MA (Fresh evidence) Sri Lanka * [2004] UKIAT 00161

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 20th & 21st May 2004
Date Determination notified:
21st June 2004

Before:

The Honourable Mr Justice Ouseley (President)
His Honour Judge N Huskinson (Vice President)
His Honour Judge G Risius CB (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant: Ms N Finch, instructed by Irving and Co
For the Respondent: Ms J Anderson, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

Introduction

1. The Appellant is a citizen of Sri Lanka who was born in 1975. He entered the United Kingdom in August 2002 and claimed asylum upon arrival. His claim was rejected and his asylum and human rights appeals were dismissed by the Adjudicator, Mr G D Thompson, in a determination promulgated on 9th July 2003.

2. This was scarcely surprising as the Adjudicator had heard the evidence of the Appellant to the effect that the story he told in his original claim, in his SEF statement and in his interview, was untrue. This untrue story had not been withdrawn in the ordinary or additional grounds of appeal before the Adjudicator. It was to the effect that he had been helping the LTTE through supplying food to them with his family, that he had been arrested and tortured

by the army and made to identify an LTTE member who had committed suicide to avoid arrest. He had escaped through bribery, but realised that the LTTE knew he had identified one of its members and would try to shoot him for that betrayal. As a result of the peace agreement, the LTTE were roaming the country, looking for those who had betrayed them. In support of his claim, he produced numerous photographs and letters, including one from the village headman, confirming some of what the Appellant had said, and one from the Red Cross confirming his arrest and release after severe torture, bearing the stamp of the magistrate who was the chairman of the Red Cross branch concerned, with the right rubber stamp and on properly headed notepaper. He agreed in evidence that his mother had got the documents to help his claim; she had pleaded for the letter from the Red Cross to help stop him being deported; the contents of the letter from the village headman and the Red Cross were untrue.

3. Some weeks before his appeal to the Adjudicator was heard, the Appellant changed his story and it was notified to the Secretary of State. He had joined the LTTE in 1989, and after training he had been involved in fighting. He was severely traumatised as a result of heavy fighting in the early 1990s and spent a year recuperating. Later, he became a sentry, in charge of a local group. He was wounded, and the ebb and flow of the war caused him to move about. In 1997, he was put in charge of an LTTE group and led a group of 45 fighters in LTTE advances in 1998-9. After the start of peace talks, he was sent to an army controlled area where he undertook intelligence work and propaganda for the LTTE. He felt himself in danger from the army, and had had enough of fighting after nine years but thought that the LTTE would punish him for leaving it. He obtained a passport and although he had difficulties leaving at the airport where the police questioned him suspiciously about the LTTE, he reached Singapore where he was given a new passport, French identification and another document. He feared both the Sri Lankan authorities and the LTTE. He supported this story with more photographs, a video, a medical report which was consistent with the injuries he said he had received in the fighting, and a report from Dr Good on conditions in Sri Lanka, which said that nothing in the second story was inconsistent with what had happened and was happening in Sri Lanka. Dr Good thought that the Appellant would be very well known to the Sri Lankan authorities especially in the army and would be well known in his neighbourhood for having been in the LTTE. It confirmed what the Appellant said about the attitude of the LTTE towards those who had left it without permission.

4. The Appellant explained that he had changed his story because he had received better legal advice from different solicitors. The first story was what he had been advised to say by his agent who told him that he should not say that he had been a member of the LTTE, because it was a proscribed organisation in this country. He had not himself been involved in any of the terrorist activities of the LTTE which were carried out by a special unit.

5. The Adjudicator regarded the fact that the second story was a detailed and complex story as no guide to its truthfulness since the Appellant's first and untrue story had also been a detailed and complex one, supported by false documents. He was prepared to go to some lengths to tell a false story. The changing circumstances in Sri Lanka as the peace process developed had caused him to change his story to one which gave him a better chance of staying, as his prospects were considerably reduced under his first story.

6. The Adjudicator also found implausible other parts of the second story: the circumstances in which he said that he would be blamed for the death or disappearance of two LTTE men in Colombo, the event which he said precipitated his departure; his fear that he was being looked at suspiciously by Army officers who he alleged had seen him at a peace negotiation in 1991 when he was just sixteen. The medical report was seen as neutral as between the truthfulness of either account or other possibilities and the photographs were not proved reasonably likely to be genuine. The fact that the second story exposed the Appellant to a risk of exclusion was not persuasive as to its genuineness.

7. The Adjudicator concluded in paragraph 61:

> "In conclusion, I find that the appellant is not credible and that both his first and second stories are completely untrue. In the words of the Tribunal in Dasdemir HX/00957) (when they applied Karanakaran, Court of Appeal, 25.2000) I comprehensively disbelieve the appellant and I make it clear that I see no reasonable likelihood of truth in any evidence which he has given relating to the material issues in this case and that I have found all such evidence to be incredible to the extent that I am not prepared to consider it at all. I completely reject it. It follows that he cannot prove his case. In view of my credibility findings it is unnecessary for me to consider the question of '*Exclusion*' from Convention protection."

8. He thought that the Appellant would face no difficulties on return because of his scarring and continued:

> "I conclude that, in possession of a temporary travel document from the Sri Lankan High Commission in London, he would simply be waved through the airport controls, as the background evidence and Tribunal decisions indicate is the case with returned asylum seekers who do not have particular risk factors attached to them. Because of my complete rejection of his credibility I also totally reject his evidence of his having had difficulties at the airport on leaving Sri Lanka. The result of my credibility finding is that I conclude that he has not proved to the lower standard of proof a genuine 1951 Convention fear of persecution which is objectively well-founded."

