COURT OF APPEAL
CIVIL DIVISION

BENCH BOOK

IMMIGRATION AND ASYLUM LAW

JONATHAN LEWIS

(4th Edition)

(Chapters 10 and 11 – Sally Meacher)

Robert Dedman (1st and 2nd Editions)

September 2007

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FOREWORD TO THE THIRD EDITION

The first edition of the Bench Book was issued in October 2004, and updates were issued in January and April 2005. In October 2005 the second edition was issued. This time in loose-leaf form, so that it would be easier to update it, as happened in January and April 2006. The publication of this third edition has been delayed for three months, partly because the original author, Robert Dedman, has now left the Civil Appeals Office, and partly because some fairly major structural changes were needed in the light of the many changes in law and practice in the last 12 months.

The purpose of the Bench Book has always been to help the members of the Court of Appeal who handle applications for permission to appeal in immigration and asylum cases. By the very nature of things we could not hope to cover all the ground. We tried, however, to bring into one place most of the statutory provisions, the procedural rules, and the principles of contemporary case-law that are most frequently encountered in day to day practice. The Bench Book also contains guidance on the meaning and purpose of the different categories of reported decisions that are issued by what is now the Asylum and Immigration Tribunal.

We are again publishing the Bench Book, complete with hypertext links to the original material, on the Civil Appeals Office and RCJ Infonets and on the Court of Appeal website on the Internet.

Robert Dedman was responsible for compiling the Bench Book, subject to my general editorial direction, from the time that this project was initiated. We owe him a major debt of gratitude. He has now been succeeded by Jonathan Lewis, who has devoted the same skill and energy to the task, for which we are very grateful. Although I have now retired from the Bench, the members of the court asked me to continue my general supervisory role, an invitation which I was happy to accept.

SIR HENRY BROOKE

January 2007

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AUTHOR'S NOTE

Very little of the content of the first editions of the Court of Appeal, Civil Division Immigration and Asylum Bench Book has survived into this 4th edition. The 3rd edition substantially revised and restructured the 2nd edition, reflecting the fact that the transition between the immigration regimes under the *Immigration and Asylum Act 1999* and unamended *Nationality, Immigration and Asylum Act 2002* to the *Nationality, Immigration and Asylum Act 2002* as amended by the *Asylum and Immigration (Treatment of Claimants Etc.) Act 2004* was almost complete. Hence, there is no discussion of the unamended 2002 Act in this edition.

This edition was prompted by Lord Justice Laws's suggestion that all the quotations scattered throughout the Bench Book be summarised. The Bench Book has generally now been pruned so as to keep its length constant despite the addition of discussion of 27 new authorities (decided after the 3rd edition).

Unfortunately, providing the Court with minor loose-leaf updates has been the source of some logisitical difficulty – primarily because updating one paragraph often results in tens of pages needing to be replaced. It is now intended only to issue updates when there are a sufficient number of important developments so as to make an update essential.

The Bench Book can be found on the Civil Appeals and RCJ infonets. As is explained in Chapter 1, the online version is of *substantially* greater use than the traditional hard copy and it will be updated more regularly as there are no logistical difficulties in doing so. The Bench Book is also available to the public on the Civil Appeals website (please see the disclaimer box below, which contains terms of use).

This Bench Book seeks to state the position of the law as 3 September 2007.

JONATHAN LEWIS

3 September 2007

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Purpose of this Bench Book

1.1.1 The Bench Book is not a substitute for a textbook on asylum and immigration law. It is intended to be a first port of call only. Its purpose is to summarise the increasingly large body of case law and statutory framework to assist members of the Court in dealing with immigration claims and asylum appeals. Its focus is on issues that arise at an appellate level and not with the everyday concerns of the lower tribunals. For this reason this edition pays closer to attention to the topic of "errors of law".

1.1.2 It is intended to issue updates as and when necessary. This edition of the Benchbook reflects the state of the law as at September 2007.

Electronic Version

1.1.3 The electronic version of the Bench Book will be substantially more useful to the members of the Court than the traditional hardcopy for two reasons. First, it provides instant access to most cases. Clicking on an authority in a blue font, while holding down "Ctrl", opens a web page with the relevant judgment. This can be printed out. This is particularly useful when dealing with applications from litigants-in-person who may not have provided the relevant authorities.

1.1.4 Second, it is possible to search through the Bench Book for particular keywords. Pressing "Ctrl" and "F" brings up a search function whereby you can search through the Bench Book for particular words. For example, if one was looking for a case in which an asylum seeker might have been expected to relocate within his or her home country, one would simply search for "internal relocation" or "relocation" or "relocate". This is helpful when the result appears in the discussion of a case where the primary *ratio* was not related to that word. To further assist the Court, some keywords in the text are represented as follows: **KEYWORD**.

1.2 The Immigration Regimes

1.2.1 Different immigration appellate regimes were established by:

(a) the **IMMIGRATION AND ASYLUM ACT 1999** (the "**1999 Act**"); and

(b) the **NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002** (the "**2002 Act**").

1.2.2 Now that very few cases now reach the Court that arose under the 1999 Act, the section of the second edition of the Bench book that related to that Act has not been reproduced in this edition.

1.2.3 Under the two appeal regimes as originally enacted, a claimant could appeal against a decision of the Secretary of State for the Home Department to an **ADJUDICATOR** (on fact and law), with a right of appeal to the **IMMIGRATION APPEAL TRIBUNAL** (the "**IAT**") (on fact and law) and an onward right of appeal to the Civil Division of the Court of Appeal (on law only).

1.2.4 On 4 April 2005, a new appeal regime instituted by the **ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS ETC) ACT 2004** (the "**2004 Act**") came into force.[1] It made significant changes to the regime under the 2002 Act by abolishing the existing appeals system and putting in its place a single tier structure comprising the Asylum and Immigration Tribunal (the "**AIT**").

1.2.5 As the number of cases brought under the *unamended* 2002 Act has gradually dwindled, they are no longer discussed in the Bench Book.

1.2.6 The rules of procedure which govern immigration appeals had been set out in the *Immigration and Asylum Appeals (Procedure) Rules 2003* (the "**2003 Rules**").[2] However, new rules (the *Asylum and Immigration Tribunal (Procedure) Rules 2005*[3] (the "**AIT Rules**")) came into force on 4 April 2005, revoking the 2003 Rules as from that date.

1.3 The AIT - Starred and Country Guideline Determinations

1.3.1 The AIT has handed down a number of "**STARRED DETERMINATIONS**" arising out of claims which raise an important point of law.[4] Unlike "normal" determinations, starred determinations are binding on the AIT *itself* in respect of the parts of the determination which are starred.

1.3.2 Paragraph 18 of the AIT Practice Direction**APPENDIX 4** provides that determinations are to be treated as authoritative by the AIT as regards any matter to which the starring relates. A list of the starred determinations, together with a distillation of the legal principles derived from them, appears at **APPENDIX 2**. The AIT may only depart from a starred determination where it is inconsistent with other authority binding on it.

1.3.3 The AIT has also handed down a number of "**COUNTRY GUIDELINE DETERMINATIONS**." These provide general guidance on the conditions in certain countries as at the time of the determination. Paragraph 18.4 of the AIT Practice Direction**APPENDIX 4** provides that a country guidance

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[1] By the *Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No. 5 and Transitional Provisions) Order 2005*, SI 2005 No. 565.
[2] SI 2003 No. 652. Prior to 2003 which, virtue of paragraph 60, revoked previous set of rules (2000).
[3] SI 2005 No. 230.
[4] Practice instituted in 2001 by Collins J in *Ali Haddad –v- Secretary of State for the Home Department* [2000] INLR 117 (IAT) and confirmed by paragraph 7 of Practice Direction 10 (2003). Practice was approved by the Court of Appeal in *Sepet and Bulbul –v- Secretary of State for the Home Department* [2001] EWCA Civ 681; [2001] INLR 376; [2001] Imm AR 452 at [99].

determination must be treated as authoritative (unless superceded or replaced by another country guidance determination or inconsistent with other binding authority) in any subsequent appeal so far as that appeal relates to the country guidance issue in question and depends on the same or similar evidence. A list of the countries for which country guideline determinations have been handed down appears at APPENDIX 3.

1.3.4 In *R (Iran) -v- Secretary of State for the Home Department*, the Court of Appeal held that unless there was a good and explicitly stated reason for failure to apply a country guidance decision, such a failure would constitute an error of law.[5] In *IA (Somalia) -v- Secretary of State for the Home Department*,[6] the Court of Appeal confirmed that such an error amounted to a *material* error of law.

[5] [2005] EWCA Civ 982; [2005] All ER (D) 384 (Jul) (CA) at [21] – [27].
[6] [2007] EWCA Civ 323 (20 April 2007) (Tuckey, Rix and Keene LJJ).

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CHAPTER 2

AN OUTLINE OF THE LAW RELATING TO REFUGEE STATUS

2.1 The Immigration Regime in the UK is Subject to International Treaty

2.1.1 The right to claim asylum in the UK stems from the Convention Relating to the Status of Refugees 1951 (the "**Refugee Convention**").[1] ARTICLE 1A(2) of the Refugee Convention defines a refugee as a person who:

> **Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside his country of former habitual residence, is unable or, owing to such fear, is unwilling to return to it.**

2.1.2 In *R -v- Immigration Appeal Tribunal ex parte Islam and Shah*,[2] Lord Steyn said that to fulfil the criteria of Article 1A(2) the immigrant must show that:

(a) he has a well-founded fear of persecution;

(b) the persecution would be for reasons of race, religion, nationality, membership of a particular social group, or political opinion;

(c) he is outside the country of his nationality; and

(d) he is unable, or owing to fear, unwilling to avail himself of the protection of that country.

2.1.3 Similarly, in *Januzi -v- Secretary of State for the Home Department*,[3] Lord Bingham explained that the Article 1A(2) definition has three qualifying conditions:

(a) a *causative* condition which governs the whole definition: owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;

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[1] As applied by the Protocol of 1967. It was introduced into UK law by section 2 of the Asylum and Immigration Appeals Act 1993.
[2] [1999] 2 A.C. 629 at 638; [1999] 2 W.L.R. 1015.
[3] [2006] UKHL 5; [2006] 2 W.L.R. 397; [2006] 3 All E.R. 305 at [5].

(b) an *indispensable* condition that the person should be outside the country of his nationality; and

(c) the person must either be unable or "unwilling" to avail himself of the protection of the country of his nationality, owing to fear of being persecuted for a Convention reason.

2.1.4 In *AA & LK -v- Secretary of State for the Home Department*,[4] it was held that a person who could **VOLUNTARILY** return to his country of origin *without* fear of retribution is not outside his home State owing to a well founded fear of persecution and could not therefore fall within the definition contained in Art 1A(2), notwithstanding that on an **ENFORCED RETURN** he would be at risk.

2.2 Certain categories of person are excluded from Article 1A of the Refugee Convention

2.2.1 Certain categories of person will not qualify as refugees for the purposes of Article 1A of the Refugee Convention. **ARTICLE 1E** provides that the Refugee Convention will not apply to

> **a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of nationality of that country.**

2.2.2 **ARTICLE 1F** of the Refugee Convention further provides that:

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

2.2.3 In *T -v- Secretary of State for the Home Department*,[5] the House of Lords held that a "**POLITICAL CRIME**" in the UK required the suspect to have the purpose of influencing or overthrowing a government and a link between that purpose and the alleged crime. This would particularly be the case where the target was government or civilian and the crime involved a risk of indiscriminate injury.

[4] [2006] EWCA Civ 401; [2007] 2 All ER 160.
[5] [1996] A.C. 742; [1996] 2 All ER 865; [1996] Imm AR 443 (HL).

2.2.4 In *Gurung -v- Secretary of State for the Home Department (Nepal)*,[6] (a starred determination), the IAT laid down a number of general principles in respect of the application of **ARTICLE 1F** of the Refugee Convention:

(a) Exclusion clauses are to be applied restrictively. In contrast to the focus under Art 1A(2) on current risk, the focus under Art 1F is on *past* crimes or acts.

(b) In any case in which an Adjudicator intends to apply the exclusion clauses, he should avoid equating Art 1F with a simple anti-terrorism provision. He should make findings about the serious crime or act committed by the claimant and then explain how that fits within a particular sub-category or categories. The evidential burden of proving that a claimant is excluded by Art 1F rests on the Secretary of State.

(c) In deciding whether a person's membership of an organisation amounts to complicity in any crimes or acts proscribed by Art 1F, it is crucial to examine the particular circumstances, taking account not only factors concerning the individual and his specific role in the organisation but also that organisation's place and role in the society in which it operates.

(d) So far as the reasons part of the determination itself are concerned, whenever there is an obvious exclusion issue, it should be dealt with first.

(e) If, having dealt with exclusion first in the determination, an Adjudicator decides that Art 1F does not apply, he or she must then go on to deal with the appeal under the inclusion clauses in the usual way.

(f) If Art 1F is found to apply, Adjudicators should only go on in "belt and braces" fashion to consider the inclusion clause issues when the decision to exclude is seen to be problematic or to turn on a narrow or finely balanced point.

(g) Where an Adjudicator (in a post 2 October 2000 appeal) concludes that an appellant falls within the Exclusion Clauses, it will be necessary in any event for him to go on to consider whether the decision to remove the appellant would violate Art.3 ECHR.

(h) When the Secretary of State makes an assessment on the applicability of Article 1F, different considerations should apply. Even if exclusion issues are addressed first, it is highly desirable that, in the interests of justice, at all stages of his examination of an asylum claim he adopts a "**BELT-AND-BRACES**" approach and that he sets out in his reasons for refusal his decision on the Appellant's position under both the Inclusion and Exclusion Clauses.

[6] [2002] UKIAT 4870; [2003] INLR 133; [2003] Imm AR 115.

2.2.5 In *A (Iraq) -v- Secretary of State for the Home Department*,[7] an adjudicator failed to consider the terms of Art 1F of the Refugee Convention in his determination. The IAT upheld the determination on the basis that the Adjudicator had made no error of law in so doing. Allowing the Secretary of State's appeal and remitting the matter to the IAT, the Court of Appeal noted that in *Gurung* the IAT had set out that the assessment of whether a person fell within Art 1F of the Refugee Convention was *not optional*, but rather an integral part of the assessment of refugee status. Although it had consistently been held that it would be wrong to allow a **POINT** to be taken for the first time on appeal if it depended on further facts left uncertain by the decision, if the facts were clear it was the duty of the IAT to ensure that the correct legal test was applied.

2.2.6 Under s.54 of the Immigration, Asylum and Nationality Act 2006, Article 1F(c) of the Refugee Convention is to be interpreted so as to include acts of committing, preparing or instigating **TERRORISM** (whether or not the acts amount to an actual or inchoate offence), or of encouraging or inducing others to do so, as being contrary to the principles and purposes of the **UNITED NATIONS**. Under s.55 the Secretary of State is authorised to certify that Article 1(F) applies to an appellant or Article 33(2) applies on **NATIONAL SECURITY** grounds and require the AIT and Special Immigration Appeals Commission to dismiss the appeal if they agree with the statements in the certificate.

2.2.7 See paragraph 11.10 below on the **QUALIFICATION DIRECTIVE** and exclusion from refugee status.

2.3 The Refugee Convention may cease to apply following certain specified events

2.3.1 **ARTICLE 1C** of the Refugee Convention provides that:

> **This Convention shall cease to apply to any person falling under the terms of section A if:**
>
> **(1) he has voluntarily re-availed himself of the protection of the country of his nationality; or**
>
> **(2) having lost his nationality, he has voluntarily reacquired it;**
>
> **(3) he has acquired a new nationality, and enjoys the protection of his new country of nationality;**
>
> **(4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;**

(5) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; or

(6) being a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

2.3.2 In *R (on the application of Hoxha) -v- Secretary of State for the Home Department*,[8] the House of Lords held that Art 1C(5), and in particular the proviso in that article, did *not* require the decision-maker to give effect to the claimant's compelling reasons for not returning them to their home countries by granting them refugee status, even though their claimed entitlement arose under Art 1A(2) rather than Art 1A(1) as required by Art 1C(5).

The House of Lords held that, although research papers and articles published after the Court of Appeal's judgment raised the issue of the application of Art 1C(5) to refugees claiming asylum under Art 1A(2), neither the drafting history of the article nor subsequent state practice supported the Appellants' argument. To hold otherwise would be effectively to rewrite it so as to create a fresh entitlement to refugee status based on no more than historic fear and present compelling reasons for non-return, with no need at all for any current fear of persecution. That would be to distort entirely the language and structure of the text and do a serious disservice to the cause of human rights generally.

[7] [2005] EWCA Civ 1438; [2005] All ER (D) 22 (Dec) (CA).
[8] [2005] UKHL 19; [2005] 1 W.L.R. 1063; [2005] All ER (D) 163 (Mar) (HL) at [85].

2.4 Persecution

A two-stage test

2.4.1 In *Horvath -v- Secretary of State for the Home Department*,[9] the House of Lords held that an immigrant seeking to claim asylum under the Refugee Convention must show that:

(a) he had a well-founded fear of persecution for a Refugee Convention reason; and

(b) the home state could not provide sufficient protection to meet that fear.

2.4.2 The Lords indicated that "*the test, whilst having a subjective element, is in that respect objective*".[10] For a fear to be well-founded, there must be a "reasonable degree of **LIKELIHOOD**" that what the immigrant fears will come to pass (see *R (on the application of Sivakumuran) -v- Secretary of State for the Home Department*).[11] This test should not be applied in such a way as to substitute formulaic for substantive justice (*SR (Iran) -v- Secretary of State for the Home Department*).[12]

2.4.3 In *Degirmenci -v- Secretary of State for the Home Department*,[13] the Court of Appeal held that the low standard of proof in asylum cases related to the establishment of the risk. It did not set a threshold above which all the evidence presented was to be treated as fact. Rather, in arriving at a determination, the evidence must be given as much or as little weight as the decision-maker judges right.

2.4.4 In *Danian -v- Secretary of State for the Home Department*,[14] the Court of Appeal held that in all asylum cases the key question is whether there a serious risk that on return the applicant would be persecuted for a Convention reason. Further, would the asylum-seeker in fact act in the way he says he would and thereby suffer persecution? If so, then however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, he is entitled to asylum.

Past Persecution

2.4.5 In *R (on the application of Hoxha) -v- Secretary of State for the Home Department*,[15] the House of Lords held that a person could not fall within the definition of a refugee in Art 1A(2) where he has a fear of the

[9] [2001] AC 958; [2000] 3 All ER 577; [2000] Imm AR 552 (HL).
[10] *ibid.* at p 596 per Lord Clyde.
[11] [1988] A.C. 958; [1988] 1 All ER 193 (HL), at 198 per Lord Keith of Kinkel.
[12] [2007] EWCA Civ 460 (17 May 2007) (Auld, Sedley, Hughes LJJ).
[13] [2004] EWCA Civ 1553; [2004] All ER (D) 435 (Oct) (CA) at [13] (Sedley, Buxton LJJ and Sir Martin Nourse).
[14] [1999] INLR 533 (CA) at pages 7G and 8C-D.
[15] [2005] UKHL 19; [2005] 1 WLR 1063; [2005] All ER (D) 163 (Mar) (HL) at [28] – [29].

continuing effects of **PAST PERSECUTION**. Baroness Hale stated that there must be a *current* fear of persecution for a Convention reason upon return (applying *Adan -v- Secretary of State for the Home Department*).[16] Otherwise there would have been no need for the proviso to article 1C(5) because all those with compelling reasons arising out of past persecution not to return would still have qualified as refugees. However, past persecution is *relevant* as to whether a person has a current fear.

2.4.6 In *Demirkaya -v- Secretary of State for the Home Department*,[17] the Court of Appeal held that the treatment a person had been subjected to before leaving his country of origin was very relevant to the question of whether that person had a well founded fear of persecution on his return. The Court held that evidence of a significant change in the country of origin could explain why a person persecuted in the past may no longer be at risk on return, but it was incumbent upon the Tribunal to explain why that was so.

2.4.7 The **QUALIFICATION DIRECTIVE** and the implementing Rules reflect the ratio in *Demirkaya* on the issue of past persecution (see paragraph 11.16 below).

No Past Persecution

2.4.8 In *B -v- Secretary of State for the Home Department*,[18] the Court of Appeal held that whilst past history of *no* persecution was not determinative of future risk, unless circumstances in the country of return had deteriorated or some other factors were present, it was inevitable that an asylum seeker would have difficulty in showing future risk.

Stateless persons

2.4.9 In *Revenko -v- Secretary of State for the Home Department*,[19] the Court of Appeal held that where the Appellant was a **STATELESS** person, Article 1A(2) of the Refugee Convention required that he had a well-founded fear of persecution in the country of his **HABITUAL RESIDENCE**.

