IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 1st December 2003
Date Determination notified:
26 February 2004

Before:

The Honourable Mr Justice Ouseley (President)
Mr H J E Latter
His Honour Judge G Risius CB

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

For the Appellant: Mr M Malik of Sutovic and Hartigan
For the Respondent: Ms J Bracken, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of an Adjudicator, Mr A A Wilson, prepared on 3rd December 2002 and promulgated on 7th January 2003, following a hearing on 26th November 2002. The Appellants were four Croatian Serbs. The first and third Appellants were the father and mother of the second and fourth Appellants, their daughter and son. Both were adults. The father and son appealed on asylum grounds. There was no appeal by the wife and daughter on asylum grounds, although the Adjudicator said that their status fell to be determined in line with that of the first Appellant, the father. The son appealed on both asylum and human rights grounds. The father's appeal was allowed on both asylum and human rights grounds. The second and third Appellants' only appeals were dismissed on human rights grounds. The fourth Appellant's appeal was dismissed on asylum grounds, but allowed on human rights grounds. In effect, all the issues turned upon whether the return of the father, the first Appellant, to Croatia, would be a breach of the Refugee Convention and of his human rights.

2. Of some significance in this appeal is the fact that at the time when the Adjudicator heard the matter, the case of S & others [2002] UKIAT 05613 Starred, as the Adjudicator referred to it (strictly SK), was still pending in

the Tribunal. This case was known to the Appellants' solicitors since they were Sutovic and Hartigan. The Adjudicator knew that the case had been heard by the Tribunal and that it was intended that judgment be delivered during December 2002. In fact it was notified on 3rd December 2002 to the same solicitors who were appearing both in SK and in these Appellants' appeals.

3. The Appellants pressed for an adjournment in view of the pending decision in SK, but this was rejected by the Adjudicator. He referred to the unfortunate history of hearings and adjournments which these appeals had suffered. Two adjournments had been granted pending first the decision of the Court of Appeal in S and others and second the Tribunal's determination of the case. Although, he said, guidance of the sort envisaged to be provided by SK would be very welcome, he concluded that in its absence, matters fell to be determined in the light of the evidence available. Because the same solicitors were involved, he thought there was no reason why matters placed before the Tribunal could not be properly placed before him. He therefore refused the adjournment "*having regard to the overwhelming and primary purpose of determining a prompt, efficient and just disposal of the hearing*".

4. We should add that the Adjudicator did not have the benefit of an appearance on behalf the Secretary of State and as he indicates in a number of places in his determination, he would have found the Secretary of State's appearance of some assistance to him.

5. We turn to the basis of the asylum claim of the father. The family left Croatia in March 1998 for Norway where their asylum claim was refused three times, whereupon they left for the United Kingdom and made a further asylum claim. The Adjudicator summarised the basis for the appeals as being that "*all the Appellants suffered to some extent discrimination and violence in Croatia at the end of the civil war, but left due to the particular risk it was stated the first Appellant was under of being prosecuted by the Croatian authorities as a putative war criminal*". He had come from a Serb enclave in a predominantly Croatian area.

6. The Appellant had been mobilised and on active duties for some nine months at the end of 1991 through to 1992, working on the front line and then as a military policeman. He had been discharged following the creation of the Republic of Serb Krajina and placed on reserve duty, during which again he had worked as a military policeman. One of his duties had been to act as a guard for a group of Croats and Hungarians for about three months. The warden of that camp was, said the first Appellant, certainly wanted by the Croatian authorities for war crimes. The first Appellant maintained that he had never been involved in any war crimes. At the end of 1997, he had been sacked from his job, as the eastern sector of Croatia was handed over following the withdrawal of UN Forces. A pattern of discrimination and violence then emerged. He was verbally abused and received death threats. His wife was refused entitlement to social security and other benefits. His daughter was threatened at school and was once attacked by a Croatian policeman. He himself had been physically

assaulted by two Croats who had recognised him as a Serb by his dialect and, in March 1998, three masked Croats smashed the windows of his house. As a result of this, they all decided to leave.

7. The Appellant said that he knew he was on a list of persons wanted for war crimes because when he had been in Norway he had been shown a list of people, although he had never seen it again. He said he was on the list of persons who had received an eight year jail sentence. A lot of policemen were on the list, as were his brother-in-law and nephew. He was unable to give much more information about it, and had not mentioned it at his interview. He also said there had been telephone threats as a result of his guarding the camp.

8. The fourth Appellant, the son, also gave evidence describing how matters had deteriorated in East Croatia following the departure of the UN Forces at the beginning of 1998. A friend had been attacked and stabbed, but the police had been of no assistance, denying the incident. He had been attacked at school by fifteen Croatians who noted that he had been a Serb and so attacked him. He had been unable to obtain medical attention because of the difficulties of obtaining Croatian medical documents. Although he had said that he had become depressed, there was no medical evidence to support that. His main fear was that he would be forced into military service when he was eighteen, fearing that there would be a repetition and worse of what had happened to him at school. He was also concerned that his father had been accused of war crimes.

9. The Adjudicator considered the objective material before him, together with a report of Dr Milivojevic. This material included the CIPU Report of 2002, the OSCE Report of May 2002 and an OECD Report of 2002. He drew conclusions from that general background evidence. He concluded that "*any real involvement in the civil war as a Serb can lead to prosecution as a war criminal*" and that this could lead to "*very probable excessive delays in the judicial system*". He also said that it was clear "*that there is substantial local prejudice, particularly in Eastern Croatia relating to persons who supported the previous Serbian-controlled Government*" and whatever the declarations and indications of good intent made by Central Government, they were frequently not reflected in matters on the ground. It was clear that the son would now be liable for military service, but it is possible that he would not be prosecuted. However, "*the actual information relating to the service of Serbs within the military service effectively was non-existent*". This might well have been because there were very few young male Serbs left in Croatia to be conscripted.