9. After the appeal was dismissed, the Appellant sought leave to appeal on two grounds. The first was that the Adjudicator had failed to set his criticisms of the Appellant's evidence in the context of the background evidence and had also relied on his own experience rather than the cultural background when assessing the credibility of supporting material. Second, it was said that the Adjudicator had not put to the Appellant questions which would have enabled him to answer issues of concern to the Adjudicator which he took against the

Appellant. There was a third ground of appeal so-called but it was no more than an application to call fresh evidence to support the second story, on the ground that the Adjudicator and Tribunal were part of a continuing appeal process. This fresh evidence was to come from three witnesses: one had known the Appellant in the LTTE and had Indefinite Leave to Remain in the United Kingdom, another also knew the Appellant to have been in the LTTE through his brother whom he would identify in the photographs and the third was to deal with the origin of the photographs. The reason given for the calling of the first two was given as follows:

> "These witnesses were not called at the hearing before the Adjudicator as the question of whether the Appellant was a member of the LTTE had not been put into question and his solicitors believed that the detail given in the Appellant's witness statement and the photographs and video he was able to produce were sufficient to meet the burden of proof which fell on him."

10. Leave to appeal was refused on the ground that the Appellant was a liar and there was no reason why he should be allowed to call further evidence in support of his second story which had been disbelieved in a careful determination. It was contended in an application for statutory review that the Tribunal had erred in its approach to the reception of fresh evidence. The duty of anxious scrutiny coupled with the role of the Tribunal as part of a continuing asylum determination process required the Tribunal to admit the evidence. The reason now given for the absence of the third witness was that there had been no reason to suppose that the probative value of the photographs would be doubted. Statutory review was granted, not because of the merits of the case but because of "*some other compelling reason*", namely the need for the Tribunal to give guidance about the reception of fresh evidence when dealing with a jurisdiction based on error of law.

11. By the time the appeal came on to be heard, further fresh evidence was sought to be adduced: a further witness from Sri Lanka who knew the Appellant there, a Sunday Times journalist of distinction, Ms Marie Colvin, who had met the Appellant in Sri Lanka, a further statement from the Appellant himself describing how he had met this journalist, further photographs, and updated country background material. The key feature of Ms Colvin's evidence was that she had met the Appellant in April 2001 when on an assignment to meet the LTTE leader and her guide and bodyguard to meet him had been the Appellant. Leave was also sought to amend the grounds of appeal by adding the claim that there was an error of law by a mistake of fact because it was clear from the evidence of Ms Colvin that the Appellant was a member of the LTTE.

The framework for the decision

12. The effect of the grant of statutory review was to grant leave to appeal to the Tribunal. The admission of evidence which was not before the Adjudicator is governed by Rule 21 of the 2003 Rules. Written notice is required of the evidence and an explanation of why it was not submitted to the Adjudicator.

Rule 48 is not the basis upon which evidence not before the Adjudicator becomes material which the Tribunal can examine; it dispenses with any requirement that the material is admissible according to the rules of evidence applicable in a court of law, but that does not deal with the issue of the admissibility of evidence not before the Adjudicator.

13. The approach to the reception of evidence which was not before the Adjudicator has been considered by the Tribunal and the principles governing its admission have recently been set out in E v SSHD [2004] EWCA Civ 49. Although that case was concerned with the 2000 Rules and the way in which the Tribunal should deal with evidence submitted after it had reached its decision, when deciding whether to grant permission to appeal to the Court of Appeal or to rehear the case itself, the principles are of relevance more widely. There is no reason to adopt a different approach to the grant of leave to appeal from Adjudicators to the Tribunal, or as between the grant of leave and the actual decision on the substantive appeal. It would also be particularly strange if there were a difference of approach in the ways in which the Tribunal considered fresh evidence when dealing with an appeal which it reheard itself, or when hearing one remitted by the Court of Appeal or one which it had granted leave to be heard in the usual way.

14. The principles in E are set out in paragraph 92, and the Ladd v Marshall principles are summarised in paragraph 23(ii):

> "92. In relation to the role of the IAT, we have concluded:
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> (i) The Tribunal remains seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties;
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> (ii) following the decision, where it was considering the application for leave to appeal to this Court, it had a discretion to direct a rehearing; this power was not dependent on its finding an arguable error of law in its decision;
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> (iii) however, in exercising such discretion the principle of finality would be important. To justify re-opening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by Ladd v Marshall principles, subject to any exceptional factors.
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> 23(ii) New evidence will normally be admitted only in accordance with '*Ladd v Marshall* principles' (see *Ladd v Marshall* [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2325; White Book para 52.11.2). The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of

> the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876."

15. The Court of Appeal pointed out that it was not dealing with the current jurisdiction of the Tribunal which is limited to hearing an appeal on a point of law. However, we see no reason why the general principles governing the reception of evidence which was not before the Adjudicator should be different. There is no reason why the first and third principles should be changed. The application of the second principle will be different. When applied in the context of an appeal on the ground of error of fact or law, the fresh evidence has to be such that it would probably have had an important influence on the result of the factual or legal conclusions of the Adjudicator. When applied in the context of error of law alone, the test for the relevance of fresh evidence which could and should have been before the Adjudicator cannot now be that it assists a challenge to factual conclusions such as credibility findings or other personal circumstances which are very much matters for the Adjudicator. The application of the second principle now requires that the evidence be relevant to showing that the Adjudicator made an error of law, which probably had an important influence on the result.

16. It would not normally be possible to show by evidence which should have been before the Adjudicator but had not been produced to him, that he had made an error of law. (Even less so would it normally be possible that evidence related to subsequent events, or which could not have been before the Adjudicator with due diligence for other reasons, could show an error of law in his decision.) Of course there may be exceptional factors in an asylum or human rights case, which mean that evidence which could and should have been before the Adjudicator can be admitted on appeal.

17. This case illustrates the principles. Miss Finch for the Appellant sought to introduce fresh evidence; this is a case where the Tribunal's jurisdiction is limited to an error of law; she accepted that the evidence had to be of relevance by showing an error of law, as a result of E. She said that it was relevant because it showed an error of fact of such a nature as to constitute an error of law in the way identified in E, paragraph 66. It would not however be possible to say that it was relevant as showing an error of fact, short of an error of law. It could not be argued that a material consideration has been ignored when that consists of material which was never put before the Adjudicator, whether or not it could with reasonable diligence have been introduced before him, unless it falls within the category defined in E or other exceptional circumstances applied.