2.4.10 In deciding whether an Applicant is stateless, the Court will have regard to the law of nationality of the country concerned (an example can be found in *Darji and Gurung -v- Secretary of State for the Home Department*).[20]

Causation

2.4.11 In *Sepet and Bulbul -v- Secretary of State for the Home Department*,[21] the Court of Appeal held that the **MOTIVES** of the person carrying out the persecution were largely irrelevant save in so far as they provide evidence

[16] [1999] 1 A.C. 293.
[17] [1999] Imm AR 498, CA
[18] [2006] EWCA Civ 1267 (13 July 2006).
[19] [2000] EWCA Civ 500; [2001] Q.B. 60; [2000] 3 W.L.R. 1519; [2000] Imm AR 610.
[20] [2004] EWCA Civ 1419; [2004] All ER (D) 416 (Oct) (CA).
[21] [2001] EWCA Civ 681; [2001] INLR 376; [2001] Imm AR 452 (CA).

that might assist the applicant's claim. All that was necessary for there to be sufficient **CAUSATION** is that the applicant faced discriminatory conduct on one of the grounds specified in the Refugee Convention (for which see section 2.5 below). However, in the Lords, Lord Bingham said, in a strictly *obiter* statement, that the persecutor's motive for the persecution was key when deciding whether there was persecution for a Refugee Convention reason.[22]

2.4.12 *Sivakumar -v- Secretary of State for the Home Department*[23] was decided on the same day as *Sepet* by the same Committee. There, it was decided that in a case where an applicant had been persecuted for a number of different reasons, it was only necessary for *one* of those reasons to fall within Article 1A(2) of the Refugee Convention and his reasonable fear to relate to that motive, for his claim to succeed (per Lord Rodger). This was, however, limited by the caveat that the law in this area was concerned with the reasons for the persecution, not the motives of the persecutor.

Modifying Behaviour to Avoid Persecution

2.4.13 In *J -v- Secretary of State for the Home Department*,[24] the appellant had been detained by the authorities in Iran on account of his **HOMOSEXUAL** activities. He escaped to the UK and claimed asylum. While his asylum proceedings were ongoing he formed a same sex relationship with man settled here.

Maurice Kay LJ observed that it was common ground that practising homosexuals in Iran constituted a particular social group. He held that, in determining whether an asylum seeker faces persecution in his own country, the fact that he had hitherto avoided persecution by modifying his behaviour to disguise his membership of that group does not *necessarily* mean that he is to be expected to avoid the risk in the future by continuing to modify his behaviour. The question for tribunal to determine is not whether the applicant *could* live in his own country without attracting adverse attention, but what is *likely* to happen if he returns? **SEXUAL IDENTITY** extends beyond physical acts into many aspects of human relationships and activity, and a distinction had to be made between *expecting* someone to live discreetly if that was likely to happen, and *expecting* him to do so if that was necessary to avoid persecution.

Psychiatric Injury

2.4.14 In *B -v- Secretary of State for the Home Department*,[25] the Court of Appeal held that risk of rape and **PSYCHIATRIC** injury if returned to the country of

[22] [2003] UKHL 15; [2003] 1 W.L.R. 840; [2003] 2 All ER 1097 (HL) otherwise upholding the Court of Appeal's decision.
[23] [2003] UKHL 14; [2003] 1 WLR 840; [2003] 2 All ER 1097 (HL).
[24] [2006] EWCA Civ 1238 (26 July 2006).
[25] [2005] EWCA Civ 61; [2005] All ER (D) 15 (Feb) (CA) at [14] (Lord Phillips MR, Buxton and Carnwath LJJ).

origin could not give rise to the requisite well founded fear. The risk of rape will only give rise to such a fear if a state agency is implicated.

Conscientious Objectors : Generally

2.4.15 In *Sepet and Bulbul -v- Secretary of State for the Home Department*,[26] the House of Lords held that there was no rule of international law which recognised a right to **CONSCIENTIOUS OBJECTION** to **MILITARY SERVICE**. Forcing conscientious objectors to undertake national service did not therefore, as a general rule, amount to persecution for a Refugee Convention reason.

Conscientious Objectors : Exceptions

2.4.16 In *Sepet and Bulbul*, the House of Lords set out three exceptions to the general rule. Refugee status should be accorded to a person who refused to undertake compulsory military service:

(1) on the grounds that such service would or might require him to commit atrocities of gross human rights abuses; or

(2) on the grounds that such service would or might require him to participate in a conflict condemned by the international community; or

(3) where refusal to serve would earn grossly excessive or disproportionate punishment.

Persecution by non-state actors

2.4.17 In *Horvath -v- Secretary of State for the Home Department*,[27] the House of Lords held that a well-founded fear of persecution could arise where there was a *failure* by the home state to make protection available against ill-treatment or violence which the immigrant had suffered by way of his persecution. The decision-maker was only bound to grant asylum where the person's own state was unable or unwilling to discharge its duty to protect its nationals. However, this did not mean that the home state was under a duty to provide complete protection against such acts – the decision-maker would have to take a practical view of the duty.

2.4.18 In *Bagdanavicius -v- Secretary of State for the Home Department*,[28] the Court of Appeal held that even if the state provides adequate protection, an immigrant may still show persecution if he can demonstrate that the home state's authorities know (or **OUGHT TO KNOW**) of the circumstances giving rise to his particular case, but are unlikely to take any action to provide the

[26] [2003] UKHL 15; [2003] 3 All ER 304 (HL).
[27] [2000] UKHL 37; [2001] AC 958; [2000] 3 All ER 577 (HL).
[28] [2003] EWCA Civ 1605; [2004] 1 WLR 1207 (CA).

further protection that his circumstances reasonably require. This decision was upheld in the *Lords*.[29]

2.4.19 In *DK -v- Secretary of State for the Home Department*,[30] the Court of Appeal held that the fact that the **POLICE** are **WILLING**, and are doing their best to protect someone does not necessarily mean that they are offering a sufficiency of protection. Moreover, it was not necessary for the appellant in this case to show that Iraq's protective machinery had totally collapsed before he could successfully claim refugee status.

Persecution by state officials acting outside their authority

2.4.20 In *Svazas -v- Secretary of State for the Home Department*,[31] the Court of Appeal indicated that where the mistreatment is conducted by **STATE OFFICIALS**, even if they are acting outside their authority in so doing, the responsibility of the state for the persecution is *assumed* and the decision maker must then examine what the state is doing about it. The mechanisms for preventing misconduct and punishing those officials who engage in it will be relevant to the determination. The seniority of the officials involved in the misconduct is relevant in deciding whether the mechanisms are sufficient.

Internal relocation

2.4.21 An application for asylum may be refused if the decision-maker considers that the asylum seeker could have relocated to a different region of his or her home state where he or she would not have had a well-founded fear of persecution.

2.4.22 This is known as either "**INTERNAL PROTECTION**", "**RELOCATION**", "**FLIGHT ALTERNATIVE**" and "**INTERNAL RELOCATION**".

2.4.23 The leading authority on this issue is *Januzi -v- Secretary of State for the Home Department* (discussed below),[32] where Lord Bingham carefully analysed the academic literature and earlier authorities. He adopted the term "internal relocation" and this is now the description most commonly used.

2.4.24 The basic principles had previously been set out by the Court of Appeal in *R (on the application of Robinson -v- Secretary of State for the Home Department*:[33]

(a) the question of internal relocation is central to the issue of whether an immigrant is treated as a refugee;

[29] [2005] UKHL 38; [2005] 2 W.L.R. 1359.
[30] [2006] EWCA Civ 682 (25 May 2006).
[31] [2002] EWCA Civ 74; [2002] 1 W.L.R. 1891 (CA).
[32] [2006] UKHL 5; [2006] 2 W.L.R. 397.
[33] [1998] QB 929; [1997] 3 W.L.R. 1162; [1997] 4 All ER 210; [1997] Imm AR 568 (CA).

(b) the Adjudicator and the IAT had jurisdiction to decide the issue of internal relocation in coming to a decision on appeal; and

(c) in coming to a conclusion on internal relocation, the decision-maker was required to consider all the circumstances of the case. The issue is as to whether it would be **UNDULY HARSH** to expect the immigrant to relocate to another area within his home country.

2.4.25 In *P & M -v- Secretary of State for the Home Department*,[34] the Lord Chief Justice said that it was up to the Secretary of State to raise the possibility of internal relocation. Adjudicators could not be expected to investigate such issues on their own initiative where there was an absence of evidence to suggest that there was an alternative location to which the immigrant could flee.

2.4.26 In *AE & FE -v- Secretary of State for the Home Department*,[35] the Court of Appeal held that when considering immigration applications and appeals, a court must distinguish between:

(a) the right to refugee status under the Refugee Convention. Here, the reasonableness of internal relocation should focus on the consequences to the asylum seeker of settling in the place of relocation instead of his previous home. The comparison between the asylum seeker's situation in this country and what it will be in the place of relocation is not relevant;

(b) the right to remain by reason of rights under the ECHR (the comparison referred to in (a) is relevant); and

(c) considerations which may be relevant to the grant of leave to remain for humanitarian reasons (the comparison referred to in (a) is relevant).

2.4.27 Section 91 of the UNHCR Handbook (1979) provides:

The fear of being persecuted need not always extend to the whole of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

2.4.28 The standard of proof in assessing the internal relocation was considered by the Court of Appeal in *Karanakaran -v- Secretary of State for the Home*

[34] [2004] EWCA Civ 1640; [2004] All ER (D) 123 (Dec) (CA) at [33].
[35] [2003] EWCA Civ 1032; [2004] Q.B. 531; [2004] 2 W.L.R. 123; [2003] Imm AR 609 (Lord Phillips MR, Simon Brown and Ward LJJ) at [67].

Department,[36] where the Court distinguished between the task of the administrative decision maker and that of the judge. In the case of the former, the "**BALANCE OF PROBABILITIES**" test was of little assistance. It would be wrong for the decision-maker to exclude certain matters in the balancing exercise simply because he or she did not consider that they had been proved to a civil standard of proof.

2.4.29 *Januzi -v- Secretary of State for the Home Department* comprised four appeals relating to internal relocation. Mr Januzi, an ethnic Albanian from the Serb dominated area of Kosovo, claimed asylum in the UK on the ground that he had a well founded fear of racial persecution by the Serbian authorities. The Secretary of State rejected his application on the basis that it would not be unduly harsh to expect him to relocate to one of a number of other areas in Kosovo where the Albanian population predominated.

2.4.30 The common issue in the appeals was whether, in judging reasonableness and undue harshness, account should be taken of any disparity between the civil, political and socio-economic human rights which a person would enjoy under the leading international human rights conventions, particularly the Refugee Convention, and those that he would enjoy at the place of relocation.

2.4.31 The success of his claim turned on the interpretation of "refugee" in Art.1A(2) of the Geneva Convention. The Lords considered the **NEW ZEALAND** jurisprudence which represented the "high water mark" of Mr Januzi's case. The line taken in New Zealand – the New Zealand Rule – was that for the reality of protection in the place of relocation to be meaningful, there must be provision of basic norms of civil, political and **SOCIO-ECONOMIC** rights. This approach has previously been rejected by the English Court of Appeal and the House considered that it had rightly done so for five reasons.

2.4.32 First, there is nothing in the article of the Convention from which the New Zealand Rule may by any process of interpretation be derived. Second, the rule cannot be properly implied into the Convention – the thrust of the Convention is to ensure the fair and equal treatment of refugees in countries of asylum. Third, the rule is not expressed in a Council Directive, an important instrument, on minimum standards for the qualification and status of third country nationals. Fourth, the rule is not supported by such uniformity of practice based on legal obligation and such consensus of professional and academic opinion as would be necessary to establish a rule of customary international law. Fifthly, adoption of the rule would give the Convention an effect which is not only unintended but anomalous in its consequences.

2.4.33 Lord Bingham explained the fifth reason by way of example. Suppose a person lives in a poor country, with low standards of social provision and with scant respect for human rights. He is subject to persecution for

[36] [2000] EWCA Civ 11; [2000] 3 All ER 449; [2000] INLR 122 (CA).

Convention reasons and escapes to a rich country, where if he is recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could with no fear of persecution live elsewhere in his country of nationality but would there suffer all the drawbacks of living in a poor and backward country. As Lord Bingham concluded, "[i]t would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject".

2.4.34 The House left open the possibility that a comparison between the asylum seeker's situation in the UK and what it will be in the place of relocation might be relevant when considering the ECHR or the requirements of humanity

2.4.35 *Januzi* has been applied in *Jasim -v- Secretary of State for the Home Department*,[37] where the majority of the Court of Appeal held that the AIT was entitled to conclude that Jasim could be returned to Baghdad (as opposed to his home in Kirkuk) because it had considered all the evidence relating to internal relocation.

2.4.36 In *AH (Sudan), IG (Sudan), NM (Sudan) -v- Secretary of State for Home Department*,[38] the Court of Appeal considered further issues arising out of *Januzi* (the Lords had remitted some of the *Januzi* appeals to the AIT and they had found their way back to the Court of Appeal). The Court emphatically rejected the AIT's interpretation of "undue harshness" as requiring nothing less than breaches of Arts.2 and 3 ECHR for three reasons:

a) There is a difference between the tests applied in relation to the Refugee Convention and the ECHR.

b) In *Januzi*, Lord Hope held that a conclusion as to "undue harshness" could be reached without reliance on the ECHR. He had in mind a case where conditions throughout the country were unacceptable in Refugee Convention, and not just in ECHR, terms.

c) There is no support for this approach in *Januzi*. Lord Bingham considered that what must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth).

The Court went on to set out the following fundamental propositions which summarise the case law:

a) The starting-point must be conditions prevailing in the place of habitual residence.

[37] [2006] EWCA Civ 342 (Pill LJ, Sir Peter Gibson and Sedley LJ (dissenting)).
[38] [2007] EWCA Civ 297 (4 April 2007) (Buxton, Moore-Bick and Moses LLJ).

b) Those conditions must be compared with the conditions prevailing in the safe haven.

c) The latter conditions must be assessed according to the impact that they will have on a person with the characteristics of the asylum-seeker.

d) If under those conditions the asylum-seeker cannot live a relatively normal life according to the standards of his country it will be unduly harsh to expect him to go to the safe haven.

e) Traumatic changes of life-style, for instance from a city to a desert, or into slum conditions, should not be forced on the asylum-seeker.

2.5 Refugee *Sur Place*

2.5.1 See paragraph 11.17 below

2.6 Civil War

2.6.1 In *Adan -v- Secretary of State for the Home Department*,[39] the House of Lords held that where a civil war is ongoing, it is not sufficient for an asylum seeker to show that he would be at risk if he returned to his country. He must be able to show a "**DIFFERENTIAL IMPACT**" and show fear of persecution for a Convention reason over and above the ordinary risks of clan warfare. Hence the civil war in Somalia, where there were incidents of widespread clan and sub-clan based killing and torture did not give rise to a well-founded fear of persecution in respect of the individual claimant. The House held that he was at no greater risk of such adverse treatment than others at risk in the civil war for reasons of their clan and sub-clan membership.

2.7 Different types of persecution envisaged by Article 1A(2) of the Refugee Convention

Race

2.7.1 Paragraph 58 of the **UNHCR HANDBOOK** states that race, in terms of the Refugee Convention,

> **…has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage. Frequently, it will also entail membership of a specific social group of common descent forming a minority within a larger population.**

[39] [1999] 1 A.C. 293.

Religion

2.7.2 There is no definition of what constitutes "religion" in the legislation or the rules. However, apostasy has been accepted.[40]

2.7.3 In *Shirazi -v- Secretary of State for the Home Department* (a case which concerned the conversion of an Iranian Muslim to Christianity whilst in the UK), Sedley LJ said that *"great caution [was] appropriate in deciding…on the genuineness of conversions"*.[41] See paragraphs 11.9.1 and 11.9.4 for discussion of the treatment of religion under the Qualification Directive.

Nationality

2.7.4 The IAT has held on different occasions that nationality was to be established on the criteria of "**SERIOUS POSSIBILITY**"[42] and on the ordinary **CIVIL STANDARD OF PROOF**.[43]

2.7.5 In *Dag (Turkey) -v- Secretary of State for the Home Department*,[44] the IAT (in a starred determination) held that an immigrant's claim to be a national of the Turkish Republic of Northern Cyprus was insufficient to form the basis of a claim for nationality as the Republic was not capable of being a country of nationality for the purposes of Art.1A(2) of the Refugee Convention.

2.7.6 See paragraphs 11.9.1 and 11.9.5 for the treatment of nationality under the Qualification Directive.

Membership of a Social Group

2.7.7 In *R -v- Immigration Appeal Tribunal ex parte Islam and Shah*,[45] the House of Lords held that a social group falling within the meaning of Art.1A(2) of the Refugee Convention was one whose members shared a **COMMON IMMUTABLE CHARACTERISTIC** and were discriminated against in matters of fundamental human rights. Cohesiveness of the group, although it might tend to prove the existence of a particular group, was not a prerequisite.

The House of Lords held that women themselves could constitute a social group if they lived in a society which discriminated against them on the grounds of sex. It was immaterial that some women might be able to avoid the impact of the persecution. However, to fall within the ambit of the Refugee Convention, the group must exist independently of the persecution which is claimed.

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[40] *Yaqub –v- Secretary of State for the Home Department* (19569) (IAT).
[41] [2003] EWCA Civ 1562; [2004] 2 All ER 602 (CA) at [32]. Further, see fn. **Error! Bookmark not defined.** below.
[42] *Ivanov –v- Secretary of State for the Home Department* (R12583) (IAT).
[43] *Arafah -v- Secretary of State for the Home Department* (20157) (IAT).
[44] [2001] (01/TH/00075) (IAT starred).
[45] [1999] UKHL 20; [1999] 2 A.C. 629; [1999] 2 All ER 545; [1999] 2 W.L.R 1015; [1999] Imm AR 283 (HL) (Lord Millett dissenting).

2.7.8 In *RG (Ethiopia) -v- Secretary of State for the Home Department*,[46] the Court of Appeal held that the question whether women in any country constitute a "particular social group" is fact sensitive and requires thorough analysis of the country background material. It is not necessary to fit the facts of such a case within the facts of *Islam and Shah*. However, Keene LJ noted that identifying a particular social group involved more than pure questions of fact but required a legal test as to the facts found. Widespread societal discrimination, combined with inadequate protection by the police and the courts, may suffice, without any disability for women being enshrined in the law.

2.7.9 In *P & M -v- Secretary of State for the Home Department*,[47] the Court of Appeal held that where an immigrant claims persecution for reasons of membership of a particular social group, the four questions to be asked are:

(a) What is the particular social group in the instant case?
(b) What is the persecution feared?
(c) Is the fear of such persecution for reasons of membership of the particular social group?
(d) Is the fear well founded?

2.7.10 In *K -v- Secretary of State for the Home Department*,[48] the House of Lords considered the meaning of "membership of a particular social group" in Art.1A(2). In the first appeal, a woman fled Iran (with her son) because they had been targeted by Revolutionary Guards, agents of the Islamic Iranian state, solely because of their relationship to the husband (and father). In the second appeal, a 15 year old girl fled from Sierra Leone as she was at risk of subjection to female genital mutilation – a practice which has been globally condemned and is illegal in the UK. The Secretary of State accepted that Art.3 ECHR prevented the return of both appellants to their home countries because of the treatment they would be liable to suffer if returned. However, the appellants sought refugee status as this would provide them with stronger protection.

The Lords explained that it follows from the Art.1A(2) definition that not all persecutory or abhorrent treatment falls within it – only treatment inflicted for one of the five listed grounds will suffice. Each ground emanates from some form of discrimination. Persecution need not be **MOTIVATED** by enmity, malignity or animus on the part of the persecutor; what matters is the real reason.

The Lords observed that to identify a social group one must first identify the society of which it forms part; a particular social group may be

[46] [2006] EWCA Civ 339 (4 April 2006).
[47] [2004] EWCA Civ 1640; [2004] All ER (D) 123 (Dec) (CA) at [16]
[48] [2006] UKHL 46. An appeal conjoined with *Fornah -v- Secretary of State for the Home Department* (18 October 2006).

recognisable as such in one country but not in another. A social group need not be cohesive to be recognised as such. There can only be a particular social group if it exists independently of the persecution to which it is subject. Importantly, the Lords held that persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society. It is not necessary to show that every member is subject to the same threat. All that needs to be shown is that there is a causative link between his or her membership and the threat of the persecution.

The Lords had little doubt that persecution by reason of being a member of a particular family could constitute persecution for reasons of membership of a particular social group: a family is "socially cognisable group in society". Lord Rodger saw no basis for construing the words of the Convention in a restrictive sense and gave the example of people being persecuted simply because of their membership of a royal family which once ruled a country but had then been overthrown. This conclusion was justified by the fact such persecution is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. The Lords held that "the original evil that gives rise to persecution of the individual is one thing" but when the persecution is transferred to the family, that on the face of it will come within the scope of the article. Simply put, the initial persecution need not be for a Convention reason.

The Lords held that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men. However, they divided on how to define the relevant particular group. Lord Hope suggested that the more qualifications the definition contains the more grounds there may be for objection. An important question arises as to how the balance is to be struck between definitions that are unnecessarily precise and those that are unnecessarily wide. The majority found that the relevant social group was "uninitiated indigenous females in Sierra Leone".

2.7.11 In *Secretary of State for the Home Department -v- Ouanes*,[49] the Court of Appeal held that **COMMON EMPLOYMENT** (in that case, the immigrant was a government appointed midwife) would not normally be a characteristic indicating membership of a particular group for the purposes of the Refugee Convention.

2.7.12 In *L (China) -v- Secretary of State for the Home Department*,[50] the Court of Appeal held that members of the Falun Gong movement possessed no immutable characteristics. Membership of that group was a matter of individual **CHOICE** and a person could choose to become a member, and then to cease to be a member at any time. There were no membership lists and those who chose to practise Falun Gong in the privacy of their own homes did not suffer a significant risk of ill-treatment.

