway, said that he could not concur in the "lengthy opinion of Judge Reinhardt, or the very extensive dicta that it expounds." He much preferred the rationale of the 7th Circuit Court of Appeals in *Eain v. Wilkes*, where the court held that the political character of the offence provision did not apply to "the indiscriminate bombing" of a civilian populace. It is the minority view that has found favour in subsequent cases.

In *In re Atta,* 706 F.Supp. 1032, the United States District Court for the Eastern District of New York was concerned with an attack by three members of the Abu Nidal Organisation on a bus in Israel. The driver was killed, and one of the passengers en route for Tel Aviv was injured. One of the attackers escaped to Venezuela, and thence to the United States. The Government of Israel requested extradition. District Judge Korman certified accordingly. He summarised the case law, at p. 1039, as sustaining the proposition that " 'the United States does not regard the indiscriminate use of violence against civilians as a political offense.' " He

dealt in short order with Judge Reinhardt's judgment in *Quinn v. Robinson*. He said, at p. 1040:

> "Setting aside the fact that the qualifications of the rule as set forth by Judge Reinhardt cannot be reconciled with the sweeping rhetoric of his opinion, his analysis is flawed for a number of reasons. . . . The decision to extradite involves principally a decision regarding who may have refuge here. Whether or not it is 'our place to impose our notions of civilised strife on people who are seeking to overthrow the regimes in control of their countries,' it is plainly our place to decide who may obtain safe harbor in, or passage through, the United States. Providing refuge for those who seek political change is one thing, making the United States a haven for those who engage in conduct that 'violates our own notions of civilised strife' is quite another matter."

When the case reached the 2nd Circuit Court of Appeals (*Ahmad v. Wigen* (1990) 910 F.2d 1063) Judge Van Graafeiland agreed with District Judge Korman. He said, at p. 1066:

> "We agree that an attack on a commercial bus carrying civilian passengers on a regular route is not a political offense. Political motivation does not convert every crime into a political offense."

All the United States decisions so far considered have been extradition cases. I now come to a refugee case. In *McMullen v. Immigration and Naturalization Service,* 788 F.2d 591 (a follow-up of the case referred to above) the 9th Circuit Court of Appeals were concerned with an application for deportation of a former member of the Provisional I.R.A., who had committed numerous terrorist crimes between 1972 and 1974 in Northern Ireland and on the mainland. He relied on section 243(h)(2)(C) of the Immigration and Nationality Act, 8 U.S.C., which corresponds exactly to article 1F(*b*) of the Convention. In giving the leading judgment of the court Circuit Judge Wallace quoted with approval the test stated in *Goodwin-Gill, The Refugee in International Law* (1983), pp. 60–61:

> "The nature and purpose of the offence require examination, including whether it was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards a modification of the political organisation or the very structure of the state, and whether there is a close and direct causal link between the crime committed and its alleged political purpose and object. The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature."

The court held that there was a distinction between terrorist acts directed at military or official agencies of the state and random acts of violence against ordinary citizens that are intended only "to promote social chaos" (*Eain v. Wilkes*, 641 F.2d 504, 519), citing *In re Meunier* [1894] 2 Q.B. 415. The court, 788 F.2d 591, 598, distinguished its own previous decision in *Quinn v. Robinson*, 783 F.2d 776 on the unsatisfactory ground that the

A case was concerned with extradition (Circuit Judge Goodwin, 788 F.2d 591, 600, thought it was "a distinction without a difference"). There is then an extensive quotation from *Eain v. Wilkes*, 641 F.2d 504, 520. The court concluded, 788 F.2d 591, 598:

> "P.I.R.A.'s random acts of violence against the ordinary citizens of Northern Ireland and elsewhere . . . are not sufficiently linked to their political objective and, by virtue of their primary targets, so barbarous, atrocious and disproportionate to their political objectives that they constitute 'serious non-political crimes . . .' "

B

There have, so far as I know, been no decisions of the Supreme Court of the United States since *Ornelas v. Ruiz* (1896) 161 U.S. 502. But the recent decisions of the 2nd, 7th and 9th Circuit Courts of Appeals to which I have referred are a sufficient indication that in United States law any definition of "serious non-political offence" would necessarily include the indiscriminate bombing of the civilian population. The contrary view stated by the divided court in *Quinn v. Robinson*, on which Mr. Blake relied so strongly, can no longer be regarded as authoritative.

C

I come last, in this review of the authorities, to the Canadian case, *Gil v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 1559, from which I have derived the greatest help. There is a full account of all the English and American authorities, to which I have myself referred. There is, in addition, a reference, at paragraph 30, to *Folkerts v. Public Prosecutor* (1978) 74 I.L.R. 498, a decision of the Supreme Court of the Netherlands, emphasising the objective nature of one aspect of the test, at p. 501:

D

> "In judging whether the political aspect of the offences concerned is of predominant importance, the court has at all times applied the following criterion: could the offenders reasonably have expected that the offences—separately or combined—would yield any result directly related to the ultimate political goal described above?"

E

There is also a useful reference to *Ellis v. O'Dea (No. 2)* [1991] 1 I.R. 251, in which the President of the High Court of Ireland echoed the prevailing American view as to indiscriminate violence. All these cases, except *Quinn v. Robinson*, point in the same direction.

F

The facts of *Gil's* case were that the appellant, an Iranian citizen, came from a family which had supported the Shah. After the Ayatollah Khomeini came to power, he became a member of a group which planted bombs on the business premises of Khomeini's supporters in the bazaar, which resulted in the death of many innocent bystanders. Hugessen J. rejected the appellant's application for asylum. He said, at paragraph 40:

G

> "There is, in my view, simply no objective rational connection between injuring the commercial interests of certain wealthy supporters of the regime and any realistic goal of forcing the regime itself to fall or to change its ways or its policies."