10. It is clear that the Adjudicator had real reservations about the credibility of the evidence of father and son, but they had not been questioned because the Home Office had not been represented. He accepted their evidence in the absence of a direct challenge to their credibility in the Home Office refusal letter. He was understandably critical of the failure of either party to contact Norway where apparently three times the Appellants' asylum claim had been rejected. He pointed out the limited information which had been supplied by the second and fourth Appellants in relation to medical

matters. He pointed out that all he had in relation to the daughter, the third Appellant, was that she was now married to a Serb whose status had yet to be established in the United Kingdom. She had a child. The Adjudicator concluded in paragraph 48:

> "The first Appellant has lodged however some documents in support of his claim. Clearly his war record indicates that he was involved in military service and I note also that he has a general record of employment. Having regard to the totality of the evidence, and noting that the Respondent had not specifically attacked the Appellant's credibility in their refusal letter, and noting that the provision of conviction of persons for war crimes *in absentia* was and is a real problem in eastern Croatia, I accept the first Appellant's history as recounted by him and it forms the factual basis of my determination. That is in relation to the first Appellant."

Of the wife's medical condition, that is acute stress and anxiety, the Adjudicator said that it appeared that those mental health problems had been well and successfully managed and were not a matter that had to be particularly addressed. He said of the son that he found the history given by the son credible, noting the severe physical attack by Serbs on him when he was at school. This would affect his own subjective fear of return to Croatia.

11. In paragraph 52 the Adjudicator said:

> "In relation to the Appellant's fear of serving in the military service that to a large extent is based upon firstly an assessment that the civilian option would not be available to him, on a balance I do accept the factual assertion contained in Dr Milivojevic's report, and secondly his subjective fear of service based on the fact that he considers his father will be regarded as a war criminal."

The factual assertion referred to is that the option of civilian or community service would not be available to the fourth Appellant. He recognised that he had no clear cogent evidence on the treatment of Serbs in the Croatian Army, but envisaged that the impact within the individual barracks at the level of NCO and fellow recruits might well be different from the position envisaged by orders given by senior officers. He would be very much in the ethnic minority as a recruit.

12. The Adjudicator referred to the decision of the Tribunal in Eric [2002] UKIAT 00441 which he found of assistance in considering the objective material in relation to somebody who had been a Serb with military service and the likelihood of war crimes proceedings. He concluded, in paragraph 55:

> "Having made the assessment that the first Appellant is credible it would appear from the OECD Report that there is a real risk that he would indeed be persecuted for war crimes the result of which it would appear from other evidence both to be uncertain, subject to delays and certainly targeted upon Serbians. For that reason it is clear that the first Appellant has a well-founded fear and it would appear that this is still current in relation to information placed before me."

13. He also concluded that there was a real risk that the first Appellant's Article 3 and Article 2 ECHR rights would be breached through being targeted as a Serb "*particularly under persecution under the war crime* (sic) *and the*

objective evidence indicated that effectively Article 6 would be breached and was the effective 'engine' whereby Articles 2 and 3 would be at a real risk of being breached". He rejected the wife's claim under the ECHR as no factual basis for it had been indicated. He concluded that the daughter had no right to family life within the United Kingdom and no real indication of why on her own her removal would cause a breach of Article 8. He said of the son, in paragraph 59:

> "The real fear of being involved in military life in a barracks is one that the Appellant only faces because he entered the United Kingdom after his eighteenth birthday and would appear therefore not to be able to claim the civilian service. It is therefore a problem of the fourth Appellant's own making by seeking protection. In those circumstances I find the Appellant cannot rely upon that fear of military service. There was and is an apparent adequate exemption that he presumably could have availed himself of. The Appellant has stated that he has suffered psychological difficulties. That was not apparent in evidence, no medical confirmation of that was given and again the Appellant apparently is in full-time employment. On that basis I find that the fourth Appellant has not made out his claim for political asylum. There are none of the complications relating to war crimes that affect the first Appellant's determination. Given these conclusions I find the fourth Appellant has not discharged the burden of proof of having a well-founded fear of persecution for a Convention reason. I have come to the conclusion that the Appellant's removal would not cause the United Kingdom to be in breach of its obligations under the Refugee Convention."

14. However, in relation to the son's human rights claim, he concluded, in paragraph 63:

> "In relation to the fourth Appellant his case clearly warrants and has had a more substantial consideration. I approach the analysis of it on the basis that having granted his father, and through him his mother and sister rights or protection under the Refugee Convention that his removal from the United Kingdom would effectively breach his family life. The fourth Appellant effectively claims that he is an isolated individual at risk. Whatever the merits of that it is clear that he has formed part of the Appellant's family at all times in Croatia, in Norway and on arrival in the United Kingdom."

He considered whether the removal of the son from the United Kingdom would be proportionate to the legitimate aim of ensuring a proper and safe system of immigration control, and concluded:

> "Having regard to the sequence of events, the age of the Appellant when he first left Croatia, the clear and obvious close family ties and his record within the United Kingdom I find that it would not be a proportionate exercise of immigration control for him to be required to leave the United Kingdom."

15. Accordingly, it can be seen, as we have said, that the decision in relation to all four Appellants before the Adjudicator depended upon the view that was taken of the father's claim under the two Conventions. Also, his claim was critically dependant upon the view formed of the risk he would face of persecution as a result of alleged war crimes.