[49] [1997] EWCA Civ 267; [1998] 1 WLR 218; [1998] Imm AR 76 (CA).
[50] [2004] EWCA Civ 1441; [2004] All ER (D) 43 (Nov) (CA).

2.7.12 See paragraphs 11.9.1 and 11.9.6 for treatment of a particular social group under the Qualification Directive.

Political Opinion

2.7.13 In *Gomez -v- Secretary of State for the Home Department*,[51] the IAT held that:

(a) An immigrant does not have to show that he actually undertook political activity or action. The ground cannot, however, be interpreted to exclude a fundamental right protected under international human rights law (in particular, freedom of thought, conscience, opinion, expression, association and assembly).

(b) The opinion must relate to the "*major power transactions taking place in that particular society. It is difficult to see how a political opinion can be imputed by a non-state actor who (or which) is not itself a political entity.*"[52]

(c) Even where the immigrant has shown a political opinion and persecution, he would still have to show a causal connection between the persecution and the political opinion. The mere existence of a political motive does not inevitably lead to the conclusion that the persecutor considers the immigrant's actions to be political.

(d) In cases involving criminal gangs or **GUERRILLAS**, evidence of imputed political opinion could not be made up solely of the general political purposes of the persecutor.

2.7.14 Article 10(1)(e) of the Qualification Directive (see **Chapter 11**) provides a definition of political opinion which is wider than that expressed in *Gomez*. Regulation 6(1)(f) of the **REFUGEE OR PERSON IN NEED OF PROTECTION (QUALIFICATION) REGULATIONS 2006** which implements Art.10(1)(e) into English law states:

> **the concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in regulation 3[53] and to their policies and methods, whether or not that opinion, thought or belief has been acted upon by the person.**

[51] [2000] UKIAT 00TH02257; [2000] INLR 549 (IAT) (Starred decision, see for a summary). This was expressly approved of by the Court of Appeal in *Noune –v- Secretary of State for the Home Department* [2000] EWCA Civ 306; [2000] All ER (D) 2163; The Times, 20 December 2000 (CA).
[52] At [73] of the IAT's determination.
[53] See paragraph 11.6.1 below.

As the Directive is intended to set minimum standards, the more stringent definition of politics in *Gomez* is unlikely to survive the Directive. Therefore, single issue campaigners whose campaigns are not necessarily aimed directly at state policy, which were unlikely to have fallen within the high-level westernised definition of "politics" in *Gomez* may well fall within the new definition.[54]

Imputed Convention Reason

2.7.15 Regulation 6(2) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (implementing the Qualification Directive on Minimum Standards (see **Chapter 11**) states:

> **In deciding whether a person has a well founded fear of being persecuted it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution.**

2.7.16 Regulation 6(2) makes it clear that the concept of imputed or attributed Convention reasons applies to all Convention reasons, and not just political opinion.

The definition of persecution is limited to the provisions of the Refugee Convention

2.7.17 In *Amare -v- Secretary of State for the Home Department*,[55] Laws LJ rejected the adoption of a "**HUMAN RIGHTS BASED APPROACH** to persecution", with the definition of persecution being widened to include any affront to internationally accepted norms of human rights. The Refugee Convention existed to secure international protection of refugees to the extent agreed by contracting States. Its breadth was limited by the terms of Art 1A(2). A "human rights based approach" risked the AIT making the mistake of seeking to safeguard and protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected than they are in the UK, something which had not been envisaged by the contracting States in enacting the Refugee Convention. Any submission along these lines should be treated with great care in future.

2.8 Conduct of immigration interviews

2.8.1 In *R (on the application of Dirshe) -v- Secretary of State for the Home Department*,[56] the Court of Appeal declared that it would be unlawful, for lack of procedural fairness, for the Secretary of State to decline to permit

[54] See paragraphs 11.9.1 and 11.9.7 below.
[55] [2006] EWCA Civ 1600 (20 December 2005).
[56] [2005] EWCA Civ 421; [2005] 1 WLR 2685; The Times, 5 May 2005; [2005] All ER (D) 259 (Apr) (CA) at [19] (Latham LJ, with whom the Master of the Rolls and Keene LJ agreed).

tape recording of interviews where no interpreter or legal representative was present as tape recording provides the only sensible method of redressing the imbalance which results from the respondent being able to rely on a document created for him without an adequate opportunity for the applicant to refute it.

2.8.2 *AM (Iran) -v- Secretary of State for the Home Department*[57] is an example of a case where the Court of Appeal refused to find that an Adjudicator had erred in law in admitting evidence from interviews in which there might have been some procedural irregularities. As there had been no application to exclude the evidence, the Adjudicator was entitled to place weight on it.

[57] [2006] EWCA Civ 1813 (4 December 2006) (Pill, Arden LJJ and Sir Martin Nourse).

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CHAPTER 3:

APPEALS TO THE AIT UNDER THE 2002 ACT *(AS AMENDED)*

3.1 Introduction

3.1.1 The 2004 Act has fundamentally changed the immigration appeals process. The new s.81 of the 2002 Act established a single tribunal, the Asylum and Immigration Tribunal (the "**AIT**"), which replaced the old two-tier structure which comprised Adjudicators and the IAT.

3.1.2 The flow charts at the end of the next section provide an overview of the process under the 2004 Act.

3.2 The 2004 Act filter mechanism

3.2.1 Paragraph 30 of Schedule 2 to the 2004 Act puts in place a filter process which, by virtue of paragraph 30(1), began with the commencement of s.103A of the 2002 Act[1] and will end at such time as the Lord Chancellor may by regulation specify. Paragraph 30 allows the Lord Chancellor to specify such further periods of application of the transitional provisions as he may appoint.

3.2.2 An immigrant who has arrived in the UK and who has claimed either asylum or that to return him to his country of origin would be in violation of his human rights will be **INTERVIEWED** by immigration officers. The Secretary of State will then issue a decision in respect of the immigrant.

3.2.3 If the immigrant is refused asylum or leave to enter or remain, a right of appeal exists to the AIT.

3.2.4 The AIT will consider the appeal, which may be brought on a **POINT OF LAW** only. The losing party may then apply to a senior member of the AIT for review of the decision, again on a point of law only. By virtue of rule 26(2) of the AIT Rules, the review will be conducted on paper only, and if the application is allowed the matter is remitted to the AIT for reconsideration.

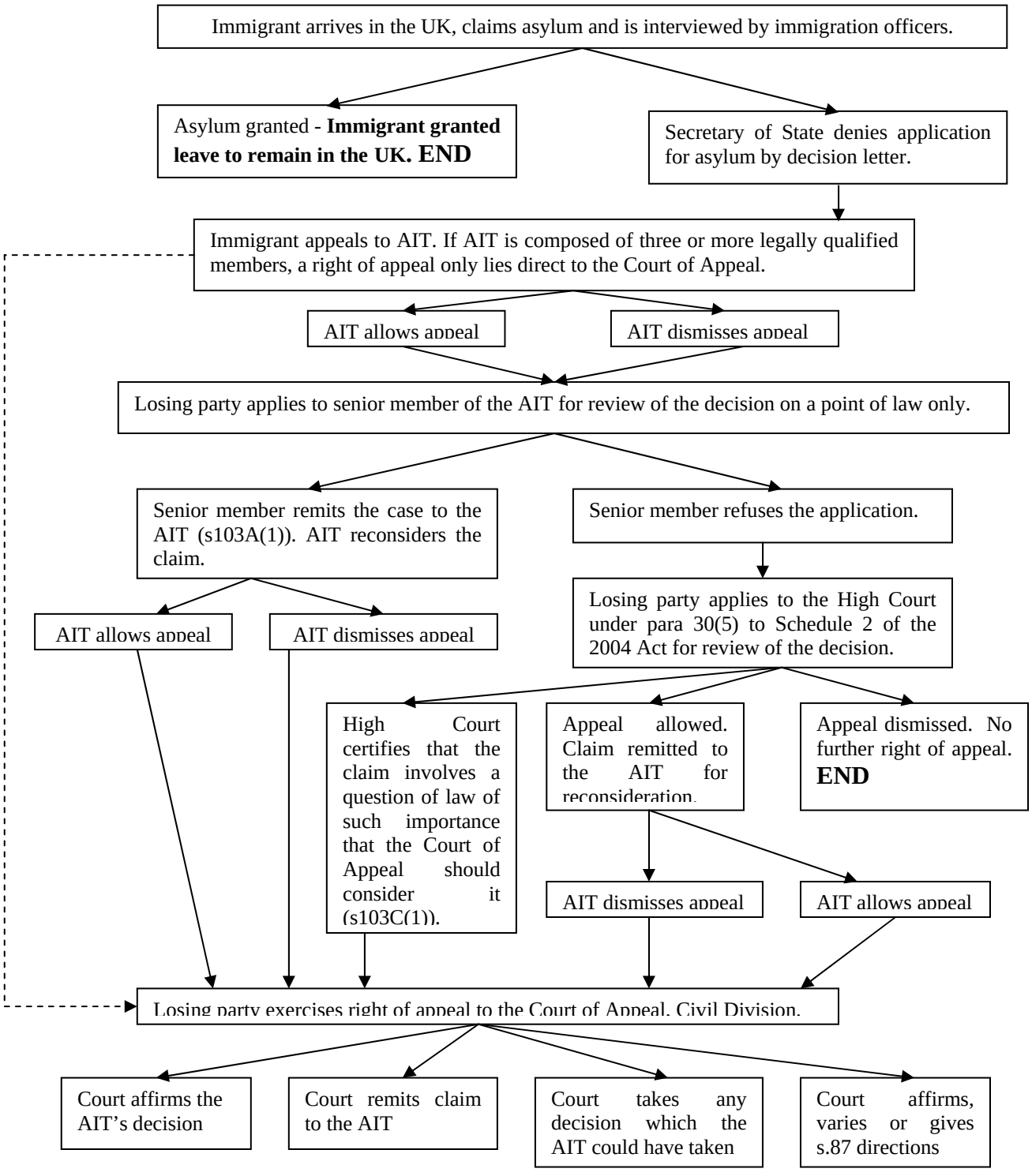
3.2.5 If the application for review is refused by the AIT, the losing party may apply to the High Court for further review, which is conducted by a single judge on paper only. The High Court may remit the matter to the AIT for reconsideration or, if it certifies that the claim involves a question of law of such importance that the Court of Appeal ought to hear it, refer the matter

[1] Section 103A was brought into force from 1 April 2005 by the *Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No. 5 and Transitional Provisions) Order 2005*, SI 2005 No. 565.

to the Court of Appeal for determination. If the application is refused by the High Court, there is no further right of *appeal*.

3.2.6 Where the AIT conducts a reconsideration, there is a right of appeal (subject to permission to appeal being granted) direct to the Court of Appeal.

2004 ACT FILTER MECHANISM
(IN FORCE)



3.3 The 2004 Act – No filter mechanism

3.3.1 **If** the Lord Chancellor chooses to abolish the filter mechanism, the appeal provisions of the 2004 Act change. The following is for information only as the filter mechanism remains in force and is most likely to remain so.

3.3.2 An immigrant who has arrived in the UK and who has claimed either asylum or that to return him to his country of origin would be in violation of his human rights will be interviewed by immigration officers. The Secretary of State will then issue a decision in respect of the immigrant.

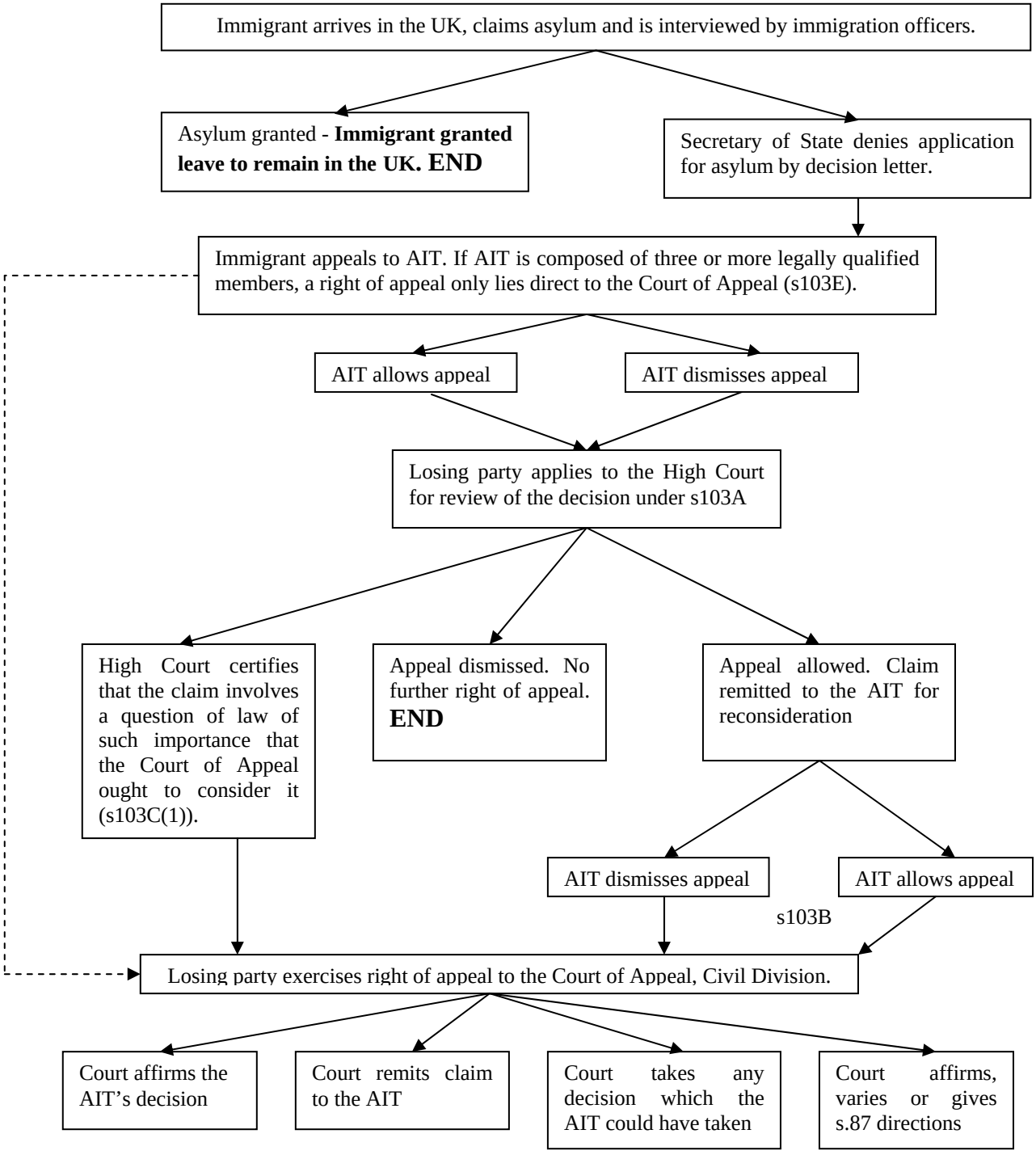
3.3.3 If the immigrant is refused asylum or leave to enter or remain, a right of appeal exists to the AIT.

3.3.4 The AIT will consider the appeal, which may be brought on a point of law only. The losing party may then apply the High Court for review of the decision, again on a point of law only.

3.3.5 The High Court may remit the matter to the AIT for reconsideration or, if it certifies that the claim involves a question of law of such importance that the Court of Appeal ought to hear it, refer the matter to the Court of Appeal for determination. If the application is refused by the High Court, there is no further right of appeal (as opposed to judicial review).

3.3.6 Where the AIT conducts a reconsideration, there is a right of appeal (subject to permission to appeal being granted) direct to the Court of Appeal.

2004 ACT WITHOUT FILTER MECHANISM
(FOR INFORMATION ONLY)



3.4 Appeals to the AIT

Decisions against which an appeal lies to the AIT

3.4.1 Section 82(1) of the 2002 Act provides that a person may appeal to the AIT in respect of any of the following:

(a) A refusal of leave to enter the UK;

(b) A refusal of entry clearance;

(c) A refusal of a certificate of entitlement under s.10 of the 2002 Act (certificates granted by the Secretary of State asserting that the immigrant has the right to remain in the UK);

(d) A refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain;

(e) A variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain;

(f) A revocation under s.76 of the 2002 Act of indefinite leave to enter or remain in the UK;

(g) A decision that a person is to be removed from the UK by way of directions for removal of person unlawfully in UK (under s.10(1)(a), (b) or (c) of the 1999 Act);

(h) A decision that an illegal entrant is to be removed from the UK by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971;

(i) A decision that a person is to be removed from the UK by way of directions given by virtue of paragraph 10A of Schedule 2 to the Immigration Act 1971 (family);

(j) A decision to make a deportation order under s.5(1) of the Immigration Act 1971; and

(k) A refusal to revoke a deportation order under s.5(2) of the Immigration Act 1971.

(l) a decision that a person is to be removed from the United Kingdom by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave).

(m) a decision that a person is to be removed from the UK by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c 77) (seamen and aircrews) .

(n) a decision to make an order under s.2A of that Act (deprivation of right of abode).

3.4.2 Pursuant to s.83 of the 2002 Act, a person may appeal in respect of the rejection of his asylum claim where he has nevertheless been granted leave to enter or remain in the UK for more than one year (or periods exceeding one year in aggregate). However, s.84(3) provides an appeal under s.83 may only be brought on the grounds that the immigrant's deportation would cause the UK to be in breach of its obligations under the Refugee Convention.

3.4.3 Section 78 of the 2002 Act provides that an immigrant may not be removed from the UK under the Immigration Acts where he has an appeal in respect of his asylum application **PENDING** before the AIT (see paragraph 7.2.31 below).

Decisions against which there is no right of appeal

3.4.4 The following decisions are not subject to the appeal provisions of the 2002 Act:

(a) overseas decisions and in-country decisions varying or refusing to vary leave, if:

(i) the applicant does not meet the requirements of the immigration rules with regard to age, nationality or citizenship (s.88(2)(a));

(ii) a relevant document (entry clearance, passport or equivalent document, work permit or equivalent) is required by immigration rules and has not been issued (s.88(2)(b));

(iii) the applicant is seeking to remain in the UK for longer than the immigration rules permit (s 88(2)(c)); or

(iv) the application is made for a purpose outside the immigration rules (s.88(2)(d)).

(b) where the Secretary of State certifies that the immigrant would be a threat to national security (s.97). In this case there is a right of appeal to the Special Immigration Appeals Commission (see Chapter 6).

3.4.5 In *GH -v- Secretary of State for the Home Department*,[2] the Court of Appeal held that, where the Secretary of State has refused leave to enter or remain, there is no right of appeal to the AIT under s.82 of the 2002 Act

[2] [2005] EWCA Civ 1182; [2005] All ER (D) 113 (Oct) (CA).

against subsequent **REMOVAL DIRECTIONS** which flow from that refusal. In such circumstances, the proper route would be to seek **JUDICIAL REVIEW** of the directions for removal (See Chapter 5). However, in a statement which he accepted was *obiter*, Scott Baker LJ expressed the view (at [46]) that in a situation where the Secretary of State issued removal directions at the same time as and linked to a refusal of leave to enter, common sense would dictate that both decisions ought to be considered at one appeal.

3.4.6 *GH* was distinguished in *AK -v- Secretary of State for the Home Department*[3] where the Court of Appeal held that it fell within the jurisdiction of the IAT under s.82 to consider the issues concerning an asylum seeker's position as a **STATELESS** person and the implications of refusal by the state authorities to allow him to return to his home countries. It was immaterial that, in this case, removal directions had not been set.

Grounds of appeal

3.4.7 Section 84(1) of the 2002 Act provides that an appeal may only be brought on the grounds that:

(a) the decision is not in accordance with immigration rules;

(b) the decision would constitute discrimination on the grounds of race by a public authority in violation of s.19B of the **RACE RELATIONS ACT 1976**;

(c) the decision is contrary to the Appellant's ECHR rights underand therefore is unlawful under s.6 of the Human Rights Act 1998;

(d) the appellant is an **EEA** national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the UK;

(e) the decision is otherwise not in accordance with the law;

(f) the person taking the decision should have exercised differently a **DISCRETION** conferred by immigration rules;

(g) removal of the appellant from the UK in consequence of the immigration decision would breach the UK's obligations under the Refugee Convention or would be unlawful under s.6 of the **HUMAN RIGHTS ACT 1998** as being **INCOMPATIBLE** with the appellant's Convention rights.

In *AA & LK -v- Secretary of State for the Home Department*,[4] the Court of Appeal held that the word "**REMOVAL**" in s.84(1)(g) meant

[3] [2006] EWCA Civ 1117 (31 July 2006).
[4] [2006] EWCA Civ 401; [2007] 2 All ER 160

enforced removal pursuant to removal directions set by the Secretary of State for the Home Department.

In *JM (Liberia) -v- Secretary of State for the Home Department*,[5] the Court of Appeal held that once a human rights point was properly before the AIT, it was obliged to deal with it. That was consonant with the general jurisprudence relating to the obligations of public bodies under the Human Rights Act 1998 and was the proper result of a construction of the relevant provisions. It would therefore be appropriate to give a wide interpretation to the words "in consequence of" in section 84(1)(g).

The Secretary of State may at any time require immigrants to state their grounds for remaining in the UK.