18. There is however an important qualification which applies in the asylum and human rights field to the admission of fresh evidence which could not have been before the Adjudicator, and it has an impact on the application of the Ladd v Marshall principles to such claims. This is seen in section 77(3) and (4) of the Immigration and Asylum Act 1999, which permitted the Tribunal and

Adjudicator to take into account any evidence relevant to the appeal on asylum or Article 3 human rights grounds, including evidence about matters arising after the date of decision. It was the decision of the Tribunal in SK [2002] UKIAT 05613* which explained that the reference to Article 3 was not intended to be a limitation. Of course, that did not remove the obligations in relation to evidence which could and should have been before the Adjudicator to show why it had not been adduced and could not have been adduced with reasonable diligence, and that it was relevant and apparently credible.

19. There is an equivalent provision in the Nationality, Immigration and Asylum Act 2002, section 85(4) in respect of Adjudicators, and section 102 in respect of the Tribunal, which is expressed in wider terms. Section 102 says:

> "(2) In reaching their decision on an appeal under section 101 the Tribunal may consider evidence about any matter which they think relevant to the adjudicator's decision, including evidence which concerns a matter arising after the adjudicator's decision.
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> (3) But where the appeal under section 82 was against refusal of entry clearance or refusal of a certificate of entitlement –
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> (a) subsection (2) shall not apply, and
> (b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse.
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> (4) In remitting an appeal to an adjudicator under subsection (1)(c) the Tribunal may, in particular –
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> (a) require the adjudicator to determine the appeal in accordance with directions of the Tribunal;
> (b) require the adjudicator to take additional evidence with a view to the appeal being determined by the Tribunal."

20. This provision has to be read with the limitation of the ground of appeal in section 101 to a point of law. The provisions need therefore to be read in this way. The fact that the right of appeal is limited to an error of law means that the same principle, which limits the reception of evidence which could and should have been before the Adjudicator, continues to apply with the added restriction that it must also be relevant to showing that there was an error of law. There is no simple right to introduce any evidence of fact, whenever obtainable, given the restriction on the ground of appeal.

21. However, there is a need to look at evidence of subsequent events frequently in these cases and to ensure that the decision is made on current material in relation to country conditions and personal circumstances. This was recognised a while ago in Ravichandran v SSHD [1996] Imm AR 97. The Tribunal discussed this in D (Croatia) [2004] UKIAT 00032* in paragraphs 41 and 42:

> "41. The Court of Appeal in Ravichandran v SSHD [1996] Imm AR 97, considered the different provisions of the Asylum and Immigration Appeals Act 1993

which had no such express provisions dealing with the time at which matters had to be considered. However, in relation to asylum appeals, where the issue is whether removal would breach the Refugee Convention and having regard to the obvious policy sense in enabling the appellate bodies to consider what may be post-Adjudicator circumstances changing more or less favourably to any party, the Court concluded that asylum matters had to be considered as at the date of the hearing.

42. It has been the general practice of the Tribunal over the years to consider evidence and to reach conclusions in asylum and human rights cases in the light of the material before it as to the current circumstances, whether of a personal nature or relating to the way in which country circumstances bear upon the appeal. This is different from but related to its power to consider evidence which could have been but was not put before the Adjudicator. It includes material which by its nature could not have been before the Adjudicator. Commonly it will include the latest country information but it can also include evidence of individual changes in circumstance, whether of marriage or children or medical condition. It can also include evidence which could and should have been before the Adjudicator."

22. The Tribunal in D continued in paragraphs 43, 44 and 46:

"43. Sometimes this evidence will reinforce a ground of appeal; at other times it will support opposition to it. Sometimes a ground of appeal may be good in itself, but will have become insufficient to lead to the appeal being allowed, because the error now has no significance in the light of new circumstances, and a remittal for further consideration would inevitably lead to the same result. This jurisdiction is not usually controversial. Conversely, where the appeal grounds are insufficient themselves to lead to the allowing of an appeal, but where circumstances have changed such that the original decision of the Adjudicator cannot now stand, the Tribunal's general practice has been to allow the appeal. It can work both ways as between the Secretary of State and a claimant. Mr Malik did not suggest that we had no power to allow an appeal on that basis.

44. This makes sense of the jurisdiction to decide whether removal would be a breach of the Refugee Convention and, although the human rights grounds in the 1999 Act (by contrast with section 84(1)(g) of the 2002 Act), focus on the decision of the Secretary of State rather than on the fact of removal as being the cause of a breach of the ECHR, it is plain that the Tribunal has to look to the consequences of the implementation of the decision anyway. Under each Convention, the question of a breach or entitlement is not based on past events but on an assessment of current risk upon the assumed removal. Indeed the suspension of removals pending determination of appeals enables and its purpose in part is to enable the determination of risk on removal to be judged against the most up-to-date material. That also has to operate even-handedly as between the Claimant and the Secretary of State; it could not be right for decisions on the Conventions to be made on the latest material only where that assists the claim.

46. We consider therefore that the key to whether the Tribunal can consider the later material at the appeal and consider the Tribunal's earlier assessment of it, is the simple fact that it has the appeal before it, rather than whether or not an Appellant succeeds on a ground of appeal, a ground which may be wholly unrelated to the new material. The alternative approach would introduce a

> degree of arbitrariness into the decision making process at the appellate stage, with the ability to hear the new material depending on whether or not it was thought, for example that the reasoning of an Adjudicator had been adequately expressed on what might be a wholly unrelated point. Once permission is granted, the appeal is before the Tribunal; the grounds have to be considered along with any other material relevant to a decision on the appeal. The appeal has to be dealt with in the light of the current material, including for example, factual material about the claimant. As we have set out above, the question of breach of either Convention, risk on removal and entitlement to refugee status are looking to the future; it would scarcely be a rational system if such a decision in the Tribunal, for or against a claimant or Secretary of State, turned on the existence of an unrelated error, say, in adequacy of reasoning by the Adjudicator."