16. The Secretary of State sought leave to appeal on five grounds. Four of those grounds related to the effect of the Tribunal's decision in SK on the Adjudicator's decision. In effect, and in a variety of ways, it was said that the decision of the Adjudicator was inconsistent with the determination of

SK and the Adjudicator had given no adequate reasons for differing from SK. Ground three of the five related to the assertion that the appeal had been allowed because the first Appellant "*would be convicted for war crimes in absentia. No evidence was presented before the Adjudicator (par 47) of such war crime list/s and the Adjudicator has erred to concluded from this.* (sic)" The Home Office promised to attend any hearing. Leave to appeal was granted with the comment that all the grounds were properly arguable.

17. It is important that two conclusions of the Tribunal in relation to this appeal be clearly established. First of all, although it is possible to make some criticisms of the Adjudicator's reasoning or the expression of his reasoning in places, these are not to our mind significant criticisms in relation to the evidence and background material which he had before him as summarised by him. He considered the evidence carefully. He has expressed his reservations and his conclusions upon it. He considered the background evidence which he had before him and has expressed his conclusions upon that, as well as applying it rationally to the individual circumstances before him. He saw his decision as being in line with the Tribunal decision in Eric and so took the view that he was reaching a conclusion consistent with the Tribunal's guidance.

18. The ground of appeal in relation to war crimes proceeds from the premise that the Appellant had not been convicted in absentia, but would be somewhat curiously at risk of such conviction were he to return.

19. The Adjudicator accepted that the first Appellant was at risk of prosecution and thereby of persecution on account of alleged war crimes; he had not been convicted of them in absentia. We say that not just because that is how we understood Mr Malik to be presenting the case before us, but because that is also how it seems to have been presented to the Adjudicator. Paragraph 19 summarises the claim as "*the risk of prosecution*" as a putative war criminal; paragraph 33 refers to the grounds of appeal to the Adjudicator as saying that the list was of persons wanted. The objective evidence is particularly related to the way in which war crimes allegations are made against Serbs. The risk, in paragraph 55, is of persecution for war crimes, the result of which is uncertain, delayed and targeted against Serbs. The Adjudicator found the evidence about the list, which was said to be of persons sentenced for war crimes, difficult to accept (paragraph 55), but in the light of other evidence, accepted the first Appellant's description of his history, and therefore a risk of persecution through prosecution and other ethnic discrimination. He appears to have accepted that some list containing the first Appellant's name existed; he does not conclude that the list, even if referring to convictions, proved the fact of a conviction for war crimes. Mr Malik did not suggest otherwise to us. After all, an actual conviction in absentia should have been readily proven and it would have been very surprising if the first Appellant had been untroubled on account of war crimes before he left (he saw his troubles as arising from his ethnicity alone) and yet shortly after, when he was in Norway, he had already been convicted and put on a list.

20. The Adjudicator was essentially accepting the first Appellant's evidence as to his military activities and the threats and assaults made, in reaching his view as to the risk of persecution and prosecution in the context of the way some Croats took measures designed to intimidate Serbs and deter their return; that is consistent with background material. The Adjudicator was entitled to conclude in all the circumstances presented to him that there was a risk of persecution. We do not consider that the Adjudicator's approach on the material before him can seriously be faulted. Accordingly, we reject the Respondent's sole ground of challenge which does not relate to the effect of the Tribunal decision in SK. If the Secretary of State had been represented before the Adjudicator in relation to that issue, the position might have been different. But that is the fault of the Home Office alone.

21. We also reject the criticism made of the timing of his determination in relation to the production of the Tribunal decision in SK. It was in fact the Appellants before him who sought the adjournment, not the Respondent, which the Adjudicator rejected in view of the history of their appeals. In our judgment, he was fully entitled to reject that application. Had the Secretary of State wished to apply for an adjournment or to support the Appellants in their application, the easiest way of doing so would have been to turn up or alternatively to make representations that the Adjudicator should postpone his determination until after the decision of the Tribunal was available. So, we reject the criticism that the Adjudicator should have waited until the Tribunal decision had been reached, in the absence of any application from the Secretary of State that he should do so and in the light of his proper rejection of the application for an adjournment. He was also entitled to assume that he had been provided with the material which had been provided to the Tribunal itself in SK because the solicitors were representing both sets of Appellants. We were told, however, by Mr Malik that that assumption was in fact incorrect, but he could not say what it was that had been provided to the Tribunal but not to the Adjudicator.

22. It was said, next, on behalf of the Secretary of State, that as the decision in SK was notified on 3rd December 2002 before the Adjudicator's own decision had been promulgated, the Adjudicator ought to have considered his decision in the light of it, if necessary giving parties the opportunity to make further representations. If he had become aware of the decision in SK (and there is no suggestion that Sutovic and Hartigan provided him with a copy for him to take into account, notwithstanding their desire for an adjournment so that he could), it would have been open to the Adjudicator to reconsider the matter having given the parties the opportunity to make representations on it.

23. It is important to understand that Adjudicators do not necessarily discover Tribunal decisions upon the instant at which they are notified to the parties. Moreover, Adjudicators work under a heavy load and it is unrealistic to suppose that once a decision has been written, they know whether it has been promulgated or are able to recollect all the decisions which they have reached, but which may not have been promulgated, in the light of whatever may be the latest decision from the Tribunal.

Accordingly, we take the view that the Adjudicator did nothing procedurally wrong in reaching his determination without waiting for or considering the Tribunal's decision in SK. It is a commonplace feature of this jurisdiction that a relevant case giving guidance on country conditions may be in the offing without it being appropriate for Adjudicators to adjourn appeals pending before them so that the decision can be taken in the light of the latest Tribunal decision which may or may not bear precisely on the facts which they find. Indeed, the structure of the Rules in relation to Adjudicators is hostile to adjournments in general.