3.4.8 Section 120 of the 2002 applies to immigrants who have applied to enter the UK or for leave to remain or who have been the subject of an immigration decision (as defined by s.82). By notice in writing under s.120(2) of the 2002 Act, the Secretary of State or an immigration officer may require those persons to state:

(a) their reasons for wishing to enter or remain in the UK;

(b) any grounds on which they should be permitted to enter or remain in the UK; and

(c) any grounds on which they should not be removed from or required to leave the UK.

A "One Stop" appeals process

3.4.9 Under s.85(1) of the 2002 Act, an appeal against any of the decisions listed in s.82 is **DEEMED** to include an appeal against any other of the s.82(1) decisions which may be or become relevant. This effectively makes the appeal to the AIT a "one stop shop" and prevents an immigrant from seeking to reopen his appeal by arguing that a different category of decision has since been taken in his case.

3.4.10 Where an appellant makes a statement under s.120 pursuant to s.85(3) (whether before or after the appeal has commenced), s.85(2) provides that the AIT must consider any matter raised in the statement which constitutes a ground for appeal under s.84(1) against the decision under appeal.

[5] [2006] EWCA Civ 1402; [2006] I.N.L.R 548 (4 October 2006).

Attempting a Second Appeal

3.4.11 Section 96 of the 2002 Act provides that where there has been a previous immigration decision in respect of the immigrant, a **FRESH** appeal under s.82(1) may not be brought if:

(a) the Secretary of State or an immigration officer certifies that (s.96(1)):

- the immigrant was notified of a right of appeal under s.82(1) against another immigration decision (whether or not an appeal was brought or, if brought, has been determined);
- the claim or application to which the new decision relates relies on a matter that the Applicant could have raised in an appeal against the first decision; and
- in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the earlier decision.

(b) where the Secretary of State or an immigration officer certifies that (s 96(2)):

- the Applicant received a s.120 notice by virtue of an application other than that to which the new decision relates, or by virtue of a decision other than the new decision;
- the new decision relates to an application or claim which relies on a matter which should have been, but was not, raised in a statement made in response to the s.120 notice; and
- in the opinion of the Secretary of State or the immigration officer, there was no satisfactory reason for the matter not having been raised in the statement.

3.4.12 In *R (on the application of Ngamguen) -v- Secretary of State for the Home Department*,[6] the High Court held that where an immigrant puts forward new material of substance but the Secretary of State does not consider that the new matters have any **WEIGHT**, he is entitled to certify the claim as one made for the purposes of **DELAY** and having no legitimate purpose. The Secretary of State must, however, be shown reasonably to have been satisfied that in his opinion the appellant's case was so **HOPELESS** that it was not reasonably arguable.[7]

3.4.13 Section 99 of the 2002 Act provides that a pending appeal will lapse if the Secretary of State or an immigration officer issues a certificate under s.96.

[6] [2003] Imm AR 69 (QBD) applying the similar provision in s 73 of the 1999 Act.
[7] *R (on the application of Vemenac) -v- Secretary of State for the Home Department* [2003] INLR 101 (QBD) applying the similar provision in s.73 of the 1999 Act.

Power of the Secretary of State to certify claims as unfounded

3.4.14 Section 94(1A) of the 2002 Act[8] provides that an applicant may not appeal against an immigration decision of the following kind where the Secretary of State certifies that the claim or claims mentioned in s.94(1) is or are **UNFOUNDED**:

- refusal of a certificate of entitlement under s.10 of the 2002 Act;
- refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain; or
- variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain.

3.4.15 The claim or claims mentioned in s.94(1) relate to an asylum claim, a human rights claim, or both.

3.4.16 Under s.13 of the Immigration, Asylum and Nationality Act 2006,[9] the Secretary of State may make regulations to limit his power to certify clearly unfounded claims on the basis of the type of leave that the person has when the claim is made.

3.5 Hearings Before the AIT

3.5.1 Section 106 of the 2002 Act grants the Lord Chancellor the power to make rules of procedure regulating proceedings before the AIT. The the *Asylum and Immigration Tribunal (Procedure) Rules 2005*[10] (the "**AIT RULES**") were put into force pursuant to this power and have applied to matters before the AIT as from 4 April 2005.

Overriding objective

3.5.2 Rule 4: The overriding objective of the rules is to *"secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible."*

[8] Inserted by s.27 of the 2004 Act with effect from 1 October 2004 by virtue of the Article 2 of the *Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No. 1) Order 2004*, SI 2004 No. 2523.
[9] As of 23 August 2007, not yet in force.
[10] SI 2005 No. 230.

Time limits for bringing an appeal

3.5.3 Rule 7: Provides that the time limits for lodging the notice of appeal:[11]

(a) where the appellant is in *detention* under the Immigration Acts, not later than **5** days after he is served with notice of the Secretary of State's decision (r.7(1)(a));

(b) where the appellant is *within* the UK in any other case, not later than **10** days after he is served with notice of the decision (r.7(1)(b));

(c) where the appellant *was in the UK* when the decision was made but could not appeal while he was in the UK by virtue of a provision of the 2002 Act (and is now outside the UK), not later than **28** days after his departure from the UK (r.7(2)(a)); or

(d) where the appellant is *outside* the UK in any other case, not later than **28** days after he is served with notice of the decision (r.7(2)(b)).

Variation of the grounds of appeal

3.5.4 Rule 14: Subject to the right for an appellant to have a statement under s.120 of the 2002 Act considered by the AIT, the appellant may vary his grounds of appeal only with the permission of the AIT.

Appeals must be determined at a hearing

3.5.5 Rule 15(1): Subject to certain exceptions, every appeal must be considered by the AIT at a hearing.

3.5.6 The exceptions referred to above are as follows:

(a) the appeal lapses by reason of s.99 of the 2002 Act (r.15(1)(a)(i));[12]

(b) the appeal is treated as **ABANDONED**, by virtue of s.104(4), by the appellant being granted leave to remain in or leaving the UK (r.15(1)(a)(ii));

(c) the appeal **LAPSES**, by virtue of s.104(5), due to a deportation order being made against the appellant (r.15(1)(a)(iii));

(d) the appeal is **WITHDRAWN** by the appellant (r.15(1)(a)(iv));

[11] Rule 57 provides that, in calculating time, any period excludes the day on which it begins and where the time limit is less than 10 days, the period will exclude any day which is not a business day.

[12] Section 99 provides that appeals lapse where the Secretary of State certifies that the appellant did not (i) pursue an earlier right of appeal on the same matter (s 96), (ii) that the decision was taken on the grounds of national security (s 97), or (iii) that the decision was taken other grounds of public good (s.98). Rule 16 provides that where the Secretary of State issues a certificate under s 97 of the 2002 Act, the AIT must (once the Secretary of State has filed the certificate at the AIT) take no further action in relation to the appeal.

(e) all parties to the appeal consent to it being determined without a hearing (r.15(2)(a));

(f) the appellant is outside the UK or it is impracticable to give him notice of a hearing, and he is unrepresented (r.15(2)(b));

(g) a party has failed to comply with the AIT Rules and the AIT is satisfied that, in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing (r.15(2)(c)); or

(h) the AIT is satisfied, having regard to the material before it and the nature of the issues raised, that the appeal can justly be determined without a hearing (r.15(2)(d)). In this case the AIT must notify all the parties of its intention to determine the appeal without a hearing and afford the parties an opportunity to make written representations as to whether there should be a hearing.

3.5.7 Rule 15(1)(c) contains a **SWEEP-UP** provision allowing the matter to be determined without an appeal where any other provision of the AIT Rules permits or requires it.

The AIT may sit as a legal panel

3.5.8 Section 103E of the 2002 Act institutes a separate appeal process for proceedings in which the AIT sat as a **PANEL** of three or more **LEGALLY-QUALIFIED MEMBERS**.

3.5.9 Rule 44(1): The AIT is under no duty to consider representations by a party as to the number or class of members sitting.

Hearings in the absence of a party

3.5.10 Rule 19(1): The AIT may[13] hear an appeal in the absence of a party or his representative where it is satisfied that either the party or his representative had been given notice of the time, date and place of the hearing AND "there is no good reason for such absence" .

3.5.11 Rule 19(2): The AIT may hear the appeal in the absence of a party if it is satisfied that:

(a) a representative of the party is present;

(b) the party is outside the UK;

(c) the party is suffering from a communicable disease or there is a risk of him behaving in a violent or disorderly manner;

[13] "May" substituted by SI 2007/835, r.2(a) (Date in force: 10 April 2007: see SI 2007/835, r.1(2).

(d) the party is unable to attend due to illness, accident or some other good reason;

(e) the party is unrepresented and it is impracticable to give him notice of the hearing; or

(f) the party has notified the AIT that he does not wish to attend the hearing.

3.5.12 In *FP (Iran) -v- Secretary of State for the Home Department*,[14] the appellants' asylum cases had been disposed of in their absence where they had not received notification of the hearing dates. This was because their legal representatives had failed to inform the AIT of a change of their addresses.

Pursuant to r.19 of the AIT Rules, the appeals were heard in their absence since no satisfactory explanation was given for their absences. The appellants contended that the empowering provision, s.106 of the Nationality, Immigration and Asylum Act 2002 was not large enough to sanction the injustice worked in cases such as theirs by the combined effect of rules 19(1) and 56.

The Court of Appeal held that rules 19(1) and 56 were unlawful in that they denied a party the opportunity to be heard where through the fault of their representatives; they had not been aware of hearings taking place and had their cases determined against them in their absence.

The Rules resulted in irremediable procedural unfairness. The AIT's refusal to reopen the appeals in light of the reasons for non-appearance was not just permitted but *demanded* by the Rules. It was not possible to read the Rules in any other way. Thus the Rules themselves were unlawful in depriving each individual of a chance to be heard on an issues fundamentally important to them and were incompatible with Art.6 ECHR.

3.5.13 The Home Office has responded immediately to this decision by amending rules 19 and 62(7) (The Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2007).[15] The Tribunal now *may* hear an appeal in the absence of a party or his representative provided certain conditions are met (whereas previously it had no choice). Where the Tribunal could hear if the appeal if the party or his representative had "given no satisfactory explanation for his absence", the requirement has changed where "there is no good reason for such absence". Rule 62(7) deals with transitional provisions and allows the tribunal, when conducting a reconsideration, to consider grounds not considered by the Immigration Appeal Tribunal when granting permission to appeal.

[14] [2007] EWCA Civ 13 (Sedley LJ, Arden LJ, Wall LJ); 23 January 2007.
[15] Statutory Instrument 2007 No. 835 (L. 5).

Special procedures relating to asylum appeals

3.5.14 Special procedures are to be found in Rule 23 which relate to the time limits for hearing of asylum appeals where the appellant is in the UK and is appealing against a decision of the kind specified in s.82 of the 2002 Act.

Any failure to comply with the AIT Rules does not invalidate any step taken in the proceedings

3.5.15 Rule 59(1): Before the AIT has determined an appeal or application, any failure to comply with the AIT Rules will not invalidate any steps taken in the appeal or application unless the AIT so orders.

3.5.16 Rule 59(2): Any determination made by the AIT in an appeal or application remains valid even if a hearing did not take place or the determination was not made or served within a time period specified by the AIT Rules.

3.5.17 A different time limit applies in respect of "Fast Track" appeals under the 2002 Act (paragraph 3.6).

Evidence before the AIT

3.5.18 Rule 51 deals with evidence in hearings before the AIT and provides:

i. The AIT may allow any form of evidence of fact, including evidence which would not be admissible in a court of law (r 51(1)).

ii. However, the AIT cannot, by virtue of r.51(2), compel an Appellant to give evidence or produce a document which he could not be otherwise compelled to give in civil proceedings in that part of the UK.

iii. Rule 51(3) provides that the AIT may require evidence to be given under oath.

iv. Rule 51(4) provides that where the AIT has given time limits as to the filing and service of evidence, it must not consider any written evidence which was not filed and served in accordance with those directions unless it is satisfied that there are good reasons to do so.

v. Rule 51(5) states that, where a party seeks to rely on copy documents, the AIT may require original documents to be produced.

vi. In relation to an appeal to which s.85(5) of the 2002 Act applies,[16] r.51(6) provides that the AIT must only consider matters which it is not prevented from considering by that section.

[16] Section 85(5) provides that in appeals against refusal of entry clearance or a refusal of a certificate of entitlement under s.10 of the 2002 Act the AIT may consider only the circumstances appertaining at the time of the decision to refuse the application.

vii. Rule 51(7) provides that, subject to s.108 of the 2002 Act,[17] the Tribunal must not take account of any evidence which has not been made available to all the parties.

Relevant considerations

3.5.19 Under s.86(2), the AIT must determine any matter raised as a ground of appeal and any other matter which s.85 requires it to consider.

3.5.20 In addition, s.85(2) requires the AIT to consider any matter raised in a statement made by the Applicant under s.120 of the 2002 Act which constitutes a ground for appeal under s.84(1) against the decision which the applicant seeks to appeal.

3.5.21 Under s.85(4), the AIT may consider evidence which it thinks relevant to the substance of the decision. This may include evidence which concerns a matter arising after the date of the decision itself.[18] This was affirmed in *SO (Nigeria) -v- Secretary of State for the Home Department*,[19] where the Court of Appeal held that where claimants applied for indefinite leave to remain in the UK as dependent children and then reached the age of 18 during the time it took for their appeal to be heard, the adjudicator was not limited to treating the applicants as if they were still minors and was entitled, pursuant to s.85(4), to consider their age and maturity.

Allowing an appeal

3.5.22 Section 86(3) of the 2002 Act provides that the AIT must allow the appeal if it thinks that, in the alternative:

(a) *the decision was not taken in accordance with the law or with any applicable immigration rules.*

In *R (on the application of Dhudi Abdi) -v- Secretary of State for the Home Department*,[20] the Court of Appeal held that a decision was not taken "in accordance with the law" in s.86(3)(a) if there was a failure "to act in accordance with established principles of administrative or common law."

In *R (on the application of Kwok Ong Tong) -v- Immigration Appeal Tribunal*,[21] the High Court held that the phrase "any applicable

[17] An investigation in private by the AIT under s.108 of the 2002 Act into a document which has been alleged to be a forgery and in respect of which the disclosure of method of detection of the forgery would be contrary to the public interest.
[18] But note that s.85(5) provides that in appeals against refusal of entry clearance or a refusal of a certificate of entitlement under s.10 of the 2002 Act the AIT may consider only the circumstances appertaining at the time of the decision to refuse the application.
[19] [2006] EWCA Civ 76 (30 January 2007) (Auld, Wall and Hallett LJJ).
[20] [1996] Imm AR 148 (CA).
[21] [1981] Imm AR 214 (Admin).

immigration rules" imposes a duty to consider all aspects of the rule concerned, not just those pleaded by the parties.

(b) *the discretion which was exercised ought to have been exercised differently.*

However, s.86(6) of the 2002 Act provides that a refusal by the Secretary of State to **DEPART** from or authorise departure from the immigration rules will not be taken to be an exercise of **DISCRETION** for the purposes of s.86(3)(b).

3.5.23 The exercise of **DISCRETION** open to appeal in such cases is the exercise of the discretion granted to the Secretary of State under the Immigration Rules.[22] Although the AIT's analysis will often concern issues of extra-statutory discretion or proportionality (for example, in cases concerning Art.8 ECHR), it is the exercise of the Secretary of State's discretion under the Immigration Rules which is at issue.

3.5.24 Section 86(5) provides that the AIT must dismiss the appeal if the requirements of s.86(3) are not met.

Consequences of allowing an appeal

3.5.25 If the immigrant's appeal is allowed, the AIT's determination is **SUBSTITUTED** for the decision of the Secretary of State. Should the appeal be refused, it follows that the Secretary of State's decision remains in place.

3.5.26 Section 87(1) provides that, where the AIT allows an appeal under s.82 or s.83, it may give a direction for the purpose of giving effect to its decision. This direction will, pursuant to s.87(2), be binding on any person responsible for making an immigration decision – he must act in accordance with the directions given.

Abandoned Appeals

3.5.27 Section 104(4) of the 2002 Act has been amended and sections 104(4A), (4B) and (4C) of the 2002 Act have been inserted by the Immigration, Asylum and Nationality Act 2006.[23] Those sections provide that an appeal brought by a person *within* the UK under s.82(1) of the 2002 Act will be treated as having been **ABANDONED** if that person:

(a) leaves the UK (s.104(4));

(b) is granted leave to enter or remain in the UK *subject to qualifications* (s.104(4A));

[22] HC 395.
[23] Section 9, in force from 13 November 2006 (SI 2006/2838), Article 3.

3.5.28 The first qualification (under s.104(4B)) applies where the appellant is granted leave to enter or remain in the UK for a period exceeding 12 months. The appeal will be *not* be regarded as being abandoned if it is brought on the ground that removal from the UK would breach the UK's obligations under the Refugee Convention or be unlawful under s.6 of the Human Rights Act 1998 and the appellant formally gives notice that he or she wishes to continue the appeal on this ground.

3.5.29 The second qualification (under s.104(4C)) is that an appeal will *not* be regarded as being abandoned if it is brought on the ground that the decision is unlawful by virtue of s.19B of the Race Relations Act 1976 and the appellant formally gives notice that he or she wishes to continue the appeal on this ground.

3.5.30 The leading case law relating to abandoned appeals arose out of s.58(8) of the 1999 Act, which provided that an appeal was treated as abandoned if the Appellant left the UK. In *AM (Afghanistan) -v- Secretary of State for the Home Department*,[24] the IAT held that if an appellant left the country before the appeal was heard, the appeal was treated as abandoned no matter how short the period of absence.

3.5.31 A determination that an appeal has been abandoned is one which may itself be appealed (see *Gremesty -v- Secretary of State for the Home Department*, an IAT starred determination).[25]

3.5.32 In *Shirazi -v- Secretary of State for the Home Department*,[26] the Court of Appeal held, in the context of the 1999 Act, that appeals to that Court were not touched by the legislation governing abandoned appeals or appeals that have become moot. Sedley LJ stated that it would be contrary to principle, except in obedience to an unequivocal statutory requirement, to introduce a rule which arbitrarily truncates access to justice in that Court.

3.6 Fast track appeals to the AIT

3.6.1 On 4 April 2005 the *Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005*[27] (the "**2005 FAST TRACK RULES**") came into force, replacing the original Fast Track Rules as from that date.

3.6.2 The 2005 Fast Track Rules apply only where an immigrant is detained in a named **DETENTION FACILITY**[28] at the time he is served with a notice of the Secretary of State's decision and has been detained there continuously since

[24] [2004] UKIAT 00186 *(IAT starred).*
[25] [2001] UKIAT 01TH00096 [2001] INLR 132 (IAT starred determination).
[26] [2003] EWCA Civ 1562; [2004] 2 All ER 602; The Times, 27 November 2003 (CA) at [14]. Mummery LJ and Munby J agreed.
[27] SI 2005 No. 560.
[28] The facilities named in Schedule 2 to the 2005 Fast Track Rules are Campsfield House Immigration Removal Centre (Kidlington, Oxfordshire), Colnbrook House Immigration Removal Centre and Harmondsworth Immigration Removal Centre (both Harmondsworth, Middlesex) and Yarls Wood Immigration Removal Centre (Clapham, Bedfordshire). Other centres may be added from time to time.

the notice was served.[29] Contact details of the detention centres can be found here. The 2005 Fast Track Rules modify the AIT Rules only insofar as they apply to that immigrant. The principal modifications to the regime outlined above are as follows:

(a) Rule 8(1): The appellant must lodge a notice of appeal not later than 2 days after the day on which he is served with notice of the immigration decision against which he is appealing.

(b) Rule 8(2): The AIT must not extend the time limit for appealing unless it is satisfied that, because of circumstances outside the control of the person or his representative, it was not practicable for the notice of appeal to be lodged within the time limit.

(c) The time frame for consideration of the appeal and the service of the AIT's determination is substantially reduced.

(d) Rule 28: The AIT may only **ADJOURN** a fast track hearing where:

- it is necessary as there is insufficient time to hear the appeal or application;
- a party has not been served with notice of the hearing in accordance with Rules; or
- the AIT is satisfied by evidence filed by a party that the appeal or application cannot justly be determined on the date for which it has been listed and there is an identifiable date (not more than 10 days after the date on which the appeal or application was originally listed) by which it can be justly determined.
- the appeal is transferred out of the Fast Track system.

(e) Rule 30: The AIT may transfer proceedings out of the fast track if:

- all parties consent;
- it is satisfied that, on the basis of evidence filed by a party, there are exceptional circumstances which mean that the application or appeal cannot otherwise be justly determined; or
- the Respondent has failed to comply with the Rules, the AIT Rules or a direction of the AIT and the AIT is satisfied that the appellant would be prejudiced by that failure were the appeal or application to be determined under the fast track.

3.6.3 In *R (on the application of the Refugee Legal Centre) -v- Secretary of State for the Home Department*,[30] the Court of Appeal considered the fast track (operated under the 2003 Fast Track Rules) system as being operated at Harmondsworth. That system is limited to single male applicants from countries in which the Secretary of State believes that there is no serious risk of persecution. The Court held that provided the fast track system was

[29] Rule 5(1) of the 2005 Fast Track Rules.
[30] [2004] EWCA Civ 1481; [2005] 1 W.L.R. 2219; [2004] All ER (D) 201 (Nov) (CA).

operated flexibly it was not inherently unfair, but nevertheless recommended the adoption of a written flexibility policy to which officials and representatives alike could work.[31]

[31] This proposition was accepted by the Home Office in legal argument.