23. Those principles which now apply to immigration decisions generally, except those relating to entry clearance or certificates of entitlement, show how in this public law area, it is necessary to look at material which could not have been before the Adjudicator. It is material which shows what the current personal position is, where that is relevant, and the current country circumstances are, where they are relevant, but it would not usually permit factual material current at the date of the Adjudicator's determination to be admitted, unless it both satisfied the Ladd v Marshall test and was relevant to the demonstration of an error of law.

24. There is an additional significance, in this context, of evidence which should have been before the Adjudicator in that it may be difficult to make sense of the change in circumstance, personal or country, about which evidence is being received unless evidence is also admitted as to the earlier position, even though it ought to have been, but was not, before the Adjudicator. Of course, it will not assist its apparent credibility that it was not. Such additional evidence may also assist in deciding whether a decision which has been found to be erroneous in law should be remitted for hearing to an Adjudicator or dealt with in the Tribunal. That is an illustration of the circumstances in which the Ladd v Marshall test is applied differently in this area. This is not intended to be an exhaustive statement of instances where the interests of justice may require evidence to be admitted which does not satisfy the Ladd v Marshall test.

25. Accordingly, we considered the fresh evidence which Miss Finch sought to adduce within that framework, a framework which also applies to applications for leave to appeal to the Tribunal.

The fresh evidence

26. We heard oral evidence from Ms Colvin, and from two witnesses whose statements explained that they had known the Appellant to be a member of the LTTE. We also heard from the Appellant himself. The evidence of Ms Colvin was heard in full because of the limits on her availability, she had no written statement and it would have been difficult, given the nature of her evidence, to assess its apparent credibility, in the sense of reliability without either oral

evidence or a very careful written statement. There were also some documents related to her meeting the Appellant, how contact was established in this country and about her assignment in Sri Lanka. The cross-examination of the other witnesses including the Appellant was limited to the questions which arise under Ladd v Marshall, as to when they were available and known to the Appellant and as to why they had not been called before the Adjudicator. They were not cross-examined about the substance of their evidence. We also had a written statement from a third Sri Lankan who claimed also to know the Appellant as an LTTE fighter but who was not available on this occasion. There was also updated country material from the Secretary of State to be given by a witness and from Dr Good for the Appellant.

27. The substance of Ms Colvin's evidence was that the normally very secretive LTTE leader in early 2001 wanted to declare a major change of policy in the civil war and to do so through an interview with her; he selected her because of her reputation as a journalist of integrity. The attitude of the Sri Lanka Government to journalists meeting Prabakharan meant that it would have to be arranged clandestinely. In April 2001, she was taken to a rendezvous point where an armed group of eight or so, of which the Appellant was one of two leaders, met her and escorted her through the Sri Lankan army lines to the camp where she met Prabakharan. The journey took some 30 hours, half of which were on foot, and about 16 to 20 of which were in daylight. There were occasions when she spoke to the Appellant who had some broken English, sometimes they had to sit around waiting till the passage was clear and at other times they walked in single file. She did not allow anyone to use her satellite phone.

28. She also saw him two or three times at the camp where she was for two weeks. He was sometimes in the company of very senior LTTE fighters. She took no photographs and did not ask his name. She had never referred to him in letters or in the articles written later. She assessed him as being an officer although that was not a term which could be applied readily to the members of an irregular body such as the LTTE. He appeared to be a senior in the ranks. He was in charge of a unit sent directly by the leader to escort a journalist to whom he wished to make an important announcement and whom he had chosen. She was told that he had been especially selected to escort her. He appeared to be a guard and a fighter who was quite senior. He was deferred to by some other fighters.

29. When she left, she was not taken by LTTE fighters but by Tamil civilians who put her in contact with a Roman Catholic priest; she chose to return that way. It was on the return that she was ambushed by government forces.

30. She was contacted by solicitors in this country who asked whether she knew the Appellant and who then sent her photographs from which she recognised the Appellant as the one who had led her escort to Prabakharan. She recognised him again straightaway when she saw him at the Tribunal building with two

other Tamils, though he was sideways on, she went up to him and shook his hand and his face lit up in response. She was absolutely certain that the Appellant was the man who had escorted her.

31. The next two witnesses were Sri Lankan. SI produced a statement dated 24th July 2003, shortly after the appeal was dismissed; he produced another one in March 2004. He was granted Indefinite Leave to Remain in 2001. His brother was in the LTTE and SI had met the Appellant through the brother three or four times between 1996 and 1999. He suggested that the Appellant held a senior position because he had a vehicle, a motorbike and at other times a pick-up truck, and his brother said that the Appellant held a responsible position. He did not know what that position might have been because his brother did not say, nor did he know whether that included being a bodyguard. He did not say what section the Appellant was in. He produced a photograph of his brother with the Appellant and SI's family. About two years ago, the Appellant had telephoned him because he had met a mutual friend; he wanted to call SI as a witness in his case, to which SI agreed but the Appellant did not say anything much about it. About six or seven months ago, SI had spoken to a solicitor but he could not really remember the gap. SI had spoken to his brother since SI had come to the United Kingdom and had told him that he had met the Appellant. His parents had told the brother, on home on leave from the LTTE, that the Appellant was in the United Kingdom. In the light of the fears expressed by the Appellant that the LTTE would see him as a traitor and would seek to have revenge upon him, SI was asked what reaction there had been to the knowledge that the Appellant was in the United Kingdom and that SI had been asked to help him with his case. There was no reaction to the discovery that he was in the United Kingdom other than that he asked how SI had met the Appellant, but the conversation broke off because the brother moved around, even though the call was placed at a communication centre when the brother was on leave; he did not tell his brother that he was helping the Appellant and the brother had not been told that the photograph of the family with the brother and the Appellant had been sent to help the Appellant. The photograph had been asked for before SI had spoken to the Appellant in the United Kingdom, as he wanted a family photograph.

32. KM made a statement in May 2004 when the other witness proved unavailable. He had been granted Indefinite Leave to Remain in June 2003. He had been in the LTTE for five years and had been punished by them for two years for trying to leave them; he was made to cook for them. After escaping from them he went to an army controlled area where the army arrested him on a number of occasions, tortured him and eventually he escaped. He had met the Appellant in 1995 in a camp and knew that he held positions of responsibility. After KM was injured in fighting he was taken to a camp to recover where the Appellant was in charge of political duties (a suggestion also made by SI). He knew that he had a prominent position. He also carried out some plans but he did not know what those plans were. He had last seen him in Sri Lanka in 1997.