24. Accordingly, save to the extent that this Tribunal is allowed to consider the circumstances of the Appellants as found by the Adjudicator against the current guidance as to the country conditions for Serbs returning to Croatia, this appeal would have to be dismissed.

25. The second point of importance to be established is the impact on this case of the consideration of the return of Serbs to Croatia in SK and subsequently in a determination of 20th November 2003 in DK v SSHD [2003] UKIAT 00153(K) Croatia. Although Mr Malik did not expressly concede that the position of someone like the Appellant would be very difficult to sustain in the light of those decisions and the later country guidance, he was in considerable difficulty in pointing to anything which offered support to the assessment that the Appellant would now be at risk of persecution or breach of his human rights were he to be returned. Mr Malik did not refer to any material in the background evidence to suggest that the conclusions to which the Tribunal had come in SK and more recently in DK were inapplicable to someone in the first Appellant's position or that there were new circumstances, changes of position or even something wrong with those two decisions.

26. Mr Malik said that there was no reason still to suppose that the Appellants did not have a subjective fear; the first Appellant was at risk because he was on a list; he had left after troubles in 1998 and he might be vulnerable at the hands of those he guarded. Although the father's evidence did not relate any of the incidents from which he suffered to his service in the military or as a camp guard, his son had given evidence at interview that the threats were made against his father because his father had been in the military police and a POW guard. There is also some , but not wholly persuasive, evidence that lists of the sort to which reference has been made, are produced in order to intimidate and deter Serbs from returning. There is no evidence that this or any other such list represents any list of those wanted by Croatian prosecutors, or by local police or by nationalists. There is simply no objective or reliable evidence as to its or their origin, or as to the information upon which they are based or as to any use to which anyone puts them inside Croatia. We approach this matter, as we consider the Adjudicator did on the basis that the Appellant, however, was somebody who was at risk of being prosecuted for war crimes and not just on the basis that he was a Serb.

27. The position in relation to prosecution for war crimes was dealt with in SK at paragraphs 38 and 39. Indeed, MM was someone who had been

sentenced in absentia to four years imprisonment but for crimes which could not be regarded as a war crime. In summary, those paragraphs said that the UNHCR monitored the position if a returnee were arrested, but had found the trials to be fair and correct; the numbers did not suggest widespread prosecutions, let alone implementation of the lists; there had been a positive trend in prosecutors' decisions in rejecting war crimes which had no evidential basis, and a retrial took place of anyone convicted in absentia. There would be a remand in custody, perhaps, but release would often be quickly effected if the case were weak. War crimes were also considered in DK at paragraphs 81, 82 and 85. In paragraph 81, the Tribunal said:

> "The position over war crimes prosecutions has not markedly changed; there are still trials in absentia, but that does not prevent a fresh trial upon arrest. Serbs face discrimination in the frequency of arrest and prosecution; some may be trivial harassing arrests from which the Croats do not suffer. They may be intended to discourage returns. However, the increase in arrests in 2003 still only affects a very small number of people; there is a trial process which is not said to be unfair and there is an appeal system which has led to some convictions being overturned. Some Croats are prosecuted; it is necessary to judge that figure in the light of the difficulty of persuading Serb victims to give evidence."

28. In paragraph 82, the Tribunal said:

> "Much of what [Dr Blitz] he has to say about war-crimes is historic in nature and he goes on to say that since 2002, a new Prosecutor has reviewed pending war crimes cases and has not admitted any new in absentia prosecutions. There is HRW material which shows that that stance has not always been followed. A substantial number of Serbs had been released after a short period. There continued to be discrimination in the prosecution of war crimes. He appears to accept that there have been few cases of Serbs actually being sentenced for war crimes and instead referred to the atmosphere of hostility surrounding trials and the intimidatory tactic of arbitrary arrest and detention of Serbs so as to reinforce the impression that whatever the Government may say, they are not welcome back. It is to give the wrong impression for Mr Mullins to say that group indictments have been used in a number of cases since 2000; there is no example of their use anew since the end of 2001. True it is that the new prosecutor activated some of the 2000 dormant indictments in 2000, but the number activated was in fact quite small, and the numbers arrested fell in 2002 to 34. The arrests came because prosecutors had been asked to review outstanding war crimes cases. There had been an upsurge of arrests in 2003; in the first half of the year 27 people were arrested, 21 of them were Serbs. Trials of Croats have produced mixed results, partly because of the fear associated with giving evidence in Croatia against Croats. Again it is right that as at July 2003, there were 1,467 war crimes cases of which 99 percent involved non-Croat suspects but the actual experience of arrests is quite different in numbers."

29. The Tribunal also concluded that the sort of list which was involved in DK, which appears to be very much the sort of list that was involved in this case, plays no part in the prosecution of war crimes nor are they used as the basis for the selection of Serbs in Croatia for harassment.

30. As Mr Malik reminded us, the guidance of the Tribunal does not preclude individual decisions in individual cases, yet from his submissions it is quite plain that there is nothing in the circumstances of the first Appellant as found by the Adjudicator which would warrant differentiating him from the general position as set out in those two cases. Applying that guidance

would lead to this appeal being allowed. Accordingly, the second point is that it is only if the Secretary of State is entitled in this appeal to rely upon the later cases and their appraisal of later material, that this appeal succeeds on the other SK-related grounds.