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CHAPTER 4:

REVIEW OF THE DECISION OF THE AIT

4.1 Right to apply to the High Court for an order requiring the Tribunal to reconsider its decision

Section 103A : ***Review of Tribunal's Decision***

(1) A party to an appeal…may apply to the appropriate court, on the grounds that the Tribunal made an **error of law**, for an order requiring the Tribunal to **reconsider** its decision on the appeal.

(2) The appropriate court may make an order under subsection (1) —

(a) only if it thinks that the Tribunal may have made an error of law, and

(b) only once in relation to an appeal.

(3) **[TIME LIMITS]** An application under subsection (1) must be made—

(a) in the case of an application by the appellant [in UK], within the period of **5** days beginning with the date on which he is treated, in accordance with rules under section 106, as receiving notice of the Tribunal's decision,

(b) in the case of an application by the appellant [outside UK], within the period of **28** days beginning with the date on which he is treated, in accordance with rules under section 106, as receiving notice of the Tribunal's decision, and

(c) in the case of an application brought by a party to the appeal other than the appellant, within the period of **5** days beginning with the date on which he is treated, in accordance with rules under section 106, as receiving notice of the Tribunal's decision.

4.1.1 Section 103A(1) of the 2002 Act was inserted by s.26(6) of the 2004 Act. For exceptions to it, see paragraph 4.2 on the filter mechanism below. The "appropriate Court" is generally the High Court. This section only applies where the AIT was <u>not</u> composed of three or more legally qualified members (s.103A(8)).

4.1.2 Section 103A(6) provides that a decision of the High Court under s.103A(1) will be final – there is no further avenue of appeal.

4.1.3 Section 103A(4)(b) creates an exception to the time limits set out in s.103A(3) by permitting an application to the High Court to be made out of

time where that the application could not reasonably practicably have been made within the requisite time period.

Respondent's Reply

4.1.4 Rule 30 of the AIT Rules provides that where an order for reconsideration has been made by the Immigration Judge, High Court or the Court of Appeal, if the other party intends to argue that the AIT should uphold the initial determination for reasons different from or additional to those given in the initial determination, he must serve a reply on both the AIT and the appellant.

Material Error of Law

4.1.5 Under Rule 31(2), when undertaking a s.103A reconsideration, the AIT must first decide whether the original tribunal made a material error of law. A material error of law is defined in r.31(5) as an error of law "*which affected the [AIT's] decision on the appeal*". If it decides that the original tribunal did not make an error of law, it must order that the original determination is to stand.

Judicial Review as a Final Resort

4.1.6 In *R (AM (Cameroon)) -v- Asylum & Immigration Tribunal*,[1] the Court of Appeal held that in exceptional circumstances it was possible for a court to grant permission for judicial review of **INTERLOCUTORY** decisions of an immigration judge *despite* the fact that a High Court judge had rejected the applicant's case for reconsideration under s.103A of the 2002 Act. The judicial review jurisdiction was not excluded by s.103A(6) of the Act and a court was arguably not prevented from granting such relief as was necessary where "gross procedural unfairness" was established.

4.2 The Filter Mechanism – Review of the AIT's Decision by a Senior Member of the AIT

Legislative Scheme

4.2.1 (See paragraph 3.2.1 above for an introduction). The regime provides that, in relation to applications for review by the High Court under s.103A(1) of the 2002 Act or for permission to seek review out of time under s.103A(4), an immigration judge on the AIT panel will consider the application for review prior to it being considered by the High Court.[2]

Provisions in the AIT Rules Relating to the Filter Process

4.2.2 Rule 26 of the AIT rules provides that s.103A applications are to be decided by an immigration judge (who has been authorised by the President of the

[1] [2007] EWCA Civ 131 (Waller VP, Rix and Hooper LJJ), 21 February 2007.
[2] Paragraph 30(2) of Schedule 2 to the 2004 Act.

AIT to deal with such applications) without a hearing. The judge is not obliged to consider any grounds other than those set out in the application notice and then by reference only to the applicant's written submissions and the documents filed with the application notice. Such an application must be dealt with by the AIT within **10** days of receipt of the application notice.

4.2.3 The immigration judge considering the application may, by virtue of paragraph 30(4) of Schedule 2 to the 2004 Act:

(a) make an order under s.103A(1) or grant permission under s.103A(4)(b); or

(b) refuse to make such an order or grant permission (in which case he must notify the High Court and the Applicant).

4.2.4 Rule 26(6) of the AIT Rules provides that the immigration judge may make the order for reconsideration only if he thinks that:

(a) the AIT may have made an error of law; and

(b) there is a real possibility that the AIT would decide the appeal differently on reconsideration.

4.2.5 Paragraph 30(7) of Schedule 2 to the 2004 Act provides that the immigration judge may <u>not,</u> in such circumstances, make a reference directly to the Court of Appeal under s.103C.

4.2.6 Under r.27 of the AIT Rules, the immigration judge must give reasons for his decision (although these may be in summary form). He may also give directions as to any subsequent hearing, including directions as to the number or class of members of the AIT to whom the reconsideration is to be allocated. Rule 27(5) contains special provisions relating to service of any decision where the matter relates to an asylum claim and the appellant is in the UK.

4.2.7 Where the immigration judge refuses to make an order or grant permission, the Applicant may (under paragraph 30(5) of Schedule 2 to the 2004 Act) notify the High Court that he wishes it to consider his application nevertheless. This notification must be made within 5 days of the date on which, in accordance with s.106 of the 2002 Act, the Applicant is treated as having received notice of the decision to refuse to make the order or grant permission.[3]

4.2.8 The High Court <u>must</u> consider the application if it was made in time.[4] If the application was made out of time, the High Court may nevertheless

[3] Paragraph 30(5)(b) of Schedule 2 to the 2004 Act.
[4] Paragraph 30(5)(c)(i) of Schedule 2 to the 2004 Act.

consider it if it concludes that the notice could not reasonably have been given within the prescribed period.[5]

Provisions in the 2005 Fast Track Rules Relating to the Filter Process

4.2.9 Section 1 of Part 2 of the 2005 Fast Track Rules contains provisions governing hearings where one of the parties has requested that the AIT reconsider its determination under the filter process. Although the Rules provide that many of the relevant provisions of the AIT Rules will continue to apply, there are certain modifications, including the following:

(a) Rule 17(a) provides that, as soon as practicable following receipt of the application from the applicant, the AIT must serve copies on the other parties.

(b) By virtue of r.17(b), if those parties wish to file a response, they must do so no later than one day after the date on which they are served with the application.

(c) Rule 18 provides that the AIT will decide the application *without* a hearing and by reference only to the applicant's written submissions, the documents filed with the application notice and any submissions filed in response.

(d) The AIT must serve a copy of the notice of decision and any directions within one day of the date of filing of any submissions under r.17(b) or, if no response was filed, not more than one day after the expiry of the one-day time limit referred to in r.17(b).

4.3 Reconsideration of appeals by the AIT

Reconsideration under the AIT Rules

4.3.1 This section applies to all reconsiderations of AIT decisions, whether by virtue of the filter process, orders of the High Court or the Court of Appeal.

4.3.2 Rule 31(2) states that, when undertaking a reconsideration pursuant to an order under s.103A, the AIT must first decide whether the original tribunal made a material error of law. A material error of law is defined in r.31(5) as an error of law *"which affected the [AIT's] decision on the appeal"*. If it decides that the original tribunal did not make an error of law, it must order that the original determination is to stand.

4.3.3 Rule 31(4) provides that, in carrying out its reconsideration, the AIT may limit the submissions or evidence to one or more specified issues and must have regard to the directions of the immigration judge or court which

[5] Paragraph 30(5)(c)(ii) of Schedule 2 to the 2004 Act.

ordered the reconsideration (see *HB (Albania) -v- Secretary of State for the Home Department*).[6]

4.3.4 Rule 31(3) provides that, in a reconsideration, that the AIT must substitute a fresh decision to allow or dismiss the appeal.[7]

4.3.5 Rule 32 deals with evidence before the AIT during a reconsideration:

(a) Under Rule 32(1), the AIT may consider any note or record made by the original tribunal at any previous hearing at which the appeal was considered.

(b) Rule 32(2) provides that if a party wishes to adduce evidence which was not before the original tribunal, he must serve written notice on the AIT and the other party indicating the nature of the evidence and explaining why it was not submitted on any previous occasion. If the AIT decides to admit the evidence, it may give directions as to the manner of and time limit for filing the evidence.

4.3.6 In *Yacoubou and anr -v- Secretary of State for the Home Department*[8] Brooke LJ, with whom Dyson and Hooper LJJ agreed, considered that under Rules 31 & 32 the AIT had a complete **DISCRETION** as to how to conduct the reconsideration. He said that this discretion related equally to reconsiderations under the 2005 Fast Track Rules.

4.3.7 In *DK (Serbia) & Ors -v- Secretary of State for the Home Department*,[9] the Court of Appeal set out the following principles as to how **RECONSIDERATIONS** should be conducted (in effect, how **SECTION 103A** of the 2002 Act is to be interpreted):

(a) The AIT is entitled to approach a reconsideration, and to give directions accordingly, on the basis that the reconsideration would first determine whether there were any identifiable errors of law and secondly would consider the effect of any such errors on the original decision.

(b) The identification of errors of law should normally be restricted to those grounds upon which the immigration judge had ordered reconsideration. That assessment should *prima facie* take place on the basis of the findings of fact and the conclusions of the original tribunal, save and in so far as they had been infected by any errors of law. If they had not been so infected the AIT should only revisit them if there was new evidence or material that should be received in the interests of justice and which could effect those findings and

[6] [2007] EWCA Civ 569 at [29] (14 June 2007).
[7] This duty is expressed to be subject to r.31(2), which relates to reconsiderations pursuant to orders made under s.103A.
[8] [2005] EWCA Civ 1051 (CA) at [19].
[9] [2006] EWCA Civ 1747 (Latham LJ, Longmore LJ, Moore-Bick LJ); 20 December 2006.

conclusions or if there were other exceptional circumstances that justified reopening them.

(c) In some cases the reconsideration could be dealt with in one hearing but, where it was not easy to identify what errors of law might be found, a single hearing would be wholly inappropriate because it would fail to give either party a fair opportunity to deal with the substance of the reconsideration, and the errors of law identified might result in the need to consider evidence or material not available at the original hearing. The Practice Directions started from the assumption that the reconsideration should take place at a single hearing unless good reason was shown to the contrary.

(d) The issues to be determined at the initial reconsideration hearing should be clearly identifiable from the notice of application, the order for reconsideration and directions (if any), any reply and any notices to admit further evidence under r.32(2) of the AIT Rules.

(e) Both parties could then make submissions about whether they considered that the reconsideration could be disposed of at that hearing and the tribunal could give directions as to the procedure to be followed.

(f) If the AIT found that a second hearing was necessary, it should give written reasons for its finding so that the parties could understand the impact of the tribunal's conclusion on the scope of the second stage of the reconsideration.

4.3.8 The AIT should not simply order the reconsideration of a *whole* case – a reconsideration should not consider findings that had not been challenged on the request for reconsideration unless there was new material or exceptional circumstances (*HF (Algeria) -v- Secretary of State for the Home Department*).[10]

4.3.9 It is AIT practice for the panel hearing a first stage reconsideration to draw up a **PINK FORM** setting out reasons for its decision that there had been an error of law. In *WM (DRC) -v- Secretary of State for the Home Department*,[11] the Court of Appeal held that the pink form should be shown to parties before second determinations.

Under Paragraph 14.4 of the AIT Practice Direction, where the AIT transfers the proceedings (under para 14.2), it must prepare written reasons for its finding that the original Tribunal made a material error of law and include those reasons with the determination of the Tribunal which substitutes a fresh decision to allow or dismiss the appeal.

The Court of Appeal emphasised that this paragraph was a reminder that second stage reconsiderations took place in the context of the determinations of first stage reconsiderations, and on the basis of accurate

[10] [2007] EWCA Civ 445 (17 May 2007) (Carnwath, Hallett, Lawrence Collins LJJ).
[11] [2006] EWCA Civ 1780 (7 December 2006) (Buxton, Longmore and Carnwath LJJ).

accounts of those hearings. Failure to apply Paragraph 14.4 can amount to a material error of law.

4.3.10 Similarly, in *NM (Iraq) -v- Secretary of State for the Home Department*,[12] the Court of Appeal held that all matters relating to the existence of a material error of law were to be conclusively determined at the first stage reconsideration and the decision was to be incorporated into the second stage reconsideration. At the second stage it was not open to the parties, save in exceptional circumstances, to reargue issues going to the existence or otherwise of a material error of law.

4.3.11 In *Swash -v- Secretary of State for the Home Department*,[13] after referring to the determination originally promulgated by the first Adjudicator, a single immigration judge hearing a reconsideration, found the appellant's evidence not to be credible. The issue before the Court of Appeal was whether, on a reconsideration, the AIT hearing the appeal ought to have access to the determination originally promulgated. The Appellant argued that there was an appearance of bias in that the immigration judge might have been influenced by the adverse credibility findings made by the original adjudicator.

The Court of Appeal rejected this argument as, in English civil litigation, where the matter had been remitted by an appeal court to be reconsidered by the lower court, it was invariably the case that the second court would have access to the judgment of the first. The Court was not prepared to lay down general principles as to when an immigration judge should or should not have access to a previous decision. The general rule is that there should be access to the previous decision. However, in exceptional circumstances this might have to be displaced in the interests of justice –an order to such effect would be necessary.

Reconsideration under the Fast Track Rules

4.3.12 Section 2 of Part 2 of the 2005 Fast Track Rules contains provisions governing hearings where the High Court has ordered a reconsideration. Although the 2005 Fast Track Rules provide that many of the relevant provisions of the AIT Rules will continue to apply, there are certain modifications, including:

(a) The time limits for fixing a reconsideration hearing are substantially reduced. Rule 21(1) of the Fast Track Rules provides that the hearing must be fixed for not later than two days after the High Court order has been served on the parties or, if the AIT is not able to fix a hearing within that time frame, as soon as practicable thereafter.

(b) If a party wishes the AIT to consider **FRESH EVIDENCE** at the reconsideration, r.22 provides that he must, if practicable, notify the

[12] [2007] EWCA Civ 359 (26 February 2007) (Laws, Scott Baker and Wilson LJJ).
[13] [2006] EWCA Civ 1093; [2007] 1 W.LR. 1264; [2007] 1 All ER 1033 (26 July 2006).

AIT of the nature of the evidence and the reasons why it was not submitted on any previous occasion prior to the date fixed for the hearing.

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CHAPTER 5:

JUDICIAL REVIEW OF IMMIGRATION DECISIONS

5.1 The Availability of Judicial Review

5.1.1 There are three *primary* categories of decision in respect of which judicial review is available:

(a) Cases relating to certificates issued by the Secretary of State under s.94 of the 2002 Act that the claim for asylum is clearly **UNFOUNDED**.

(b) Cases in which a failed asylum seeker attempts to make a "**FRESH CLAIM**" based on new material after his or her appeals have failed.

(c) Cases in which the Secretary of State has given **REMOVAL DIRECTIONS**, that is directions for the removal of a person who is not a British citizen from the UK pursuant to s.10 of the Immigration and Asylum Act 1999.

Judicial Review NOT available for High Court's refusal to order a reconsideration

5.1.2 In *R (on the application of M and G) -v- Immigration Appeal Tribunal and another*,[1] the Court of Appeal considered the operation of **STATUTORY REVIEW** under s.101 of the unamended 2002 Act. Very briefly put, statutory review was the process whereby the High Court could consider whether the IAT was wrong to refuse permission to appeal to itself (PTA) from the decision of an adjudicator. The court held that once the High Court had affirmed the IAT's decision (to refuse PTA), it was not open to the applicant to seek to judicially review the IAT's refusal.

5.1.3 Claimants in the IAT would no doubt prefer judicial review because review by a High Court judge on paper is a less comprehensive protection than the four-stage process of judicial review, including as it does two opportunities for oral submissions. The claimants argued that a remedy falling short of the full judicial review procedure could not possibly be said to be proportionate when what was at stake was fundamental human rights (primarily because they were denied the opportunity to have an oral hearing).

5.1.4 The Court of Appeal rejected these arguments as they ran directly contrary to the purpose of the statutory scheme and where Parliament enacts a remedy with the clear intention that this should be pursued in place of judicial review, it is appropriate to have regard to the considerations giving

[1] [2004] EWCA Civ 1731; [2005] 1 W.L.R. 1445 (Lord Phillips MR and Sedley and Scott Baker LJJ) (16 December 2004).

rise to that intention. The intention was undoubtedly to avoid the unacceptable delays in bringing asylum proceedings to an end and as it was common ground that if judicial review was available the system would be significantly slowed. Given that there was a two stage hearing, the applicant would have had sufficient opportunity to present his case and this situation was not so exceptional that judicial review should be available even though an alternative statutory remedy was available.

5.1.5 Statutory review has now been abolished. However a vaguely analogous process is in place under s.103A of the 2002 Act (see paragraph 3.2 and the discussion of *DK (Serbia)* in paragraph 4.3.7 above). In *F (Mongolia) -v- Secretary of State for the Home Department*,[2] the Court of Appeal *solely* considered whether it was still bound by *G* given two subsequent developments. It did not consider whether or not *G* was incorrectly decided as that will be a matter for the House of Lords (which, at the time of writing, has not granted leave to appeal) (Buxton LJ, *obiter*, suggested that he considered *G* to have been correctly decided).

5.1.6 The Court of Appeal rejected the argument that *G* was no longer binding given two recent decisions of the House of Lords on discrimination (*A -v- Secretary of State for the Home*[3] and *Clift v- Secretary of State for the Home Department*[4]) (see paragraph 9.10.1 below). It also rejected the argument that the decision in *G* was limited to the the unamended *2002 Act* and did not apply to the new procedure under s.103A. Buxton LJ rejected the underlying argument that, as there was no longer a two-tier system (the reconsideration process not *truly* being two-tier), a claimant's case was given less attention.

5.2 Claims Certified as Unfounded

5.2.1 Section 94(1A) of the 2002 Act provides that an Applicant may not appeal against an immigration decision of the following kind where the Secretary of State certifies that the claim or claims mentioned in s.94(1) is or are unfounded:

(a) refusal of a certificate of entitlement (to abode in the UK) under s.10 of the 2002 Act;

(b) refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain (except where the leave was given in circumstances specified for the purposes of s.94(6B) by order of the Secretary of State).[5]

(c) variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain

[2] [2007] EWCA Civ 769 (MR and Buxton and Lawrence Collins LJJ) (25 July 2007).
[3] [2004] UKHL 56; [2005] 2 A.C. 68.
[4] [2006] UKHL 54; [2007] 2 W.L.R. 24.
[5] Inserted by s.13 of the Immigration, Asylum and Nationality Act 2006.

(except where the leave was given in circumstances specified for the purposes of s.94(6B) by order of the Secretary of State).

(d) a decision that a person is to be removed from the UK by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave).

5.2.2 The claim or claims must relate to an asylum or human rights claim, or both.

5.2.3 In addition, where the Secretary of State is satisfied that an Applicant is entitled to reside in a state listed in s.94(4), he must certify the claim as clearly unfounded unless satisfied that it is not clearly unfounded. Those states are (as of 23 August 2007):

Republic of Albania	*Serbia and Montenegro*	*Jamaica*
Macedonia,	*Republic of Moldova*	*Bolivia*
Brazil	*Ecuador*	*South Africa*
Ukraine	*India*	*Mongolia*
Ghana (in respect of men)		*Nigeria (in respect of men)*

5.2.4 The list reflects those states in which the Secretary of State considers there is in general no serious risk of persecution of persons entitled to reside in there or that removal to that State or part of persons entitled to reside there will not in general contravene the UK's ECHR obligations.

5.2.5 If a claim is certified as clearly unfounded, there is no right of appeal against the Secretary of State's immigration decision. The decision to issue a certificate is thus one which is amenable to judicial review.

5.2.6 The Courts have not specifically addressed the question as to their role in reviewing the certification of a claim as unfounded. However, there are general dicta which are applicable to this task. In *R (on the application of Razgar) -v- Secretary of State for the Home Department*,[6] Richards J (as he then was) held that the Court's role is to apply the *Wednesbury* test to determine whether the Secretary of State's decision was reasonably open to him. However, court must give **ANXIOUS SCRUTINY** in determining whether on the material before the Secretary of State, the claimant had an arguable case that removal would be in breach of his Convention rights. If not, his case must fail. This dicta was approved by the Court of Appeal.[7]

5.2.7 In the Lords , Lord Bingham held that (at [17]) the reviewing court must consider how an appeal would be likely to fare before an adjudicator, as the

[6] [2002] EWHC 2554 (Admin); [2003] Imm AR 529 at [30].
[7] [2003] EWCA Civ 840.

tribunal responsible for deciding the appeal. The reviewing court must thus ask itself essentially the questions which would have to be answered by an adjudicator.

5.2.8 In *Tozlukaya -v- Secretary of State for the Home Department*,[8] the Court of Appeal held that because a claim is either clearly unfounded or not (admitting of only one answer), the court exercising a supervisory jurisdiction is in as good a position as the Secretary of State to determine whether the test is met, since the test is an objective one and the court has the same materials before it.