33. He was initially unable to remember when he had first met the Appellant in the United Kingdom, but then said that it was in 2003. They had met in a bus as KM was going to sign on in Hounslow. He said that it was about two or three months after he had arrived in the United Kingdom which was 24th May 2003, probably June. He said how frightened he was of the LTTE because they were now infiltrating army controlled areas in disguise and were harassing his older brother threatening to kill KM. They never pardoned those who worked against them.

34. The Appellant gave evidence about the preparation of his case before the Adjudicator and how he met the witnesses. After he had made his first and untrue statement, he had changed solicitors to Winstanley Burgess where his case was dealt with by Mr Burgess who advised him to get two witnesses to support his case. The Appellant had tried but one refused to help; later he said that he had asked a lady. After that he had given up. He then met TA in the temple after he had lost at the Adjudicator hearing; he had just seen him there; this was the witness who was unable to attend. SI said that he would help but it appears that this too was after the Adjudicator hearing.

35. In cross-examination, he was very vague about when this meeting had taken place, whether winter or summer, but also said that it was shortly after his case before the Adjudicator was lost; the statement is dated shortly afterwards. When reminded that he had said that he first met SI in the United Kingdom after the appeal before the Adjudicator was lost, but that SI had said that they had met here two years ago, he said that that was right but it was only at the later stage that the had asked for his help; that is also not what SI had said. He was then vague about when they had met at an earlier stage, before saying that he had not asked him to help at that earlier stage because SI had not been in the LTTE. Mr Burgess had wanted witnesses who had been in the LTTE, although the Appellant's reasons for his first and untrue story had been that there was a risk of exclusion if they said that they were LTTE members. He only thought that SI would be useful and asked him to help after he had lost before the Adjudicator. He had gone everywhere where there were Tamils trying to find someone who knew him. There had been difficulties because Winstanley Burgess were closing down at around the time of his appeal.

36. He had meet KM six or so months ago in December 2003, but it appeared that he had asked for his specific help about one month ago. When he was asked about the evidence given by KM that they had met in June or July 2003, he said that he could not remember the month or the weather. He said that KM had not really been a friend in Sri Lanka.

37. The Appellant said that he had told Mr Burgess about Ms Colvin two weeks before that case; though he had initially said that it was after he had lost before the Adjudicator. He had not thought of her until then because he had only been thinking of LTTE members. Mr Burgess could not find her address. Irving's,

his current solicitors, were not told by Mr Burgess; it was the Appellant who told them. They made contact through the Sunday Times.

The application of the Ladd v Marshall tests

38. We now turn to consider the Ladd v Marshall test. Miss Anderson pointed out that Ms Colvin had seen the photographs of the Appellant before meeting him. That was not a persuasive point on the test we are considering, although she is right that identification evidence from a careful and honest witness can still be mistaken and three years had passed since the two had met. She also pointed to a number of discrepancies between what Ms Colvin said about her journey with the Appellant and what he said about it in a statement produced before he heard her evidence: she said that she had been escorted by civilians on her return, saw no one on the inward journey, did not let anyone use her satellite phone and did not talk to the Appellant on it. His statement contradicted each of those matters and the first in particular was a very different version. Those are points which are relevant to identification and memory.

39. We accept that her evidence is at least apparently credible for the purposes of the Ladd v Marshall test and said so at the hearing in order to advance submissions. She was plainly honest and there was no dispute about that. She was tested about the reliability of her memory and the accuracy of her identification; it was suggested that she had been sympathetic to the LTTE position. To our mind, not merely was she an honest witness, but she was a very careful and thoughtful witness who did her best to be objective and accurate. She was open about what she could not remember clearly but this assignment was a very important one and the loss of an eye through it gave her every cause to remember it. She pointed out that the Appellant was a lighter skinned and larger man than most Tamils, which helped to distinguish him, and in any event her journalistic experience had enabled her to acquire a good memory for faces including those of different races. The differences between what she said and what is in the Appellant's recent statement were not explored with him in cross-examination, because that was not appropriate at this stage. They may show the fragility of the memory of either or both; they may go to accuracy of identification.

40. We also indicated that we considered that the evidence of Ms Colvin passed the test in Ladd v Marshall as to availability before the hearing in these unusual circumstances. It is unlikely that if Winstanley Burgess had been informed of this witness that they would not have taken the obvious step of trying to make contact through the Sunday Times, so problems in this respect are down to the Appellant and not his advisers. But it would be far from obvious that, even with the change of story, an asylum seeker should seek out and put reliance on a very well known journalist who might well not remember him and if she did, might very well not have been interested in spending the time and effort required to provide evidence. He was fortunate that in fact she both remembered him and was prepared to give evidence, which she saw as a duty. We can well

understand that he would concentrate his endeavours on the Tamil community, turning only to her as a last resort. Even if he had told the truth from the outset, and had thereby given himself more time in which he or his solicitors could approach Ms Colvin, it is understandable that she would be seen as a last and unlikely chance, of uncertain availability or willingness to attend an Adjudicator hearing.

41. Having said that, it will be a very unusual case in which a witness whose identity is known and who is traceable can pass that part of the test in Ladd v Marshall, because an appellant should obtain all the evidence he needs to put his case to the Adjudicator. It would not normally be sufficient to pass the test that the late recognition that the first story was untrue deprived an appellant of the time needed to put a second story in order, supported by witnesses. There was a suggestion that Mr Burgess had advised that two witnesses were all that was necessary. He may or may not have done but both knew that the Appellant was completing changing his story, was admitting to making a false claim backed up by false documents. It is inconceivable that, save in circumstances as exceptional as this, someone who knows that his credibility is going to be under close scrutiny can ignore potential witnesses and seek to bring them in only when the case has been lost, seeking a remittal so that that fresh evidence can be heard.