31. We do not know the fullness of the background material placed before the Adjudicator and although Ms Bracken for the Secretary of State sought to suggest that upon the material before him the conclusion which the Adjudicator reached in relation to risk on return for the first Appellant was not justified, we do not accept that she has made out that case. The principal focus of her attack in relation to the assessment of the background material related to the way in which matters had been assessed by the Tribunal in SK and again in DK, in which it concluded that matters had not changed significantly from the SK position.

32. This brings us to the main argument which Mr Malik raised by way of response to the appeal. He submitted that it was wrong in principle for the Tribunal to allow an appeal on such a basis. He submitted that where an Adjudicator had reached a decision which the Tribunal concluded was a sound one or a reasonable one on the material placed before him, the Tribunal should not intervene. It ought not to rely on new material to overturn such a decision. It could only do so when satisfied that the Adjudicator's decision was plainly wrong. He cited the decision of the Court of Appeal in Oleed v SSHD [2002] EWCA Civ 1906 2003 INLR 179. Mr Malik was initially inclined to say that the Tribunal ought not to hear the appeal at all because of the grounds upon which permission to appeal had been granted. He said that, in effect, all the grounds other than the one in relation to war crimes were a challenge based upon material which was not before the Adjudicator and at least in part arose after his decision. It was implicit in Mr Malik's argument that the Tribunal should not have granted leave and that we should decline to hear the appeal. The grounds did not come within the restrictions identified.

33. There is an important point at issue here as to the powers which the Tribunal has and the approach which it ought to adopt when granting leave to appeal and on hearing the substantive appeal. There were restrictions on the grant of leave to appeal in Rule 18(4)(c) of the relevant Rules, the Immigration and Asylum Appeals (Procedure) Rules 2000, which provided that the form must identify the errors of fact or law which would have made a material difference to the outcome together with all the grounds relied on. Rule 18(7) provided that "*leave to appeal shall be granted only where - (a) the Tribunal is satisfied that the appeal would have a real prospect of success; ...*". The 2000 Rules, but not the 2003 Rules, had a power, in Rule 18(11), enabling the Tribunal, when considering a leave application, to consider evidence which was not before the Adjudicator.

34. There was, however, no power in the 2000 Rules to set aside the grant of leave to appeal. There was a power to set aside the refusal of leave in Rule 19, on the grounds of accidental omission, clerical error or where the interests of justice required; but that only serves to underline the absence of any such power in relation to a grant. The reason is presumably that if it is thought that there is an arguable point, the issue should then be argued.

Mr Malik eventually accepted that and accepted that his point did not go to our jurisdiction to hear the appeal; it went to how we should approach a determination in these circumstances. This is only sensible. It is the grant of leave which provides the Tribunal with its powers and without it, it has no jurisdiction. Thereafter it does have jurisdiction in relation to the appeal. It would be quite inappropriate for the Tribunal, before hearing an appeal, to consider whether leave should have been granted rather than what the outcome of the appeal should be. The grant of leave imposes on the Tribunal the duty to determine the appeal and not to question the jurisdiction thus conferred. We recognise that there may be cases in which the terms of grant could show quite plainly that leave should not have been granted on that basis. But the Tribunal will still have to determine the appeal before it, on its merits or lack of them.

35. In fact the Tribunal's powers at the hearing were governed not by the now revoked 2000 Rules but by the 2003 Rules. However, the same obligation to determine the appeal applies to a grant of permission to appeal under the 2003 Rules where the grounds are limited to an error of law. There is no equivalent provision for the setting aside of the refusal of permission, and although setting aside a decision is not in fact wholly excluded, the remaining power to correct accidental omissions or procedural errors would not be relevant here.

36. The powers of the Tribunal hearing this appeal are derived from paragraph 22 of Schedule 4 to the Immigration and Asylum Act 1999. This provides in (2) that "*the Tribunal may affirm the determination or make any other determination which the adjudicator could have made*". Sections 65(4) and (5) confer jurisdiction on the Tribunal to decide whether a decision relating to entitlement to remain in the UK breached an Appellant's human rights. Section 69(1) and (5) confer jurisdiction in relation to whether a removal in consequence of a refusal of leave to enter or pursuant to removal directions would be contrary to the Refugee Convention. It is looking to a future effect, rather more clearly so than section 65.

37. The 1999 Act also provides for the one stop procedure requiring all additional grounds to be brought forward in the one appeal.

38. Section 77(3) and (4) deal with evidence. They provide:

> "77 (3) In considering –
> (a) any ground mentioned in section 69, or
> (b) any question relating to the appellant's rights under Article 3 of the Human Rights Convention,
> the appellate authority may take into account any evidence which it considers to be relevant to the appeal (including evidence about matters arising after the date on which the decision appealed against was taken).
>
> (4) In considering any other ground, the appellate authority may take into account only evidence –
> (a) which was available to the Secretary of State at the time when the decision appealed against was taken; or
> (b) which relates to relevant facts as at that date."

39. The equivalent provision in the Nationality, Immigration and Asylum Act 2002, section 85(4) is wider and amongst other matters the apparent limit on consideration of current material in human rights matters to Article 3, has been removed. (But see the analysis of section 77 in SK for which it was starred.)

40. Both sets of rules contain provisions enabling the Tribunal to consider evidence which was not before the Adjudicator; Rules 22 and 21 respectively of the 2000 and 2003 Rules. There are procedural requirements to be satisfied before new evidence is admitted.

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.

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.