5.2.9 In *WM (DRC) -v- Secretary of State for the Home Department*, Buxton LJ concluded that a different approach must be taken when dealing with fresh claims.

5.3 Fresh Claims

5.3.1 Once a failed asylum applicant has gone through all the routes of appeal, he or she might attempt to produce new material that is said to provide the basis for a "**FRESH CLAIM**".

5.3.2 The Secretary of State's consideration of such material is governed by rule **353** of the Immigration Rules, which provides:

> **When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:**
>
> **i) had not already been considered; and**
>
> **ii) taken together with the previously considered material,**
>
> **created a realistic prospect of success, notwithstanding its rejection [emphasis added].**

5.3.3 As there is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim, a challenge to that decision can only be brought by way of judicial review.

5.3.4 Definitive guidance on this issue has been provided by the Court of Appeal in *WM (DRC) -v- Secretary of State for the Home Department*.[9] The Secretary of State's task is as follows:

(1) He has to consider the new material *together* with the old and make two judgements:

[8] [2006] EWCA Civ 379.
[9] [2006] EWCA Civ 1495 (9 November 2006) at [6].

(a) Whether the new material is *significantly different* from that already submitted (on the basis of which the asylum failed)

➔ If not, that is the end of the matter.

(b) Whether the addition of the new material creates a realistic prospect of success in a further asylum claim. This involves:

i. judging the reliability of the new material AND

ii. judging the outcome of tribunal proceedings based on that material

(c) To set aside a troubling issue, in assessing the reliability of new material, can have in mind both:

i. how the material relates to other material already found by an adjudicator to be reliable; and

ii. also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, this may be of little relevance when the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

5.3.5 The Court characterised the test as "modest". The question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. The adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. All the decision-makers, the Secretary of State, the adjudicator and the Court, must be informed by the **ANXIOUS SCRUTINY** of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution.

5.3.6 Applying *Cakabay -v- Secretary of State for the Home Department*,[10] the Court held that the Secretary of State's decision could only be reviewed on ***WEDNESBURY*** grounds. However, as Buxton LJ emphasised (at [10]), although the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny.

5.3.7 Buxton LJ carefully explained why a different approach to that taken in reviewing the Secretary of State's decision that a claim was unfounded should be taken when reviewing his decision that a claim did not constitute a fresh claim.[11]

[10] [1999] Imm AR 176.
[11] See [13] – [20].

5.4 Removal Directions

5.4.1 Under s.10 of the Asylum and Immigration Act 1999, a person who is not a British citizen may be removed from the UK if —

- having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
- he uses deception in seeking (whether successfully or not) leave to remain;
- his indefinite leave to enter or remain has been revoked under s.76(3) of the 2002 Act (person ceasing to be refugee); or
- directions have been given for the removal, under s.10, of a person to whose family he belongs.

5.4.2 The Secretary of State is required to give written notice of his intention to deport that person (s.10(3)). When a person is notified of removal directions, the notification invalidates any leave to enter or remain in the UK (s.10(3)). If a notice is sent by first class post to a person's last known address, service is deemed to take place at the end of the second day after the day of posting (s. 10(5)).

5.4.3 In *R (on the application of Lim & Anor) -v- Secretary of State for the Home Department*,[12] the Court of Appeal considered how a s.10 decision could be challenged. Removal directions had been set for Mr Lim (under s.10(1)(a)) after he was supposedly discovered to have breached a condition of his leave to remain (by working at a different restaurant from that specified in his work permit). He denied this allegation claiming he was only seen at the other restaurant collecting goods. His wife was automatically to be removed because of the operation of s.10(1)(c).

5.4.4 A s.10 decision can be challenged under s.82 of the 2002 Act (see paragraph 3.4.1(g) above). However, s.92 of the 2002 Act provides that a person may not appeal to the AIT while still in the UK unless his appeal is on the grounds that removal would infringe his ECHR rights or breach the UK's obligations under the Refugee Convention (s.84(1)(g)).

5.4.5 Given that the appellant's claim had been certified as being unfounded, how could he challenge a removal decision on the basis that it was premised on a factual error? His two options were an '**OUT-OF-COUNTRY APPEAL**' or a judicial review challenge. The difficulty with the latter obviously being that it is a remedy of last resort and the existence of an out of country appeal might render it inappropriate.

5.4.6 Sedley LJ noted, as a relevant factor, that if an out-of-country appeal succeeded, the appellant would have to pay for his or her own return to the

[12] [2007] EWCA Civ 773 (25 July 2007) (Sir Mark Potter (President Fam), Sedley and Wilson LJJ).

UK. The only exception to this is that, if the AIT holds the removal to have been not merely mistaken but unlawful, the appellant, having been removed at public expense, will be brought back at public expense.

5.4.7 He held that whether the appellant was liable to removal as an illegal entrant was a **PRECEDENT FACT** (whether the work permit condition was breached) for a court to decide, and which it was for the Home Secretary to establish to a high degree of probability. He held, relying on *Khawaja -v- Home Secretary*,[13] that the non-existence of a precedent fact relating to immigration status can deprive the decision-maker of power to decide and render any purported decision void. The most appropriate forum competent to decide the existence of precedent fact is the High Court, since the issue goes to jurisdiction.

5.4.8 The Court of Appeal held that all questions arising under s.10 were to be regarded as appealable and reviewable and the use of judicial review had to be calibrated to the nature of the issues through the exercise of judicial discretion so that both *Khawaja* and s.82 could be respected. However, Sedley LJ concluded that this case presented the kind of issue for which the legislation, for better or for worse, prescribed an out-of-country appeal. Hence judicial review was not available.

5.5 Stay of Removal

5.5.1 Sedley LJ has commented that, when it comes to the Secretary of State issuing removal directions there is often a 'remarkable burst of urgency in a system celebrated for dilatoriness'.[14]

Practical Background

5.5.2 The **BORDER AND IMMIGRATION AGENCY** (BIA) is a new executive agency of the Home Office. The Agency assumes the responsibilities of the Immigration and Nationality Directorate (IND) for managing immigration control in the UK.

5.5.3 The **COMMAND AND CONTROL UNIT** (ask for the Duty Immigration Officer) are available to the Court 24 hours, 7 days a week and if contacted (the number if held by the Deputy Masters) are able to provide the following information:

- Immigration Offences committed.
- Any Immigration paperwork served and its relevance.
- Applications made and dealt with.
- Any relevant appeals made and the outcome.
- Any criminal background.

[13] [1984] 1 A.C. 74
[14] *R (on the application of Lim & Anor) -v- Secretary of State for the Home Department* [2007] EWCA Civ 773 at [3].

- Any relevant personal and medical details and circumstances.

5.5.4 In most enforcement cases, the **OPERATIONAL SUPPORT AND CERTIFICATION UNIT (OSCU)** have responsibility as a point of contact when removal duirections are in place and will provide advice to **LOCAL ENFORCEMENT OFFICES (LEOS)** concerning removal. Where removal directions have been cancelled and judicial review proceedings have commenced, the case will be handle by the **JUDICIAL REVIEW UNIT (JRU)**.

5.5.5 BIA must give 72 hours (at least two working days) notice of removal. They must also notify the person's legal representatives if they have the details. Removal directions should be accompanied by a short factual summary of the case which includes notification that the case is one to which paragraph 18 of the Practice Direction supplementing CPR Part 54 (set out here for convenience):

18.1 (1) This Section applies where-

(a) a person has been served with [removal directions]; and

(b) that person makes an application for permission to apply for judicial review before his removal takes effect.

(2) This Section does not prevent a person from applying for judicial review after he has been removed.

(3) The [following] requirements…are additional to those contained elsewhere in [PD].

18.2 (1) A person who makes an application for permission to apply for judicial review must file a claim form and a copy at court, and the claim form must-

(a) indicate on its face that this Section of the Practice Direction applies, and

(b) be accompanied by-

i. a copy of the removal directions and the decision to which the application relates; and

ii. any document served with the removal directions including any document which contains the Immigration and Nationality Directorate's factual summary of the case; and

(c) contain or be accompanied by the detailed statement of the claimant's grounds for bringing the claim for judicial review; or

(d) if the claimant is unable to comply with paragraph (b) or (c), contain or be accompanied by a statement of the reasons why.

(2) The claimant must, immediately upon issue of the claim, send copies of the issued claim form and accompanying documents to the address specified by the Immigration and Nationality Directorate.

18.3 Where the claimant has not complied with paragraph 18.2(1)(b) or (c) and has provided reasons why he is unable to comply, and the court has issued the claim form, the Administrative Court-

(a) will refer the matter to a Judge for consideration as soon as practicable; and

(b) will notify the parties that it has done so.

18.3 If, upon a refusal to grant permission to apply for judicial review, the Court indicates that the application is clearly without merit, that indication will be included in the order refusing permission.

Legal Background

5.5.6 The Treasury Solicitor and the Immigration and Nationality Directorate had previously operated on an arrangement with the High Court (the "***CONCORDAT***") in respect of immigration judicial review proceedings (where the applicant was subject to removal directions). Provided that an application for judicial review is lodged and an Administrative Court Office number is obtained within **3** working days (where the claimant is detained) or **5** working days (where the claimant is not detained) of the relevant decision, removal directions will not be implemented pending the decision as to whether, on the papers, to grant permission. In practice, if a claimant renews the application within **7** days after the refusal, the Secretary of State does not usually remove him until after the judicial review process has been exhausted.

5.5.7 In *R (on the application of Pharis) -v- Secretary of State for the Home Department*,[15] it was held that the filing of an application for permission to appeal against a refusal to grant permission to apply for judicial review at the CIVIL APPEALS OFFICE would not *of itself* stay any removal process.

5.5.8 There has never been a *Concordat* like agreement with the Court of Appeal. This was because judicial review proceedings in the immigration and asylum field have given rise to very serious abuse, with appellants pursuing wholly unmeritorious appeals simply to delay the time when they are to be deported. An ***express*** application would have to be made to the Court of Appeal for this purpose.

5.5.9 The Court of Appeal had consulted the Master of the Rolls and concluded that seeking to appeal a refusal to claim judicial review does not give rise to an automatic stay of the deportation process.

5.5.10 If the appellant wishes to seek a stay, he/she must make an express application for this purpose which the staff of the Civil Appeals Office must place before a Lord Justice for a ruling on paper.

Last Minute Challenges to Imminent Removal

5.5.11 In *Madan & Kapoor -v- Secretary for the Home Department*,[16] the Court of Appeal (Master of the Rolls and Buxton and Lawrence Collins LJJ) set out clear guidance as to how late challenges to removal directions (including applications for last minute injunctions) should be conducted. The proceedings in the Administrative Court challenging removal on the very day removal was due to take place despite the solicitors having known, in the case of Mr Kapoor for several months, that deportation had been ordered. Mitting J concluded that the delay was deliberate, in order to make

[15] [2004] EWCA Civ 654; [2004] 3 All ER 310; The Times, 27 May 2004 (CA).
[16] [2007] EWCA Civ 770.

it impossible for proper judicial consideration to be given to the underlying merits. Buxton LJ set out the following principles:

i) CPR PD 54.18 makes provision for the hearing of judicial review applications in the Administrative Court against removal from the jurisdiction. Such applications must be made promptly on the intimation of a deportation decision, and not await the actual fixing of removal arrangements.

ii) The detailed statement required by PD 18.2(c) must include a statement of all previous applications made in respect of the applicant's immigration status, and indicate how the present state of the case differs from previous applications.

iii) Counsel or solicitors attending *ex parte* before the judge in the Administrative Court are under professional obligations

(a) to draw the judge's attention to any matter adverse to their clients' case, including in particular any previous adverse decisions; and

(b) to take a full note of the judge's judgment or reasons, which should then be submitted to the judge for approval.

iv) Those contemplating thereafter applying to this court should remember that they are most unlikely to succeed unless they can identify an error of law on the part of the judge.

v) This court has no jurisdiction to entertain any application for ancillary relief, such as an injunction against removal, unless an application has been made for permission to appeal against the decision of the administrative court. Any application for injunctive relief should either

(a) only be made after an application for permission to appeal has been issued; or

(b) in cases of real urgency, where the court office is not open, against an undertaking to issue the application (and pay the appropriate fee) at the first opportunity.

vi) The Treasury Solicitor should be promptly informed of the intention to apply for injunctive relief, in case he is able to and wishes to attend.

vii) The applicant should put before the Lord Justice:

(a) the papers that were before the judge in the Administrative Court, including the matter referred to in sub-paragraph (ii) above;

(b) counsel or solicitors' note of the reasons or judgment of the judge in the Administrative Court, stating whether or not it has been approved by the judge;

(c) a succinct statement of the error or errors alleged to have been committed by the judge in the administrative court, general claims that the judge erred in fact or law in taking a particular view, or in his decision as a whole, not being acceptable;

(d) where there has been any delay in bringing the matter before either the Administrative Court or the Court of Appeal, an explanation for that delay.

viii) Where the application is made *ex parte* there is a particular obligation to draw the court's attention to relevant authority, including in particular Country Guidance cases.

5.6 Remedies Available on Judicial Review

5.6.1 The usual judicial review remedies (mandatory order, prohibiting order, quashing order, injunction or declaration) are available to the Court (see CPR 54 Part I). As is usual in judicial review, the Court may grant interim remedies at any time during the proceedings (see CPR Part 25).

5.6.2 In hearing applications for permission to appeal arising out of applications for judicial review, the Court of Appeal may, instead of granting permission to appeal, grant permission to apply for judicial review (CPR 52.15(3)). Where it does so, the case will proceed in the High Court unless the Court of Appeal orders otherwise (CPR 52.15(4)).

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CHAPTER 6:

THE SPECIAL IMMIGRATION APPEALS COMMISSION

6.1 The Special Immigration Appeals Commission ("SIAC")

6.1.1 SIAC was created by the *Special Immigration Appeals Commission Act 1997* (the "**1997 Act**") to hear certain categories of appeal deemed sensitive by reason of the **NATIONAL SECURITY** implications of the evidence which is relied upon by the Secretary of State from time to time to exclude certain immigrants.

6.1.2 SIAC has jurisdiction over certain immigration appeals under the 2002 Act.

6.2 Rights of Appeal to SIAC

6.2.1 The rights of appeal to SIAC are set out in s.2 of the 1997 Act.[1] A right of appeal exists to SIAC if:

(a) the immigrant would have been able to appeal against the decision under the 2002 Act but the Secretary of State has issued a certificate under s.97 of the 2002 Act that his decision that the immigrant ought to be removed from the UK was taken by him (or at his direction) wholly or partly:

i. in the interests of **NATIONAL SECURITY**; or

ii. in the interests of the **RELATIONSHIP BETWEEN THE UK** and another country.

(b) the immigrant's right to appeal under the 2002 Act **LAPSED** under s.99 of that Act because the Secretary of State has issued a certificate under s.97 of that Act for either of the reasons outlined in i. or ii above.

6.2.2 Under s.2 of the 1997 Act, SIAC is granted the same powers as the AIT would have under s.86 of the 2002 Act to determine an appeal:

(a) SIAC must determine any matter which is raised before it in appeal and any matter which it is required to determine under s.85 of the 2002 Act (s.86(1) of the 2002 Act);

(b) SIAC must allow an appeal where it considers that either:

[1] A new s 2 was substituted by the 2002 Act (Paragraph 20 of Schedule 7) which came into force on 1 April 2003 (in virtue of the Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003 (SI 2003/754), Schedule 1).

i. the decision was not taken in accordance with the law (including immigration rules); or

ii. the decision involved the exercise of a discretion which ought to have been exercised differently.

(c) If neither of (i) and (ii) are applicable, then SIAC must, by virtue of s.86(5) of the 2002 Act, dismiss the appeal.

6.2.3 Under s.2(2) of the 1997 Act, s.3C or 3D of the Immigration Act 1971 relating to continuation of leave applies to SIAC.

6.2.4 Under s.2(2) of the 1997 Act, the following sections of the 2002 Act apply equally to SIAC:

- s.78 (no removal while appeal pending);
- s.79 (deportation order: appeal);
- s.82(3) (variation or revocation of leave to enter or remain);
- s.84 (grounds of appeal);
- s.85 (matters to be considered);
- s.86 (determination of appeal);
- s.87 (successful appeal: direction);
- s.96 (earlier right of appeal);
- s.104 (pending appeal);
- s.105 (notice of immigration decision); and
- s.110 (grants).

6.2.5 In *Secretary of State for the Home Department -v- Shafiq Ur Rehman*[2] the Court of Appeal held that SIAC's role was to conduct a full review of the case on the merits, including a review of the facts. However, in the Lords,[3] Lord Slynn emphasised that SIAC must give "due weight" to the Secretary of State's assessment and conclusion in the light at any particular time of his responsibilities, or of Government policy. The Secretary of State is undoubtedly in the best position to judge what national security requires even if his decision is open to review.

6.3 Evidence before SIAC

6.3.1 SIAC has the power, by virtue of r.44 of the *Special Immigration Appeals Commission (Procedure) Rules 2003*[4] (the "**SIAC** Rules"):

(a) to hear oral evidence or evidence in writing (r.44(1));

(b) to receive evidence in documentary or other form (r.44(2));

[2] [2000] 3 WLR 1240; [2000] 3 All ER 778; [2000] INLR 531 (CA). See also [2001] UKHL 1240; [2003] 1 AC 153, [2002] 1 All ER 122 (HL).
[3] [2001] UKHL 47; [2003] 1 AC 153, [2002] 1 All ER 122 (HL) at [26].
[4] SI 2003 No. 1034. Rule 56 provides that the 2003 rules will apply, with appropriate amendments, to any claim begun under the previous SIAC Rules (SI 1998 No. 1881).

(c) to receive evidence that would not be admissible in a court of law (r.44(3)).

6.3.2 Rule 44(5) provides that any party is entitled to adduce evidence and to **CROSS-EXAMINE** witnesses during any part of a hearing from which he and his representative are not excluded.

6.3.3 In *A and others -v- Secretary of State for the Home Department*,[5] the House of Lords addressed further issues arising out the detention of foreign nationals (see *A -v- Secretary of State for the Home Department* for the facts of the case).[6] The claimants had appealed their certification and detention under the *Anti-terrorism, Crime and Security Act 2001* to SIAC.

SIAC, by r.44(3), was entitled to receive evidence that would not be **ADMISSIBLE** in a court of law. It reviewed the evidence in respect of each claimant and in a number of open and closed judgments dismissed their appeals. In one case it was alleged that the Secretary of State had relied on evidence of a third party obtained through his torture in a foreign state.

SIAC held that, if there was such material which had been obtained without the complicity of British authorities, they might examine it and determine the proper weight to be attached to it and that there would be no prohibition on its admission within the meaning of Art.15 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990). They concluded, however, that there was no such material.

The Lords referred extensively to academic material, a wealth of common law and a variety of international jurisprudence and concluded that evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice. Therefore, such evidence was inadmissible against a party to proceedings in a UK court, irrespective of where, by whom or on whose authority the torture had been inflicted.

In interpreting Rule 44(3), a court cannot simply accept the literal meaning of the words but must read them in light of the fundamental principle of the common law that evidence obtained by torture is inadmissible. Thus, even though SIAC might admit a wide range of material which was inadmissible in ordinary judicial proceedings, *express statutory words* would be required to override the exclusionary rule barring evidence procured by torture.

However, the Secretary of State could rely on such tainted material when certifying, arresting and detaining a person under the 2001 Act whom he suspected of international terrorism. SIAC was to be regarded differently as it was established to exercise judicial supervision of the Secretary of State's

[5] [2005] UKHL 71; [2005] All ER (D) 124 (Dec) (HL).
[6] [2004] UKHL 56; [2005] 2 A.C. 68.

exercise of those powers and was required to assess whether at the time of the hearing before it there were reasonable grounds for his suspicion.

The House divided as to where the burden of proof lay in determining whether evidence was obtained by torture. Lords Bingham, Nicholls and Hoffmann, in the minority, held that a conventional approach to the burden of proof was inappropriate in determining whether a statement should be excluded as it had been procured by torture. All that could be asked of a detainee is that he should do no more than raise a *plausible reason* that material might have been so obtained and, where he did so, it was for the commission to initiate relevant inquiries. The majority held that to decide whether evidence was admissible, SIAC had to ask itself whether it was established, by means of such diligent inquiries into the sources as it was practicable to carry out, and on the balance of probabilities, that the information relied on by the Secretary of State was obtained under torture.

6.4 Hearings in private, closed material and the Special Advocate

6.4.1 As proceedings before SIAC inevitably involve consideration of highly confidential governmental information relating to terrorism, there are special provisions regulating the presentation by the Secretary of State of evidence which has been gathered from "**SENSITIVE**" sources.

6.4.2 Rule 43(1) of SIAC Rules provides that if SIAC considers it necessary, in order to ensure that information is not disclosed contrary to the public interest, for the applicant and his representative to be excluded from parts of the hearing, it shall so direct and shall then conduct that part of the hearing in private.

6.4.3 The Secretary of State may also present "**CLOSED MATERIAL**". By r.37(1) of SIAC Rules, this is material on which he wishes to rely but which he objects to disclosing to the Appellant and his representative.

6.4.4 However, r.37(2) provides that the Secretary of State may not rely on closed material unless a **SPECIAL ADVOCATE** has been appointed to represent the interests of the Appellant. Under r.35, the Special Advocate's functions are:

(a) to make submissions to SIAC at hearings from which the Appellant and his representative are excluded;

(b) to cross-examine witnesses at such hearings; and

(c) to make written submissions to SIAC.