42. The view we formed in relation to the other witnesses is less important in the light of that. We do not accept that SI was not available with reasonable diligence. The Appellant knew that he was in England, had been in contact with him and could have sought his help and told Winstanley Burgess of the assistance which he could offer. He did not do so. Part of his reluctance to use him was because he could not give the right sort of assistance in relation to the first story and he wanted stronger evidence in relation to the second. But these tactical calculations, and the impact of the change of story, do not suffice to show that SI was not available.

43. Although there is some consistency in SI's evidence with what Ms Colvin had to say, his evidence did not relate to that assignment, was very vague about what the Appellant had done in the LTTE, and was not really credible in relation to the brother's reaction or to the obtaining of the family photograph with the brother and the Appellant, so fortuitously. There were many occasions in his evidence when the witness was unable to recall things about the conversations with his family and the provision of the photograph, and the contact between the Appellant and SI. It was surprising that the brother had so little reaction to the discovery that the Appellant was in England in view of the fear which those who have left the LTTE claim to have of it, and that the family of an LTTE member of some seniority should help so willingly someone who had only met the witness a few times. It is a remarkable stroke of fortune that the family photograph which was taken before there had been any contact with the Appellant, and which was asked for as a family photograph, should include the Appellant, who was little known to SI and who was fortuitously in contact with

him in the United Kingdom; all the more so as the brother was reluctant to have his photograph taken anyway according to SI. The Appellant's evidence about how they met and what happened also contradicted SI's in a number of ways. Notwithstanding that there is some general consistency at a very broad level with what Ms Colvin had to say, we did not find this witness to be apparently credible.

44. KM was not available at the time of the Adjudicator hearing. It is not necessarily the case that that means that the evidence passes that aspect of the Ladd v Marshall test where it is evidence of a type which can be provided by others who can be obtained with reasonable diligence. However, although the Appellant seems to have had better fortune in finding witnesses after he lost than before, we do not accept the suggestion by Miss Anderson that other witnesses were available with reasonable diligence in this case. TA seemed, after the evidence of the Appellant, to have been found after the Adjudicator hearing, by chance in the temple although he had been asking around if anyone knew him and so could assist. It is obviously possible for chances to arise in that way and it is not too much of a coincidence.

45. KM's evidence about the Appellant was vague, put him in a political role but was emphatic that he occupied positions of responsibility. It was at odds with that given by the Appellant as to when they met in the United Kingdom. It does have some consistency with what Ms Colvin said at a very general level and he was a more credible witness than SI. We were unimpressed by his evidence and would not regard it alone as sufficiently cogent, consistent and reliable to pass the requirement for apparent credibility.

46. Miss Finch said that it was difficult to rely on the apparent credibility of TA who had not given oral evidence. We do not accept that it is always necessary for someone to give oral evidence for his evidence to have apparent credibility but the statement is very short and is silent as to how he came to be asked to give evidence after the Adjudicator hearing. If evidence is sought to be adduced after the hearing, it is necessary for evidence to deal with the question of why it had not been procured earlier so as to be available to the Adjudicator. The statement says that TA knew the Appellant as a member of the LTTE, as he himself had been, between 1990 and 1999. He had obtained ILR in 2001. He describes the Appellant, using the same language that the other witnesses did, as holding positions of responsibility and being a senior member. The Appellant had been a bodyguard or holding some other responsible role. There is very little detail about what he might have been doing, even though TA says that he used to see him sometimes three or four times a day between 1993 to 1996. Again by itself, we would not regard it as sufficient to be apparently credible.

47. What we do accept, taking the evidence in the round, is that there is apparently credible evidence which supports the Appellant's claim to have been an active service member of the LTTE in 2001, who was trusted by the leadership with

important tasks even though they may not have required someone of a high rank. There are no real equivalents in an irregular group such as the LTTE to what might be senior NCOs or junior to middle ranking officers in a regular army. But it would seem from Ms Colvin's evidence that it is apparently credible that he held more than a low level position.

Error of law

48. Miss Finch correctly submitted that, because the case came within the 2002 Act, this evidence had to show that there had been an error of law in order for it to be relevant. It is not the same as background evidence or evidence as to the current personal position of an appellant. The error of law which she submitted it showed was the error explained in E as an error of fact. The broad requirements for an error of fact to constitute an error of law are set out in paragraph 66 of the judgment.

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

49. Miss Finch relied also on paragraph 63:

> "In our view, the *CICB* case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between 'ignorance of fact' and 'unfairness' as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that 'objectively' there was unfairness. On analysis, the 'unfairness' arose from the combination of five factors:
>
> i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);
> ii) The fact was 'established', in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
> iii) The claimant could not fairly be held responsible for the error;
> iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;
> v) The mistaken impression played a material part in the reasoning."

50. Miss Finch submitted that each requirement was satisfied and Miss Anderson contended that none were. The mistake of fact was said to be that whereas the Appellant was in fact an active member of the LTTE, a middle ranking officer, the Adjudicator had concluded that there was nothing about his story which

could be believed. The precise fact said to be mistaken varied a little but that gives its essence. We do not accept Miss Anderson's submission on the first requirement that this could not by its nature be a mistake of fact within the contemplation of the Court of Appeal in E. True it is, that it is a point which goes to undermine the Adjudicator's credibility assessment but that is not of itself an answer if the relevant tests are satisfied. It is a problem for the Appellant that the asserted mistaken fact is so ill-defined and the concept of the middle-ranking officer in the LTTE is not an easy one to show applies to this Appellant. The apparently credible material from Ms Colvin shows only that he was an experienced, trusted and active member of the LTTE who had some authority over other men.

51. We do not consider that there was any mistake of fact as to the availability of evidence in the sense required by E, in the Appellant not knowing of the willingness or ability of Ms Colvin to give evidence. The type of mistake referred to there was as to the existence of evidence which was already available. Otherwise this type of mistake would simply provide a substitute test for those which the Court of Appeal referred to in E relating to fresh evidence. Miss Finch did not argue that mistake applied either but we consider it necessary to cover it.