45. This approach reduces but cannot eliminate the need for repeat applications by claimants as their circumstances change; it avoids status and rights being determined on a false basis, although they can be re-examined by the Secretary of State. Simon Brown LJ referred, in Ravichandran, to the Tribunal as (the judicial) part of the decision−making process rather than simply as the means of review of decisions already made. It contrasts with the position in the general run of immigration cases. (In SK, paragraph 20, the Tribunal emphasised that it is not a part of an administrative process but was an independent judicial body hearing appeals, but which had to test the decision under appeal against facts found by it as at the date of the hearing. It is in that sense a part of the decision-making process.)

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.

47. The recent decision in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49, confirms this approach in paragraph 19. It is also consistent with the thinking behind the Court of Appeal's conclusion as to the Tribunal's power under the 2003 Rules to direct a re-hearing rather than give leave to appeal; paragraphs 35 and 94. Paragraph 35 also makes it clear that the nature of the appeal before the Tribunal and the application of the Ravichandran approach does not mean that evidence

which could and should have been before the Adjudicator is necessarily admissible before the Tribunal. Ravichandran is concerned with making decisions on up-to-date personal and country evidence, not with permitting evidence to be adduced regardless of its earlier availability, or its relevance in showing an error of law by way of unfairness arising from an error of fact. Nor are those paragraphs concerned with the way in which the Tribunal should grant leave to appeal to it on the grounds of an Adjudicator's error of law.

48. Applying that approach to the position here, the Tribunal has the appeal before it and it has to determine it. It must do so in the light of the currently available country material and its own guidance. That material as assessed by the Tribunal in SK and DK shows that the decision cannot stand as an expression of what now would be the consequences for his Convention obligations of the Secretary of State returning the first Appellant and hence the fourth Appellant with the other members of their family to Croatia. It does not matter that the Secretary of State has not been successful in showing that the decision was wrong on the material before the Adjudicator, a lack of success due in part to uncertainty as to what he had. It cannot stand because the guidance as to the background material given in SK and confirmed in DK shows that someone in the position of these Appellants can be returned without breach of their Convention rights.

49. The Tribunal is not required to find, in order to allow an appeal, that the Adjudicator was plainly and obviously wrong in the appraisal of background material, though it is otherwise when it comes to the appraisal of a claimant's testimony. Such a test seems inapt for the consideration of background material precisely because of the need for consistency in an area where there may be scope for two differing views without it necessarily being said that one view is plainly and obviously wrong. Here, however, viewed against the later material and decisions, it is clear that the decision now is wrong and should not stand. It would be inconsistent with the guidance and assessment of the Tribunal for the decision to stand.

50. We did not regard those propositions as controversial. However, it is clear that some doubts were raised as to the correct approach for the Tribunal by the comments of the Court of Appeal in Oleed v SSHD [2002] EWCA Civ 1906, 19th December 2002. The Court of Appeal, by a majority, took the view that the Tribunal erred in overturning the Adjudicator's findings of fact in relation to the claimant's history, the credibility findings. Those findings were not so obviously wrong as to permit the Tribunal to intervene. It rejected, by a majority, an argument on behalf of the Secretary of State, whose successful appeal to the Tribunal had just been overturned, that the matter should be remitted to the Tribunal for it to reconsider matters in the light of the new circumstances in Sri Lanka.

51. Schiemann LJ said at paragraphs 32 and 33 as follows:

> "32. ... I accept that the Tribunal examines the situation in the country from which the refugee is fleeing as at the date of its determination. However, in the present case in my judgment there was nothing wrong with the

> Adjudicator's determination, there was therefore no reason to appeal it and it would be wrong for the Home Secretary, on the back of an appeal which has been dismissed, to seek to re-examine the threat to the refugee with reference to a date later than the Adjudicator's determination. To permit this would merely encourage appeals by a party who has no ground for appeal but hopes that the situation would change sufficiently to enable him to advance different arguments on different facts on appeal. Such procedures would not be in anyone's interest.
>
> 33. I note in conclusion that there is nothing in the Convention which obliges this country to shelter a person once he is no longer a refugee as therein defined because the situation has changed in his home country: paragraph 18 of the judgment of this court in Saad and Others v Secretary of State for the Home Department [2002] EWCA Civ 2008; [2002] INLR 34. I accept of course that there may well be humanitarian arguments which lead to a policy of not displacing erstwhile refugees from their country of refuge even if the situation in their home country changes. These matters do not fall to be examined by this court in the present case and have not been the subject of submissions. But I do not consider that a misuse of appellate procedures is the appropriate way of dealing with changes in the home country."

The Court therefore exercised its powers to determine the appeal for itself rather than to remit. (It is unclear what the reference to a dismissed appeal in paragraph 32 is since the appeals were allowed at each stage.)

52. It has been argued in consequence before the Tribunal on a number of occasions that this decision meant that its own jurisdiction and approach, once an appeal was before it, should not be as we have set it out, but should be confined to examining changes in circumstances only once an error had been shown on some other basis and indeed once it had been shown that the decision was plainly and obviously wrong.

53. We do not consider that that is what Oleed holds at all. The reference to the need to show that a decision is plainly and obviously wrong is a reference to the degree of error necessary for interference with findings of fact, in the absence of further evidence, which relate peculiarly to the credibility and personal circumstances of a Claimant. It does not concern itself at all with findings or conclusions in relation to the assessment of country conditions and risk on return where consistency and the Tribunal's guidance is important.

54. Further, the decision in Oleed does not purport to deal with the Tribunal's jurisdiction at all in relation to the instant issue. Indeed it could not do so without consideration of Ravichandran and the statutory provisions to which we have referred. It dealt only with the way in which in that case the Court of Appeal felt it right to choose, in the exercise of its discretion, between the various courses open to it.