6.4.5 Rule 36(1) provides that the Special Advocate may communicate with the Appellant or his representative at any time before he or she is served with material which the Secretary of State objects to being disclosed to the Appellant or his representative. Thereafter, the Special Advocate must not communicate with any person about the proceedings without direction from SIAC (r.36(2)) save that:

(c) he may communicate with SIAC (r.36(3)(a));

(d) he may communicate with the Secretary of State or his representative (r.36(3)(b));

(e) he may communicate with the Attorney-General (r.36(3)(c)); and

(f) the Appellant may communicate with the Special Advocate through a legal representative in writing but the Special Advocate must not reply to the communication other than in accordance with directions given by SIAC (save that he may, without directions, acknowledge receipt, in writing only, of the Appellant's written communication) (r.36(6)).

6.4.6 If the Special Advocate wishes to communicate about the proceedings with anyone other than those persons referred to above, he must request directions from SIAC (r.36(4)). SIAC must inform the Secretary of State (r.36(5)) prior to giving directions. The Secretary of State, on being so informed, must give notice to both SIAC and the Special Advocate of any objection he has to the proposed communication or to the form in which it is proposed to be made (r.36(5)).

6.5 Rights of appeal to the Court of Appeal

6.5.1 By virtue of s.7(1) of the 1997 Act, a right of appeal lies to the Court of Appeal from a final determination of SIAC on a point of law only. Section 7(2) provides that permission to appeal is required either from SIAC or (if SIAC refuses leave to appeal) from the Court of Appeal itself.

6.5.2 Under r.27, an application for leave to appeal to the Court of Appeal must be made to SIAC:

(a) (if the applicant is in detention) **5** days after notice of the determination is served on him;

(b) otherwise within **10** days after notice of the determination is served on him.

6.5.3 Such an application will not normally require a hearing (r.27(5)).

6.6 Grant of bail

6.6.1 Under s.3 of the 1997 Act SIAC has the power to grant bail.

6.6.2 In *G -v- Secretary of State for the Home Department,* [7] the Court of Appeal held that it had no power to entertain an appeal by the Crown from the grant of bail by SIAC.

[7] [2004] EWCA Civ 265.

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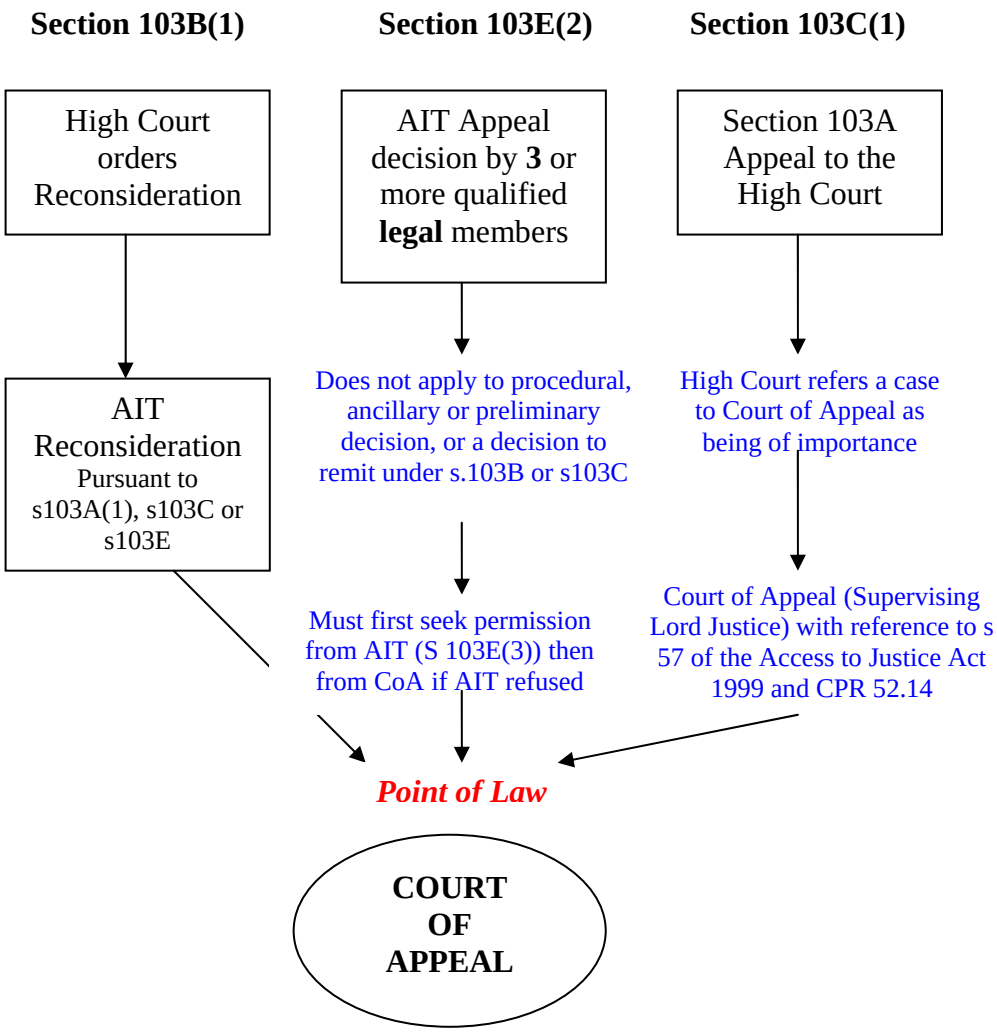
CHAPTER 7:

THE COURT OF APPEAL

7.1 Three Paths to the Court of Appeal under 2002 Act



7.2 Permission Required

7.2.1 Sections 103B(3)[1] and 103E(3)[2] provide that permission to appeal must be sought in the first instance from the AIT and then (if the AIT refuses permission) from the Court of Appeal.

[1] In respect of reconsiderations by the AIT.
[2] In respect of decisions where the AIT was composed of three or more legally-qualified members.

Applications to the AIT

7.2.2 Section 3 of Part 3 of the AIT Rules contains provisions relating to applications to the AIT for permission to appeal to the Court of Appeal.

7.2.3 Rule 34 of the AIT Rules provides that an application for permission to appeal to the Court of Appeal must be made to the AIT on the appropriate form.

Time Limits

7.2.4 The time limits for filing an application for permission to appeal (time limits which, by virtue of r.35(2), may not be extended by the AIT) are as follows:

(a) where the applicant is in detention under the Immigration Acts when he is served with the AIT's determination, not later than 5 days after he is so served (r.35(1)(a));

(b) in any other case, not later than 10 days after the applicant is served with the AIT's determination (r.35(1)(b)).[3]

Out of time applications

To The Tribunal

7.2.5 In *Tepe -v- Secretary of State for the Home Department*,[4] a case concerning the 2003 IAT Rules, the Applicant had made an out of time application to the IAT for permission to appeal to the Court of Appeal. The application had been refused by the Vice-President of the IAT on the grounds that the 2003 Rules did not allow the IAT to extend the time limit for filing the application. Carnwath LJ decided that the Court of Appeal has the power under CPR 52 to consider an application for permission out of time provided that there had been a decision of the IAT refusing permission.

7.2.6 This power is "truly exceptional" given that this jurisdiction is not expressly provided for in the regulations compared to the timetable for an application to the IAT. If there is an unexplained failure to act promptly and urgently and a long time has passed since the statutory time limit, then it would be quite wrong for the Court of Appeal to exercise its exceptional power to extend time.[5]

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[3] See paragraph 3.6 for the position under the 2005 Fast Track Rules.

[4] [2004] EWCA Civ 1727 at [10] (Ward and Carnwath LJJ). An application for permission to appeal.

[5] At [14]. Carnwath LJ was also of the view (although this was *obiter*) that a decision of the IAT not to accept jurisdiction in cases where the application for permission was made out of time would be a decision which would operate to confer jurisdiction on the Court of Appeal regardless of whether that decision was made by a legally-qualified member of the IAT or the clerk to the IAT (see [15]).

To The Court of Appeal

7.2.7 In *Ozdemir -v- Secretary of State for the Home Department*,[6] a case under the 1999 Act, the Court of Appeal (Mance LJ and Hooper J) considered an application for permission to appeal ("PTA") to itself in respect of which the IAT had refused to entertain a PTA application as being out of time. Mance LJ held that the IAT's refusal to entertain the PTA application counted as a refusal of permission, which operated to confer jurisdiction on the Court of Appeal.

The applicant had to fall back on the general provisions of CPR 52.4 (setting a 14 day time limit). Mance LJ acknowledged that the time for seeking PTA may expire before the IAT has refused PTA but that that situation was acceptable given that its cause was the applicant's delay in seeking PTA from the IAT.

7.2.8 In *Yacoubou and anr -v- Secretary of State for the Home Department*[7] Brooke LJ (with whom Dyson and Hooper LJJ agreed) said that the Court of Appeal was bound by the Court's earlier decision in *Ozdemir* (see also discussion of *YD (Turkey)* in paragraph 7.2.34). Every day that passes from the time that the AIT is without jurisdiction is likely to weaken the chances of an extension of time being granted. However, there may be truly exceptional cases where it would be a manifest injustice, on account of the particular facts, if the Court would not be willing to entertain an appeal out of time.

7.2.9 In *R(RG) -v- Secretary of State for the Home Department*[8] Brooke and Buxton LJJ considered whether to entertain an application for permission to appeal made six months out of time. The delay was attributable to a mix-up which led to a very short transcript not being available for 20 weeks. The Legal Services Commission required the transcript before it could grant funding. The court said that the solicitors, the Commission and the official shorthand writers should overhaul their procedures so as to ensure that administrative delays on this scale did not recur. If there are any reasons for the solicitors in such cases to fear that there might be delays in obtaining a transcript, it is open to them to apply to the Court of Appeal for a direction that the transcribers release a draft transcript (this would most often be sufficient for the Legal Services Commission's purposes as well).

7.2.10 *BR (Iran) -v- Secretary of State for the Home Department* (conjoined with *MD (Iran) -v- Secretary of State for the Home Department*),[9] involved appeals to the Court of Appeal brought considerably out of time. The two key features of both cases were that AIT had granted permission to appeal and that the failure to pursue the appeal was entirely the fault of the Appellants' lawyers.

[6] [2003] EWCA Civ 167 (CA) at [41] and [42].
[7] [2005] EWCA Civ 1051 (CA) at [6] and [10].
[8] [2006] EWCA Civ 396 (11 April 2006).
[9] [2007] EWCA Civ 198 (Buxton, Neuberger and Gage LJJ), 13 March 2007.

7.2.11 The starting point is that, as a party to the Refugee Convention, the UK has an obligation to ensure that cases that justify international protection are properly investigated. As Buxton LJ observed, in asylum cases, the Court's concern is not primarily the modalities and efficiency of domestic private litigation, but whether the UK will fulfil its obligations under the Refugee Convention.

7.2.12 The Court set out the following principles governing out of time appeals (governed by paragraph 21.7(3) of the CPR 52 Practice Direction):

a) Where the AIT has granted permission to appeal, there is a *presumption* that the appeal ought to be heard.

b) This presumption could be displaced if it is shown that the AIT's decision was plainly wrong in the sense that it is clear that failure to pursue the appeal would not lead to the UK being in breach of its international obligations.

c) Length of the delay should *not* be relevant.

d) Where delay has been caused by the applicant the court is likely to look carefully at the light that that sheds on the credibility of the assertion that the applicant has a good claim for international protection.

7.2.13 The grant of an extension of time, which prolongs the time spent by the appellant in the UK, would not give rise to a stronger Art.8 claim.

7.2.14 The Court of Appeal suggested that where the AIT grants PTA, it would be helpful if the covering letter drew forceful attention to the time limits. Further steps might be appropriate where the appellant is a litigant in person who is not able to read English. The Court of Appeal might consider reporting the negligence of solicitors in these circumstances to the relevant professional body.

7.2.15 In *IM (Turkey) -v- Secretary of State for the Home Department*,[10] the Court of Appeal reiterated that where appeals are brought out of time, the Court will carefully look at the conduct of the lawyers who have been responsible for the delay to see whether any form of **DISCIPLINARY SANCTION** should be imposed. In that case, as the solicitors had properly responded to the court's complaint about their conduct, fully accepted the blame and have given assurances that careful steps have been taken to ensure that this does not happen again, the Court was prepared to grant an extension of time.

Rehearings

7.2.16 Rule 36 of the AIT Rules provides that a senior immigration judge must determine the application for permission to appeal without a hearing and

[10] [2007] EWCA Civ 505 (10 May 2007) (Buxton, Lawrence Collins LJJ and Sir Paul Kennedy).

give reasons, which may be in summary form. Where the AIT intends to grant permission to appeal, r.36(3) provides that it may, if it thinks that the original tribunal has made an administrative error in relation to the proceedings, set aside the original tribunal's determination and direct that the proceedings be reheard by the AIT.

7.2.17 In *E and R -v- Secretary of State for the Home Department*,[11] the Court of Appeal held that the IAT, which then had a power to direct a rehearing itself rather than granting PTA appeal to the Court of Appeal, is not under a *duty* to direct a rehearing in any particular circumstances. It must have regard to the context of the case. It should, however, consider exercising its power to direct a rehearing if evidence came to light between the hearing and the promulgation of its decision. There must be a risk of serious injustice or some important evidence that had been overlooked.

7.2.18 In *Montes and Loiza -v- Secretary of State for the Home Department*,[12] the IAT had refused the applicants PTA to the Court of Appeal. The applicants contended that notwithstanding the fact that they had not specifically requested it, the IAT was under an obligation specifically to consider the issue of a rehearing under r.30(2)(c) of the 2003 AIT Rules on its own initiative. The Court of Appeal held that the Applicants' failure even to make an application to this effect could not put them in a better position than they would have been in had they made it. Had such an application been made, the IAT would have refused the application. Their appeal would therefore fail.

Applications under the 2005 Fast Track Rules to the AIT for permission to appeal to the Court of Appeal

7.2.19 Section 3 of Part 2 of the 2005 Fast Track Rules contains provisions governing applications to the AIT for permission to appeal to the Court of Appeal in fast track cases. Although the 2005 Fast Track Rules provide that many of the relevant provisions of the AIT Rules will continue to apply, there are certain modifications, including:

(a) The application must, by virtue of r.25(1) be lodged no later than 2 days after the day on which the appellant is served with the AIT's determination.

(b) Rule 25(2) provides that the AIT has no power to extend the time limit provided for in r.25(1).

(c) The AIT must determine the application for permission and serve it on every party not later than one day after the date on which the AIT received the application notice (r.26).

[11] [2004] EWCA Civ 49; [2004] Q.B. 1044; The Times, 9 February 2004; [2004] All ER (D) 16 (Feb) at [35] per Carnwath LJ.
[12] [2004] EWCA Civ 404 (CA).

Permission to appeal granted by the Court of Appeal

7.2.20 Paragraph 21.7 of CPR 52 PD provides that appeals from the AIT must be brought within 14 days of the date on which the applicant is served with written notice of the AIT's decision granting or refusing permission to appeal.

7.2.21 In an asylum case, additional documents correcting clerical errors made in an order granting permission to appeal did not supersede the original order for the purposes of establishing the starting point of the time period within which an appellant's notice had to be filed under CPR PD 52 para.21.7(3) (*GD (Zimbabwe) -v- Secretary of State for the Home Department*).[13]

7.2.22 Under CPR 52.3(6), the Court of Appeal will grant permission to appeal if it considers that:

(a) the appeal would have a real prospect of success; or

(b) there is some other compelling reason why the appeal ought to be heard.

7.2.23 In *AM (Pakistan) -v- Secretary of State for the Home Department*,[14] the Court of Appeal held that the fact that a point was "just arguable" did not meet the CPR52.3(6) threshold.

7.2.24 In *Cooke -v- Secretary of State for Social Security*,[15] Hale LJ held that a stricter test should be applied when the Court of Appeal was concerned with what was in effect a second appeal from the Social Security Commissioners, who were a highly expert and specialized legally qualified body. However, in *Koller -v- Secretary of State for the Home Department*,[16] Brooke LJ said that although the **STRICTER THRESHOLD** test should not be applied to appeals from the IAT:

(1) Properly reasoned well-structured judgments of the IAT will normally mark the end of the road unless there is some uncertainty about the applicable law.

(2) The Court of Appeal will be reluctant to permit a second appeal if the IAT set out the relevant principles of law correctly and set out the facts clearly before applying the law to the facts.

7.2.25 However, in *Akaeke -v- Secretary of State for the Home Department*,[17] Carnwath LJ explained that even though Courts are the final arbiters in relation to genuine issues of law (including procedural fairness), they

[13] (7 June 2007) (Ward, Sedley and Hughes LJJ).
[14] [2007] EWCA Civ 339 (26 January 2007) (Laws, Sedley and Maurice Kay LJJ).
[15] [2001] EWCA Civ 734; [2002] 3 All ER 279 (CA).
[16] [2001] EWCA Civ 1267.
[17] [2005] EWCA Civ 947; [2005] All ER (D) 409 (Jul) (CA) at [26] – [30].

should nonetheless slow to **INTERFERE** with decisions on matters within the **SPECIAL EXPERTISE** and competence of the Tribunal. The tribunal's special expertise relates to the evaluation of difficult and often harrowing evidence and to questions of general principle relating to the conditions in particular categories of claimant or particular countries.

Importantly, he included questions of **PROPORTIONALITY** to be within the special expertise of the tribunal where it, because of its day-to-day experience is better placed than the Courts to determine whether the facts of a case are sufficiently exceptional to justify a departure from the ordinary policy approach (applying the now superseded Cout of Appeal decision in *Huang*[OUTDATED]).[18]

7.2.26 In *R (Iran) and ors -v- Secretary of State for the Home Department* Brooke LJ said that the considerations underlying the decision in *Koller* had now changed.[19] In future the Court of Appeal would be slower to grant PTA in immigration cases.

Claims for Judicial Review

7.2.27 Appeals from **JUDICIAL REVIEW** decisions are treated differently. Where the High Court has refused permission to seek judicial review, CPR 52.15(2) provides that the Appellant's Notice must be filed with the Court of Appeal within **7** days of the decision of the High Court. In *R (on the application of Mohammed Nawaz Awan) -v- Immigration Appeal Tribunal*[20] Brooke LJ emphasised the importance of this time limit (given that the IAT and two High Court judges have already "said no"). However, there *might* be "exceptional circumstances" (referring to CPR 54.23(2)) where an extension would be granted.

7.2.28 Where a **substantive** claim for judicial review has been heard by the High Court, the Appellant's Notice must be filed within **21** days of the decision of the High Court, as required by CPR 52.4.

7.2.29 In *R (on the application of Bozkurt) -v- Secretary of State for the Home Department*,[21] Pill LJ suggested that the Court of Appeal would not be as sympathetic to a request for an extension of time from the Secretary of State as it would from a litigant in person. He said that a litigant may usually expect a decision in his favour to be final as from the expiry of the time provided.

[18] [2005] EWCA Civ 105; [2005] All ER (D) 12 (Mar) (CA).
[19] [2005] EWCA Civ 982; [2005] All ER (D) 384 (Jul) (CA) at [92] – [93].
[20] [2004] EWCA Civ 922 (CA) at [69] and [76].
[21] [2004] EWCA Civ 1417; [2004] All ER (D) 183 (Sep) (CA).

Automatic Stay of Removal

7.2.30 Section 78 of the 2002 Act provides that an immigrant may not be removed from the UK under the Immigration Acts where he has an appeal **PENDING** in respect of his asylum application.

7.2.31 "Pending" in s.78 has the meaning given in s.104, namely the period:

(b) beginning when the appeal is instituted; and

(c) ending when it is finally determined, withdrawn or abandoned (or when it lapses under s.99).

7.2.32 Section 104(2) of the 2002 Act provides that an appeal is not treated as finally determined when:

(a) an application to the High Court under s.103A(1) (other than an application out of time with permission) could be made or is awaiting determination;

(b) reconsideration has been ordered by the High Court under s.103A(1) and has not been completed;

(c) an appeal has been remitted to the AIT and is awaiting determination;

(d) an application to the Court of Appeal under s.103B or 103E for permission to appeal (other than an application out of time with permission) could be made or is awaiting determination;

(e) an appeal to the Court of Appeal under s.103B or 103E is awaiting determination; or

(f) a reference by the AIT to the Court of Appeal under s.103C is awaiting determination.

7.2.33 The effect of CPR52.7 is that where an appeal is lodged from a determination of the Tribunal, its order will be stayed. Directions for removal will therefore (subject to the above) also be stayed pending appeal.

7.2.34 In *YD (Turkey) -v- Secretary of State for the Home Department*,[22] the Court of Appeal considered whether it had the power to grant a **STAY** of directions for **REMOVAL** in an **OUT OF TIME** application for permission to appeal.

Section 104(2)(d) of the 2002 Act states that an appeal is not finally determined (and, therefore, the immigrant could not be removed) while an application under s.103B or 103E for permission to appeal (other than an application out of time with permission) could be made or is awaiting determination.

[22] [2006] EWCA Civ 52; [2006] 1 W.L.R 1646.

The Court held that the phrase *"other than an application out of time with permission"* was an obscure one, but probably referred to a situation in which the Court of Appeal had extended time for filing the Appellant's Notice as a discrete event, and was therefore treated as having given permission for the application for permission to appeal to be made.