52. The first requirement is very closely linked to the second in this case. We have said so far that there is apparently credible evidence as to a mistake of fact by the Adjudicator, though it is not well-defined. But the fact or evidence has to be "*uncontentious and objectively verifiable*". Miss Finch argued that such was the quality of Ms Colvin's evidence, backed up by the evidence of other witnesses, that it had been established that the Appellant was a middle-ranking member of the LTTE. We do not accept that argument. First, that point cannot be established by the mere conclusion that evidence meets the "*apparent credibility*" test for its reception as fresh evidence. Second, there is a dispute about how accurate and reliable the identification evidence is and what if anything can be inferred from it. We do not accept the submission that we are in a position to decide that issue, let alone to decide it to the level at which it could be described as "*uncontentious and objectively verifiable*". That test is not one which can be satisfied by the Tribunal hearing contentious evidence and then ruling upon it. It would be very rare that disputed evidence could meet that requirement; it could only do so where the basis of the dispute was frivolous, vexatious or abusive, a mere irresponsible refusal to accept the obvious, such as claiming that a document of faultless credentials must be a forgery and the product of a plot. That is not the position here. There was no dispute as to the honesty or integrity of Ms Colvin and we found her evidence to be "*apparently credible*" including our assessment of her reliability and accuracy. But it was some way from the test in E, of being "*uncontentious*" showing an "*objectively verifiable*" mistake of fact. Miss Anderson's points about the time which has elapsed, the stress of the events, the circumstances under which they met, the differences in what the Appellant says about the events from what she says and the general difficulties of identification evidence

are not irresponsible and have some foundation. We do not see how the need to form a view about the veracity or reliability of a witness can fit with the test save in the most exceptional circumstances.

53. There is a particular problem which would arise if the test could be met by hearing disputed oral evidence. The accuracy and reliability of Ms Colvin's evidence cannot be finally ruled upon without hearing the full evidence of the Appellant, whose truthfulness is in some doubt, and supporting witnesses. The fact that the Appellant might be a liar could cast doubt in its turn upon the accuracy of the evidence of Ms Colvin. The Tribunal could not hear the full case in order to decide whether the evidence showed a mistake of fact which satisfied the second test, yet in practical terms that is what it would have to do if Miss Finch's approach were right. That shows to our minds that the test can only be satisfied by evidence which meets the stringent requirements by being genuinely uncontentious, being the sort of evidence which would lead anyone to say that of course a mistake had been made, and a mistake as to a clearly identifiable fact. The difficulties faced by asylum seekers in obtaining evidence do not diminish the stringency of this particular requirement.

54. Thirdly, it was said that the Claimant could not be held responsible for the error; this was because he had done what he could to find evidence to support his case and there were difficulties in finding witnesses who were willing to say that they were members of a proscribed organisation; he had explained what he had done and the decisions about calling witnesses. Mr Burgess could perhaps have done more, and the Appellant should not suffer for any failings there. This submission is wrong. The Appellant is very largely to blame for the problem. The mistake on the Adjudicator's part, if it were established to be one, arose because the Appellant destroyed his own credibility by telling lies and backing his lies with false documents, and then changing his story in a way which seemed to meet what were known to be changing circumstances in Sri Lanka. If there were a lack of effort from Mr Burgess, as to which there is no evidence, that also prevents reliance upon this error of law. It was said, in the application to admit new evidence, that he had said that no more evidence was required which also does not help the Appellant. There is little clear evidence as to what contacts the Appellant sought among the Tamil community in the United Kingdom.

55. Fourth, it was said by Miss Finch that this fact would cause a complete re-examination of the credibility and risk elements of the case. If true that it was the Appellant who escorted Ms Colvin, that does not go to any other aspect of his case, which now relies in part upon his departure from the LTTE without their consent and which would cause him to be regarded as a deserter. Nonetheless, it would be a factor of sufficient significance that it could fairly be said that the absence of belief that he had been active in the LTTE played a material though not necessarily decisive part in the Adjudicator's reasoning. If the other tests had been satisfied we would have held that there had been an error of law and remitted the matter to an Adjudicator.

56. That evidence which passes the Ladd v Marshall tests does not show the error of law contended for.

57. Miss Finch pointed out that in its discussion in E of R v CICB ex parte A, the Court had referred to the shared interest which the parties and the Board had in reaching the correct result. That also applied to this area, especially with the duty of anxious scrutiny, even though the process was essentially adversarial. This duty was borne out by paragraph 197 of the UNHCR Handbook, which refers to the shared duty to ascertain the facts and the obligation which may lie on the "*examiner*" to produce evidence to assist a claimant. Accepting that there is a duty on the parties in an asylum case to co-operate, and that there is a duty of anxious scrutiny upon the Tribunal, Miss Finch's submission is not advanced. There is no duty on the Secretary of State to find witnesses, least of all witnesses whom he has not been asked to find. The content of the duty to co-operate does not extend that far and it was not clear how any such duty if fulfilled could have assisted the Appellant anyway. He breached his own obligation to co-operate by telling and maintaining lies. It is a completely different situation from the one in CICB where the obligation was referred to in the context of the production of relevant material which was already in existence and in the possession of one party which would benefit the other.

58. In this area, however, the question naturally arises as to how the new information, which if true could affect the Appellant's case in quite a significant way, making a material but not necessarily decisive difference to it, could ever be taken into account, or whether, notwithstanding it, the Appellant would be returned to Sri Lanka on what might be a false basis.

59. Miss Finch pointed to the difficulties created by section 96(1)(b) or (c) of the 2002 Act, section 96(2) being inapplicable. That section provides for certification of a claim so that it may not be appealed where the claim was made to delay removal and with no other legitimate purpose. Miss Finch was concerned that the effect of this would be that the Appellant, facing the difficulties which asylum seekers face in obtaining evidence with their education, legal, language and cultural difficulties, would be unable to undo injustice and to achieve a fair result. The predecessor provision was considered in Balamurali and Sandhu v SSHD [2003] EWCA Civ 1806. Balamurali shows that even where one purpose of the fresh claim is to delay removal, it may nonetheless have a legitimate purpose such as identifying a change in law or circumstances; it would be material but not necessarily decisive that what was now being said could have been said earlier. A legitimate purpose would be to draw to the Secretary of State's attention material that was not reasonably available earlier.