55. This view of that decision has recently been reinforced by the Court of Appeal, in Meledge v SSHD [2003] EWCA Civ 1665. Although the Court expressed no concluded view that the Tribunal had erred, Dyson LJ said at paragraph 14:

> "It seems to me that it is highly arguable that the Tribunal in the present case misunderstood what Schiemann LJ was saying in Oleed. The question in Oleed was whether this court should remit the case for a rehearing to the Tribunal. The question in the present case was whether, in hearing the appeal from a decision of the Adjudicator, the Tribunal should have regard to evidence as to the current situation in the Ivory Coast. On the face of it, that evidence was relevant and should have been taken into account: see section 77(3) of the Immigration and Asylum Act 1999."

56. As we have said, it is perfectly possible for differing views reasonably to be held about the same country conditions but it would be wholly undesirable whether at Adjudicator or Tribunal level for there to be a divergence of practice in relation to essentially similar cases. The decision of the Court of Appeal in Shirazi v SSHD [2003] EWCA Civ 1562 pointedly reminded us of that. It held that the Tribunal had erred in failing to consider and deal with a number of its apparently inconsistent earlier decisions on conditions in Iran for Christian converts from Islam. It did so notwithstanding that those earlier decisions were not binding and regardless of whether they had or had not been cited to the Tribunal. Inconsistency of that nature is an error of law. The question was not simply whether the Adjudicator or Tribunal had reached in turn reasonable decisions on the factual material presented to it.

57. This position reflects what the Court of Appeal said in Manzeke v SSHD [1997] Imm AR 524. Lord Woolf MR, dealing with the power of the Tribunal to determine an appeal instead of remitting it, said:

> "This last provision is of significance, not only because it gives a clear steer to Tribunals that they should avoid remitting cases to special adjudicators, no doubt because such remission will involve delay, but also because it indicates that the Tribunal has, where possible, to conduct any determination which will enable it finally to dispose of an appeal itself.
>
> Particularly when determining appeals brought where it is necessary to give consideration to the general situation in particular parts of the world, it is important for Tribunals, when appropriate, to give their views as to that situation, so far as relevant, to claims for asylum in that part of the world.
>
> In administering the asylum jurisdiction, the Tribunal (whether it be a special adjudicator or an Appeal Tribunal) has to consider not only whether the individual asylum seeker has the necessary subjective fear to be regarded as someone who is entitled to asylum, but in addition it has to be satisfied that that fear is well-founded. Whether or not that fear is well-founded involves applying an objective standard, a standard which will depend upon the state of affairs in that particular country as well as the circumstances of the individual asylum seeker.
>
> It will be beneficial to the general administration of asylum appeals for special adjudicators to have the benefit of the views of a Tribunal in other cases on the general situation in a particular part of the world, as long as that situation has not changed in the meantime. Consistency in the treatment of asylum seekers is important insofar as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved."

58. SK was intended to and did give authoritative guidance as to the approach to be adopted towards the position of ethnic Serbs returning to Croatia. Giving such guidance is an important part of the Tribunal's function,

enabling the parties to know where they stand and assisting the achievement of consistent decision-making throughout the asylum and immigration process. Although SK is a starred decision, it was not starred because of its guidance over Croatia, but because of an issue of statutory interpretation which arose in it. The system of starring decisions relates only to points of law and in that way marks them as binding authority for the Tribunal and Adjudicators. The value of the starring process and the giving of authoritative guidance was recognised by the Court of Appeal in both S and Others [2002] INLR 416, and again by Laws LJ when refusing a renewed application for permission to appeal in SK on 25th May 2003, [2003] EWCA Civ 841.

59. Although guidance cases are not as such factually binding precedent, in contrast to starred cases which are legally binding, they have the same force as guideline sentencing cases in the Court of Appeal, Criminal Division. This Tribunal function was recently affirmed in Indrakumar v SSHD [2003] EWCA Civ 1677.

60. We wish to emphasise that the breadth of power which the Tribunal has on appeal to it, which includes the power by virtue of paragraph 22 of Schedule 4 to the 1999 Act to make any determination which the Adjudicator could have made, does not mean that every issue is to be approached in the same way. This has been recently and helpfully restated by the Court of Appeal in Indrakumar, distinguishing and not following dicta in Koci v SSHD [2003] EWCA Civ 1507, which somewhat extended decision in Oleed from credibility findings to country conditions. This recent clarification of the Court of Appeal's rulings means that neither Koci nor Oleed should be regarded now as relevant to the Tribunal's approach to country conditions.

61. It is useful here to set out paragraph 13 of the judgment of Hale LJ:

> "13. There is, therefore, room for some debate about nuances of meaning between terms such as "wrong", "plainly wrong", "clearly wrong", or "unsustainable". But consideration of all of those cases and the principles which they adopt leads me to the following propositions:
>
> (1) The Immigration Appeal Tribunal is not different from this court or any other court with jurisdiction to hear appeals on fact as well as law. (Of course that position is to change and it will lose its jurisdiction on points of fact.)
>
> (2) The Immigration Appeal Tribunal, like this court or any other court, can only interfere if there has been an error: that is, if , on analysis, the adjudicator's decision was wrong. There is a useful analogy here with the Civil Procedure Rules, Rule 52.11(3) which says the same thing. It is not enough that the Tribunal might have reached a different conclusion itself.
>
> (3) I, for my part, do not find adverbs such as "plainly" or "clearly" wrong helpful in the context of a fact-finding exercise. They have sometimes proved useful for appellate courts when reviewing the exercise of a discretion.
>
> (4) The test is the same, whatever the nature of the error alleged, but its application will often depend on the type of evidence on which the finding of fact is based. One can distinguish at least four different types:

(i) There are findings of fact based on oral evidence and the assessment of credibility. These can only very rarely be overturned by an appellate Tribunal.