At the end of his judgment, he drew a contrast between the plot against Hitler in 1943 and the assassination of John F. Kennedy; he then concluded, at paragraph 44:

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> "These considerations, however, do not come into play in the present case for, although there is no doubt as to the extremely repressive

nature of the regime in Iran, the appellant's claim fails for other reasons: notably, the lack of nexus between the crimes and any realistic political objective, and the fact that the means employed are unacceptable as a form of political protest against any regime, no matter how repressive, totalitarian or dictatorial."

The reasoning in *Gil's* case is in line with the recent authorities in the United States. Your Lordships should, I think, hesitate long before rejecting this view of the law.

Another important source of law (though it does not have the force of law itself) is the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status.*

Paragraph 152 states:

"In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose, i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature."

Finally, mention should be made of the European Convention on the Suppression of Terrorism (1977) (Cmnd. 7031). The Convention is not, of course, directly relevant in the present case. But it represents an attempt to limit by agreement among member states the availability of the political exception in extradition cases. Under article 1 a number of offences are not to be regarded as political offences, including any offence involving the use of a bomb. Under article 13.1, a member state was entitled to enter a reservation at the time of signing or depositing its instrument of ratification; and a number of states, including France, did so. But such states undertook to take into due consideration, when evaluating the character of an offence, any particularly serious aspects of the offence, including:

"(*a*) that it created a collective danger to the life, physical integrity or liberty of persons; or (*b*) that it affected persons foreign to the motives behind it; or (*c*) that cruel or vicious means have been used in the commission of the offence."

Paragraph 21 of the Explanatory Report states:

"The Convention applies only to particularly odious and serious acts often affecting persons foreign to the motives behind them. The seriousness of these acts and their consequences are such that their criminal element outweighs their possible political aspects."

Taking these various sources of law into account one can arrive at the following definition. A crime is a political crime for the purposes of article 1F(*b*) of the Geneva Convention if, and only if (1) it is committed

for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.

Although I have referred to the above statement as a definition, I bear in mind Lord Radcliffe's warning in *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 589 that a question which was first posed judicially more than 100 years ago in *In re Castioni* [1891] 1 Q.B. 149 is unlikely now to receive a definitive answer. The most that can be attempted is a description of an idea. But to fall short of a description would, in Lord Radcliffe's words, be to abdicate a necessary responsibility, if the idea of a political crime is to continue to form part of the apparatus of judicial decision-making.

I now turn to apply the above "definition" to the facts of the present case. As already briefly mentioned, F.I.S. is a political organisation which seeks to secure power in Algeria, in order to establish a fundamentalist Islamic regime in that country. In June 1991 the then government of Algeria declared a state of siege. Many people were detained, and some ill-treated. In September 1991 it was announced that elections would be held. In December 1991 F.I.S. secured a majority in the first round of the elections, and looked virtually certain to win the second and final round, and so form the next government. But the second round of elections never took place. A military clique was formed, and a new President appointed. This was followed by rioting and protests, in the course of which many members of the F.I.S. were arrested. In March 1992 F.I.S. was declared an illegal organisation.

In the light of those facts it is clear that F.I.S. is a political organisation which was thwarted in an attempt to become the government of Algeria by democratic means. Mr. T.'s motive in becoming involved in the bombing of the airport is not in doubt. He was attempting to overthrow the government by what he regarded as the only remaining available means. He therefore satisfies the first, or subjective, condition.

But does he satisfy the second, or objective, condition? On the findings of the Immigration Appeal Tribunal, Mr. T. was an active member of a terrorist organisation which was prepared to advance its aims by random killing. He was closely associated with the attack on the airport. Although the airport itself could be regarded as a governmental target, the crime as carried out was almost bound to involve the killing of members of the public. The means used were indiscriminate, and therefore the link between the crime and the political object which Mr. T. was seeking to achieve was too remote.

In the light of the above considerations, the Immigration Appeal Tribunal was entitled to hold that there were "serious reasons for considering" that Mr. T. had committed a serious non-political crime outside the United Kingdom. I can find no error of law in the conclusion

at which they arrived, nor any error in the reasoning of the Court of Appeal, with which I agree.

It is unnecessary to consider whether the attack on the barracks was a serious non-political crime, and I say nothing on that issue.

I would dismiss the appeal.

Appeal dismissed.
No order for costs save legal aid taxation.

Solicitors: Jane Coker & Partners; Treasury Solicitor.

M. G.

[PRIVY COUNCIL]

MURRAY STANLEY GOSS AND ANOTHER . . . APPELLANTS

AND

LAURENCE GEORGE CHILCOTT . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1996 Feb. 27, 28; May 23

Lord Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Steyn, Lord Hoffmann and Lord Cooke of Thorndon

Restitution—Quasi-contract—Moneys had and received—Company lending money to defendants on security of mortgage—Mortgage instrument avoided by alteration—Defendants making interest payments but failing to repay capital advance—Whether total failure of consideration—Whether advance recoverable

A finance company made an advance to the defendants for three months on the security of a mortgage over their property, interest being payable on three specified dates. The defendants agreed to lend that sum to the second defendant's brother, who was a solicitor and a director of the finance company, on terms that he would repay the advance and have the security cancelled. The defendants permitted the company to pay the money directly to him. While the mortgage instrument was in his possession as the company's agent he altered it without the defendants' authority or knowledge so as to extend the time for repayment and amend the interest dates. Only two interest payments were made and the advance was not repaid. On an action by the plaintiff, as liquidator of the company, the judge gave judgment for the defendants, holding that the company was precluded by