60. Paragraph 346 of the Immigration Rules was also said to constitute a limitation which meant that it would be unwise to suppose that the Appellant could make a fresh claim based on the evidence of Ms Colvin. The "*claim advanced in the*

representations" has to be "*sufficiently different from the earlier claim that there is a realistic prospect*" that the asylum claim will be made out. In reaching that decision, the SSHD disregards the insignificant, the incredible or "*material available*" to the applicant when the previous application was refused or when any appeal was determined. Logically consideration of the test in the Rules precedes the application of section 96(1).

61. The Courts have considered the way in which the Secretary of State ought to consider fresh claims under the Rules on a number of occasions. Miss Finch suggested that R v SSHD ex parte Onibiyo [1996] 2 All ER 901 focused on relevant changes of circumstances, which would not apply here, but is the basis of paragraph 346. But, as Miss Anderson showed, that case is far from the last word in this area. The relevant change of circumstances does not have to be a different basis of persecution but can be an intensification in the degree of ill treatment from the same source; R v SSHD ex parte Ravichandran (No 2) [1996] Imm AR48, Dyson J. More importantly for these purposes, SSHD v Boybeyi 1997 Imm AR 491, Court of Appeal, showed that "*a realistic prospect that a favourable view could be taken of the new claim*" on appeal could be demonstrated by fresh evidence which satisfied the Ladd v Marshall tests. The Secretary of State's decision in those matters was subject to judicial review. In R v SSHD ex parte Senkoy [2001] EWCA Civ 328, fresh evidence as to the general prospects of Kurdish asylum seekers being tortured on return to Turkey, which satisfied the Ladd v Marshall tests was held to have ignored wrongly by the Secretary of State.

62. We do not say that, in the light of our decision, the Secretary of State is bound to regard this Appellant as having a fresh claim within the Rules, but he cannot simply dismiss the fresh evidence on the basis that it reinforces a claim which has already been dismissed. The Secretary of State is bound to look under the Rules, at evidence which satisfies the Ladd v Marshall tests. Miss Anderson, appearing for the Secretary of State, asserted that that was his approach to paragraph 346. We have held Ms Colvin's evidence does so; the Secretary of State may decide that KM's does as well when taken with Ms Colvin's. He will have to consider his reaction to it, which will be judicially reviewable. It may or may not affect his ultimate decision on the claim. The more stringent the requirements on appeal, the more ready the Secretary of State will need to be to consider fresh evidence as creating a fresh claim.

63. It might be thought that in a case where evidence satisfies the Ladd v Marshall test, it is more productive of delays to have the Secretary of State consider its quality and effect, perhaps leading to judicially reviewable decisions, than to legislate so that the IAT could consider the impact of the fresh evidence, but that is the clear effect of the legislation and its clear policy is to restrict the number of attempts that an Appellant may make to have his case reviewed on differing and improving evidence before the successive appellate stages.

64. There is nothing in this result, however, which is intrinsically unfair or which prevents anxious scrutiny being given to a claim.

65. That leaves only the disposal grounds of appeal to consider. We do not think that there is anything in them.

66. There are a number of criticisms of the Adjudicator's approach to credibility. He did not fail to see the evidence in the light of the background circumstances; the Appellant had told two stories each of which could fit into background condition, but those conditions were also and legitimately seen by the Adjudicator as causing the change; paragraphs 54-57. His appraisal did not involve any inappropriate cultural assumptions; none have been shown. He simply did not believe the Appellant for sound reasons which he gave. His sceptical approach (paragraph 59) to the photographs is rationally explained, and follows Tanveer Ahmed*. Given the false documents the Appellant admitted producing, his reaction is scarcely surprising. His comments about the arms are perfectly proper in relation to a country where armed conflicted has been so prevalent, and reflect the fact that, as so little of what the Appellant says was credible, it was not difficult to explain why little corroborative weight could be placed on what he produced.

67. Miss Finch also said that fundamental aspects of the credibility dispute were not put to the Appellant. This is fundamentally misconceived. First, credibility was obviously at issue in almost all respects. He had completely changed his story. There was no Secretary of State concession that the Appellant was in the LTTE; Ms Chapman's cross-examination is reported quite fully and her submission was that it was difficult to believe anything he said. Second, in those circumstances, it is for the advocate and witness to address fully the issues which affect credibility. They cannot assume that where credibility is the obvious issue, that matters or factors which are not put in cross-examination or by the Adjudicator are accepted as true. This has been addressed by the Court of Appeal in Maheshwaran v SSHD [2002] EWCA Civ 173 paragraphs 4 and 5, and more recently by Lord Carloway in the Outer House of the Court of Sessions in Koca, 22nd November 2002, paragraph 34-36. It is neither realistic nor necessary for a fair hearing for every point of concern from the Adjudicator where credibility is at issue, to be expressly put. It is a matter of judgement whether to omit to do so is unfair, or to do so risks appearing to cross-examine. On balance the larger points are better put; if they are not obvious points, they should be put in an open and neutral way, not at too great a length.

68. It is very difficult to see how it can be contended, even if factually correct that he did not do so, that the Adjudicator should have made it clear that he doubted the Appellant's membership of the LTTE or active service within it. It was an obvious central issue on credibility. The Adjudicator was not obliged to ask more about the provenance of the photographs or uniforms; he could form his own view. The idea that the Adjudicator reached conclusions, not on the case put by the Secretary of State, but on his own case, which he did not put, is

nonsense. The Appellant's credibility was the major issue; the Secretary of State submitted that nothing the Appellant said should be believed.

69. The Adjudicator was entitled to accept that submission, even if he did so in part for doubts on aspects which were not expressly canvassed. The Appellant should have realised that, given his change of story, every aspect had to be fully covered.

70. Accordingly, this appeal is dismissed. It is starred for what we say about fresh evidence.

MR JUSTICE OUSELEY
PRESIDENT