(ii) There are findings based on documentary evidence specific to the individual case. These can more readily be overturned because the appellate tribunal is in just as good a position to assess it. But even there, there may be an important relationship between the assessment of the person involved and the assessment of those documents. If so, great caution once again will be required.

(iii) There are findings as to the general conditions or the backdrop in the country concerned which will be based on the objective country evidence. The Immigration Appeal Tribunal will be at least as well placed to assess this as is the adjudicator. Although in our law the notion of a factual precedent is, as Laws LJ termed it in S and Others v Secretary of State for the Home Department [2002] INLR 416 at paragraph 28, "exotic", in this context he considered it to be "benign and practical". There will be no public interest and no legitimate individual interest in multiple examinations of the state of this backdrop at any particular time once that had been considered in detail and guidance is given by the Tribunal.

(iv) There are findings as to the application of those general country conditions to the facts of the particular case. These will be an inference to be drawn to the adjudicator and then, if appropriate, by the Tribunal. The Tribunal will be entitled to draw its own inferences, just as is the appellate court under the CPR, once it has detected an error in the adjudicator's approach."

62. We add three comments. First, in relation to documentary evidence which as the Court of Appeal points out is closely related to credibility, the Tribunal has given a starred decision, Tanveer Ahmed [2002] UKIAT 00439, [2002] Imm AR 318, which shows Adjudicators how to approach the reliability of documents. It would be an error of law for that decision not to be followed; it needs to be considered in all those very many cases, indeed the very considerable majority, where the issue is not whether the document in question is forged or authentic, but whether it is reliable or not. This distinction is vital. Documents produced may be on the right paper, even with the right stamps or signature but may be unreliable because of the way in which they are procured.

63. Second, the Court of Appeal in paragraph 16 of Indrakumar says:

> "To my mind that is the error found by the Tribunal, and having found such an error the Tribunal were entitled to look at the case again in the round."

We do not consider that by that, the Court meant that as a matter of jurisdiction, such a finding was necessary before fresh evidence or fresh guidance as to country conditions or changing personal circumstances could be adduced. We have already set out our reasoning.

64. Third, the ability to examine further evidence on an appeal on an error of law should follow the E and R decision. It is, broadly but not precisely, an error of law for unfairness to be caused by a material error as to an existing

uncontentious or verifiable fact, not caused by the Appellant or his advisers; see paragraph 66. Evidence to prove that error is admissible subject generally to the principles in Ladd v Marshall [1954] 1 WLR 1489; see paragraphs 82 and 83. Where the later, new evidence relates eg to country conditions or personal circumstances as they were before the Adjudicator, but it is sought to be argued that those conclusions were wrong by reference to that later evidence, the principles in E and R clearly apply; see paragraph 90.

65. As we have said, however, the principles in Ravichandran continue to apply to evidence of changed personal or country circumstances after the date of the Adjudicator's determination, once the appeal is before the Tribunal.

66. When the Tribunal is considering whether to grant permission to appeal to it from an Adjudicator and fresh evidence is sought to be adduced, the approach in E and R at paragraphs 66, 82 and 83 are to be applied to that evidence. There is no scope at that stage for the application of the principles in Ravichandran, which may arise once the Tribunal has the substantive appeal before it. The Tribunal's jurisdiction requires an arguable error of law to be found before permission to appeal to it is granted; there is no reason why it should adopt at that stage a different approach to new evidence from that adopted by the Court of Appeal. There is generally likely only to be a short time, between Adjudicator determination and consideration of the application for permission to appeal, in which circumstances could change unforeseeably. If they do, the Secretary of State will have to consider them as part of a fresh claim.

67. On the full appeal, however, the adduction of evidence of changed circumstances and conditions since the Adjudicator's decision follows a different approach in human rights and asylum appeals because of the statutory provisions and the nature of the claims, before this particular Tribunal.

68. It is appropriate then to say a few words about the grant of permission to appeal in this case in the light of the brief and irrelevant contention that it should not have been granted at all. If the Tribunal had issued authoritative guidance on a particular matter, of which country conditions are an obvious example, an Adjudicator's decision would be erroneous in law, if it was incompatible with that guidance, even if the reason were that it had not been drawn to his attention.

69. Likewise, where as here the specific SK guidance dealt with the very conditions with which this Adjudicator was concerned before his decision was promulgated, it is an error of law on his part to reach a conclusion as to risk on return which was inconsistent with that guidance, even though it was not made available to him. The decision of any Court may be overturned by reference to subsequent authority which shows it to have been reached in error.

70. This approach to the grant of permission to appeal flows from the Court of Appeal's recognition of the Tribunal's guidance role in Indrakumar and

other cases and its error in Shirazi. This reflects the pragmatic thinking behind Ravichandran. It also reduces, but cannot eliminate, the problem of inconsistent conclusions by Adjudicators, whether on similar or partially differing evidence as to background conditions. It discourages adjournments whilst such guidance is awaited.

71. So we would not accept the suggestion that permission should not have been granted on the SK grounds upon which it was granted.

72. This decision is starred because of what it says about the approach to new country material and to the Tribunal's guidance in respect of country material, new or pre-existing, at a substantive appeal, and whether or not a ground of appeal has to succeed before that material and guidance can be considered. It deals with the relevance of Oleed, Indrakumar, and E and R.

73. Accordingly, for the reasons which we have given, we look at the new material in relation to the appeal before us and in the light of it conclude that the decision cannot stand.

74. This appeal is allowed.

MR JUSTICE OUSELEY
PRESIDENT