The effect of s.104(2)(d) was that, even then, no appeal would be pending for the purposes of s.78 until such time as the Court granted permission to appeal.

The AIT had no power to grant a stay of removal directions. CPR 52.10(1) does not confer on the Court of Appeal any power which the Court below did not possess. However, following analysis of the relevant authorities relating to the Court's power to regulate its own jurisdiction, it was held:

(a) The Court of Appeal possesses an **INHERENT JURISDICTION** to order the Secretary of State to refrain from removing an appellant between the time when an out of time application for permission to appeal (and for an extension of time) is filed at the Civil Appeals Office and the time when the application for permission to appeal is determined.

(b) When this jurisdiction is exercised, a very important factor will be the court's assessment of the likelihood that the applications for an extension of time and for permission to appeal will be granted.

(c) Every day that passes from the time when the AIT is without jurisdiction is likely to weaken the chance of the Court of Appeal being willing to grant an extension of time, and it would be rare for the court to grant an extension of time for two months or more: it will have to be satisfied that a **SIGNIFICANT INJUSTICE** has probably occurred.

(d) The court will only grant such extension if in all the circumstances (including the considerations set out in CPR 3.9) it is just to do so. The appellant will have to present a strong case that he is likely to achieve ultimate success on his appeal against the original immigration decision for such an exceptional course to be justified.

7.2.35 **In *R (on the application of Pharis) -v- Secretary of State for the Home Department*[23] it was held that the filing at the Civil Appeals Office of an application for permission to appeal against a refusal to grant permission to apply for judicial review would not of itself stay any removal process (see paragraph** Error! Reference source not found.**).**

Taking a new point in the Court of Appeal

[23] [2004] EWCA Civ 654; [2004] 3 All ER 310; The Times, 27 May 2004 (CA).

7.2.36 In *U -v- Secretary of State for the Home Department*,[24] the Court of Appeal held that where the AIT had ruled on an Art.8 point in an asylum case, where the appellant is in a "difficult position", the full court would not reject an argument simply on the basis that it was a point in respect of which the appellant had not been granted permission to appeal.

7.2.37 On the other hand, in *R (AA(Afghanistan) -v- Secretary of State for the Home Department* (see paragraph 9.8.24 below), the Court of Appeal refused to allow a Respondent to take a new Art.8 point on a judicial review appeal by the Secretary of State, when it had not been taken in the court below.

The Court of Appeal may not require the AIT to supplement its reasons

7.2.38 In *Hatungimana -v- Secretary of State for the Home Department*,[25] the Court of Appeal considered whether it would be open to it, when considering an application for permission to appeal, to require the AIT to supplement its reasons. Finding that there were no provisions in the AIT Rules which would allow the AIT to revisit a decision in this manner, the Court held that it could not require the AIT to amplify its reasons for any decision.

7.3 No Jurisdiction over Scottish Decisions

7.3.1 Sections 103B(1), 103C(1) and 103E(2) of the 2002 Act provide that an appeal will lie to the "appropriate appellate court" in each of the following situations:

(a) an appeal on a point of law following a reconsideration by the AIT (s.103B(1));

(b) a referral up by the High Court (s.103C(1)); and

(c) an appeal against a decision of the AIT where the Tribunal was composed of three legally-qualified members (s.103E(2)).

7.3.2 Sections 103B(5), 103C(3) and 103E(5) of the 2002 Act provide that, in each of the respective circumstances referred to above, the "appropriate appellate court" is, in respect of appeals decided in England and Wales, the Court of Appeal.[26]

7.3.3 In *Gardi -v- Secretary of State for the Home Department (No. 2)*,[27] the Court of Appeal, in declaring its order in the appeal *Gardi -v- Secretary of*

[24] [2006] EWCA Civ 938 (19 June 2006).
[25] [2006] EWCA Civ 231.
[26] Those sections further provide that the "appropriate appellate court" in respect of appeals decided in Scotland, is the Court of Session and, in respect of appeals decided in Northern Ireland, is the Court of Appeal in Northern Ireland.
[27] [2002] EWCA Civ 1560; [2002] 1 WLR 3282; [2002] INLR 57 (CA).

State for the Home Department (No. 1)[28] a nullity, held that it had no jurisdiction to entertain an appeal from the IAT where the original determination had been made by an Adjudicator in Glasgow. The correct line of appeal in such cases would be to the Court of Session.

7.3.4 In *Tehrani -v- Secretary of State for the Home Department*,[29] the House of Lords held that, save in exceptional circumstances, the appropriate forum for the judicial review of a refusal of leave to appeal by the Immigration Appeals Tribunal was the Court of Session where the adjudicator made his determination in Scotland, and the High Court where the adjudicator made his determination in England.

7.4 Range of decisions which the Court of Appeal may take

7.4.1 Sections 103B(4),[30] 103C(2)[31] and 103E(4)[32] of the 2002 Act provide that the Court of Appeal may:

(a) affirm the AIT's decision;

(b) make any decision which the AIT could have made;

(c) remit the case to the AIT;

(d) affirm directions given by the AIT under s.87 of the 2002 Act;

(e) vary directions given by the AIT under s.87 of the 2002 Act;[33]

(f) give a direction which the AIT could have given under s.87 of the 2002 Act; or

[28] [2002] EWCA Civ 750 [2002] 1 WLR 2755; [2003] Imm AR 39 (CA).
[29] [2006] UKHL 47; (2006) 3 WLR 699 : Times, October 24, 2006.
[30] Appeals from reconsiderations by the AIT.
[31] Referral up by the High Court.
[32] Appeals from a decision made by the AIT when composed of three or more legally-qualified members.
[33] Section 87 provides for an Adjudicator to give directions where he allows an appeal, so as to give effect to his determination. Section 87(4) states that such a determination is treated as part of the determination of the appeal for the purposes of s 101 (which provides for a right of appeal to the AIT).

(g) (only in respect of references from the High Court s.103C(2) of the 2002 Act) under restore the application under s.103A to the High Court.

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CHAPTER 8:

ERRORS OF LAW

8.1 When seeking permission for a review, an applicant must identify all the errors of law of which he makes complaint

8.1.1 In recent years the Court of Appeal has repeatedly stressed that the decision of the original adjudicator or immigration judge is not susceptible to an appeal on the facts, and that a party aggrieved by that decision must identify the grounds on which he complains that there has been an error of law, whether in his grounds for seeking permission to appeal (prior to 4th April 2005) or in his grounds for seeking a review (under the post 4th April 2005 regime). As a general rule neither the IAT nor, under the new regime, the AIT was or is required to consider any grounds other than those included in the application (for permission to appeal, or for a review, as the case might be).[1] The grounds on which the matter is allowed to go forward (whether for an appeal or for a reconsideration) then form the "agenda" for the IAT or, now, the AIT when it reconsiders a decision.

8.1.2 This general rule is subject to limited exceptions in certain cases where an obvious point of law was not canvassed in those grounds. In *R (on the application of Robinson) -v- Secretary of State for the Home Department*,[2] the Court of Appeal held that it was incumbent on the IAT to grant permission to appeal to itself where there was an obvious point of human rights law in the asylum seeker's favour, even if the point did not appear in the grounds of appeal to the IAT. That rule was extended in a modest fashion in favour of the Secretary of State in *A (Iraq) -v- Secretary of State for the Home Department*[3] to include a situation in which it was clear from the facts that Art.1F of the Refugee Convention applied to the applicant.

8.1.3 In *GH (Afghanistan) -v- Secretary of State for the Home Department*,[4] the Court of Appeal held that the same rule would not apply to situations in which it was alleged by the Secretary of State that the Adjudicator had failed to consider a point relating to the ECHR on the grounds that, unlike Art 1F of the Refugee Convention, the ECHR did not impose a positive obligation on the state to refuse relief in any particular case.

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[1] Rule 17(3) of the 2003 Rules required an Applicant seeking permission to appeal to the IAT to identify relevant errors in the Adjudicator's determination and to explain why such errors made a material difference to the decision. Rule 18(2) provided that the IAT was not required to consider any grounds of appeal other than those included in the application for permission to appeal. For Rule 26 of the AIT Rules, see section 4.1.2.

[2] [1997] EWCA Civ 4001 (CA); [1998] Q.B. 929; [1997] 3 W.L.R. 1162.

[3] [2005] EWCA Civ 1438; [2005] All ER (D) 22 (Dec) (CA).

[4] [2005] EWCA Civ 1603; [2005] All ER (D) 306 (Dec) (CA).

8.1.4 In *Miftari -v- Secretary of State for the Home Department*,[5] Buxton LJ held that the Tribunal (then the IAT) could only have jurisdiction if a point of law could be found within the formulated grounds of appeal to the Tribunal. This follows from the fact that identification of a point of law is a necessary preliminary to the IAT having jurisdiction to entertain an appeal (such a point of law must be stated in the grounds). The IAT Vice-President could not have granted permission on a different basis which was not before the Court.

In *R (Iran)*,[6] the Court of Appeal confirmed that this dicta applied equally to any legally qualified chairman who granted permission to appeal. Further, the Court confirmed that the *Miftari* decision did not deal with *variation* of grounds (pursuant to Rule 20(1) of the 2003 Rules) but that IAT would ordinarily have been very slow to exercise their power to permit a very late variation.

8.1.5 In *R (on the application of Rodriguez-Torres) -v- Secretary of State for the Home Department*,[7] the Court of Appeal held that grounds of appeal in asylum cases should not be construed in a **NARROW** or **FORMALISTIC** way. What is important is that the question of law is identified with sufficient clarity to enable both the tribunal and the Respondent to understand what it is.[8]

In *ZT- v- Secretary of State for the Home Department*,[9] it was said that the court would be reluctant to see a case fail purely on an issue of jurisdiction. Similarly, in *Jasarevic –v- Secretary of State for the Home Department*,[10] the Court of Appeal made it plain that the formulation in *ZT* was no different to that adopted by the Court in previous cases: the Court will not look **PEDANTICALLY** at the grounds but read them in a fair and reasonable fashion.

8.1.6 The need to identify the error of law of which complaint is made surfaced again in *R (on the application of Makke) -v- Immigration Appeal Tribunal*.[11] Because he only received the Adjudicator's decision months after its promulgation, an asylum seeker's application for PTA was considerably out of time. The application only included only a statement of the reasons why it was being made out of time and did not address the merits of his claim. Permission was refused by the IAT. The asylum seeker then sought judicial review and was successful. The Secretary of State appealed, and the Court of Appeal held, in allowing his appeal, that the basic principle is that appeals must be decided on their merits. It followed that a party seeking an extension of time in which to appeal must show that the appeal would have a real prospect of success if permission were to be granted. It was not sufficient for an appellant to rely only on procedural points.

[5] [2005] EWCA Civ 481, [2005] All ER (D) 279 (May) (CA) at [21] – [24].
[6] [55] and [58].
[7] [2005] EWCA Civ 1328; [2005] All ER (D) 139 (Nov) (CA).
[8] [17].
[9] [2005] EWCA Civ 1421; [2005] All ER (D) 326 (Nov) (CA).
[10] [2005] EWCA Civ 1784; [2005] All ER (D) 87 (Dec) (CA) at [12] per Buxton LJ.
[11] [2005] EWCA Civ 176; [2005] All ER (D) 400 (Feb) (CA).

8.2 What constitutes an error of law?

8.2.1 In ***R (Iran) and ors -v- Secretary of State for the Home Department***[12] Brooke LJ, in respect of the *unamended* 2002 Act, identified a number of categories of error of law which have been expanded upon by the Court of Appeal in recent years:

(a) **Perversity**[13] – In *Miftari -v- Secretary of State for the Home Department*,[14] the court held that the word "**PERVERSITY**" meant exactly what it said and constituted a very high hurdle. The majority considered that perversity embraced decisions which were irrational or unreasonable in the ***WEDNESBURY*** sense, but also included a material finding of fact which was wholly unsupported by the evidence.

(b) **Inadequate reasons**[15] – Adjudicators were under an obligation to give reasons for their decisions (see r.53 of the 2003 Rules), so that a breach of that obligation might amount to an error of law.[16] However, unjustified complaints by practitioners that were based on an alleged failure to give reasons, or adequate reasons, were seen far too often, and an appellate court would be anxious not to overturn a judgment at first instance unless it really could not understand the reasoning of the lower court when it was making material findings.[17]

(c) **Proportionality**[18] – If an adjudicator correctly directed himself as to his duty under the law, and in an Art.8 context clearly adopted the approach to human rights and proportionality issues prescribed in *Razgar* and *Huang* OUTDATED (in the Court of Appeal), then the IAT could not as a matter of law interfere with his decision on proportionality, except on traditional public law lines (for a more detailed discussion see paragraph 9.8.1)

(d) **Country Guidance Cases**[19] - Paragraph 18.4 of the AIT Practice Direction provides that the failure to apply a country guidance decision, unless there was an good and explicitly stated reason, would constitute an error of law in that a material consideration had been ignored or inadequate reasons given.

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[12] [2005] EWCA Civ 982; [2005] All ER (D) 384 (Jul) (CA).
[13] [11] and [12].
[14] [2005] EWCA Civ 481; [2005] All ER (D) 279 (May) (CA) (Buxton (dissenting), Maurice Kay and Keene LJJ).
[15] [13] – [16].
[16] For which see, e.g., *Eagil Trust Co Ltd –v- Pigott-Brown* [1985] 3 All ER 119 (CA) and *English –v- Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 WLR 2409 (CA)
[17] This has recently been applied in *AT (Guinea) -v- Secretary of State for the Home Department* [2006] EWCA Civ 1889 (21 December 2006).
[18] [17] – [20].
[19] [21] – [27].

In *Ariaya & Sammy -v- Secretary of State for the Home Department*,[20] the Court of Appeal reiterated that country guidance cases are to be followed unless there is fresh evidence which requires a departure from the existing view. An issue that has been decided in a country guidance case should not be relitigated in another case where the evidence is not materially different.

In *Madan & Kapoor -v- Secretary for the Home Department*,[21] Buxton LJ stressed that the High Court is 'a wholly unsuitable tribunal' in which to argue that an existing country guidance case is out of date and make submissions as to how it should be updated. He explained that country guidance cases have a special status because they are produced by a specialist court, after a review of all of the available material. That involves a judicial input from a background of experience, not least experience in assessing evidence about country conditions, that is not available to judges such as sit in the Administrative Court and the Court of Appeal.

(e) **Unfairness resulting from mistake as to fact**[22] - In *E and R -v- Secretary of State for the Home Department*[23] (which concerned an appeal under the 1999 Act where the IAT had jurisdiction in respect of both fact and law) Carnwath LJ suggested that the ordinary requirements for a finding of unfairness which amounted to an error of law were that:

i. there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;

ii. it must be possible to categorise the relevant fact or evidence as "established" in the sense that it was uncontentious and objectively verifiable;

iii. the Appellant (or his advisors) must not have been responsible for the mistake;

iv. the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.

The Court in *R (Iran) and ors* went on to consider the IAT's power to admit **FRESH EVIDENCE** on appeal under the 2002 Act (where its jurisdiction was limited to an appeal on a point of law), concluding (as Laws LJ had done in *CA -v- Secretary of State for the Home Department*)[24] that once a material error of law had been shown, the IAT could decide

[20] [2006] EWCA Civ 48; 20/2/2006 Times Law Reports (8 February 2006).
[21] [2007] EWCA Civ 770.
[22] [28] – [33].
[23] [2004] EWCA Civ 49; [2004] QB 1044; The Times, 9 February 2004; [2004] All ER (D) 16 (Feb) (CA).
[24] [2004] EWCA Civ 1165; [2004] All ER (D) 354 (Jul), The Times, 3 August 2004 (CA).

what relief to grant based on an up-to-date consideration of the facts arising at that time or could remit the matter to an adjudicator for further consideration.

In *Shaheen -v- Secretary of State for the Home Department*[25] the Court of Appeal considered the application of the principle in *E and R*, holding that a distinction had to be made between a situation where (i) the Tribunal took a decision on the basis of a belief as to the existence of a material fact that was later demonstrated beyond peradventure to be wrong; and (ii) took its decision in the mistaken belief that there was no apparently cogent evidence to refute a material finding it had made. The former situation would amount to an error of law, whereas the latter would not.

8.2.2 At para 90 of his judgment in *R (Iran) and ors* Brooke LJ went on to summarise the Court's conclusions:

1. The correction of an error of law must make a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of the adjudicators on proportionality in connection with human rights issues.

2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision.

4. A failure without good reason to apply a relevant country guidance decision might constitute an error of law.

5. At the hearing of an appeal the IAT had to identify an error of law in relation to one or more of the issues raised on the notice of appeal before it could lawfully exercise any of its powers set out in s.102(1) of the 2002 Act (other than affirming the adjudicator's decision).

6. Once it had identified an error of law, such that the Adjudicator's decision could not stand, the IAT might, if it saw fit, exercise its power to admit up-to-date evidence or it might remit the appeal to the adjudicator with such directions as it thought fit.

7. If the IAT failed to consider an obvious ECHR point which would have availed an applicant, the Court of Appeal might intervene to set aside the IAT's decision on the grounds of error of law even though the point was not raised in the grounds of appeal to the IAT.

[25] [2005] EWCA Civ 1294; [2005] All ER (D) 31 (Nov) (CA).

8.3 Location of the Error of Law

8.3.1 In *Reza Fatemi Reka -v- Secretary of State for the Home Department*,[26] in refusing his claim for asylum, both the Secretary of State and an Adjudicator made adverse credibility findings against the appellant. The appellant challenged the Adjudicator's findings as being irrational and not based on the evidence. By the time his appeal was heard, the AIT had superseded the IAT.

Smith LJ held that although the appeal in the Court of Appeal was nominally against the decision of the AIT and was limited to consideration of whether their decision was undermined by an error of law, in *practice* the court's function was to decide whether the adjudicator's determination was undermined by legal error.

8.4 Assessment of Evidence

General

8.4.1 In *HK -v- Secretary of State for the Home Department*,[27] the Court of Appeal held that the fact that an AIT decision involved findings of **PRIMARY** fact and the drawing of inferences from those findings did not preclude the Court of Appeal from quashing that decision. However, where a fact-finding tribunal had decided to reject evidence for a number of reasons, the mere fact that some of those reasons did not bear analysis was not enough to justify an appellate court setting the decision aside.

8.4.2 In *Detamu -v- Secretary of State for the Home Department*,[28] the Court of Appeal found that an adjudicator had erred in law in the way in which he approached expert evidence (he had rejected it as he regarded it as being biased towards the asylum seeker). It was important for an adjudicator, before reaching conclusions about the truth of an asylum seeker's claim, to look at the evidence as a whole and the failure to do so was a material error.

8.4.3 In *Kaydanyuk -v- Secretary of State for the Home Department*,[29] the appellant adduced further evidence both in the IAT and the Court of Appeal seeking to establish that he would be at genuinely high risk of **SUICIDE** for he feared persecution if returned to the Ukraine on account of his being **HOMOSEXUAL.** He further claimed that this risk had increased as a result of his failed appeal before the IAT. The Court of Appeal held that the IAT had considered the evidence before it and the fact that the risk increased after its decision did not mean that it was labouring under a mistake of fact. The Appellant had failed to satisfy the first limb of the test in *E and R* (see paragraph 8.2.1 above).

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[26] [2006] EWCA Civ 552 (16 May 2006).
[27] [2006] EWCA Civ 1037 (20 July 2006).
[28] [2006] EWCA Civ 604.
[29] [2006] EWCA 368.

8.4.4 In *ND (Afghanistan) -v- Secretary of State for the Home Department*,[30] the Court of Appeal held that "inherent implausibility" had to be considered very carefully as a reason for rejecting an account where a case involved wholly different circumstances to those with which a fact finding tribunal was familiar. However, it could feature as a proper factor for the tribunal to take into account.

8.4.5 In *A I -v- Secretary of State for the Home Department*,[31] the Court of Appeal held that Immigration Rules (HC 395) Paragraph 289A(iv) ("Requirements for indefinite leave to remain in the United Kingdom as the victim of domestic violence") conferred a discretion on an immigration **CASEWORKER** to decide what evidence to require an applicant, who was seeking indefinite leave to remain as a victim of domestic violence, to produce to support her case. The rule was not intended to deny indefinite leave to person who *could* prove her case, but not in one of the ways prescribed by the Secretary of State in the Immigration Directorate Instructions.

Medical Evidence

8.4.6 In *S -v- Secretary of State for the Home Department*,[32] the Court of Appeal held, in applying *Mibanga -v- Secretary of State for the Home Department*,[33] that there would only be an error of law where there was an artificial separation of credibility and **MEDICAL** evidence which amounted to a structural failing and not a mere error of appreciation of the medical evidence. In order for there be an error of law, the medical evidence would have to be so powerful and so extraordinary as to take that case into an exceptional area, in which a medical report can have clear corrobative weight, rather than simply confirming that an appellant's scars or symptoms are consistent with the account given.

8.4.7 However, in *AJ (Liberia) -v- Secretary of State for the Home Department*,[34] the Court of Appeal set aside the AIT's decision on the basis that its reasoning in relation to the availability of medical treatment in Liberia was not properly based upon evidence and was therefore flawed in law.

8.4.8 Similarly, in *KP (Sri Lanka) -v- Secretary of State for the Home Department*,[35] the Court of Appeal held that a claimant was entitled to an explanation from the AIT, if they were to find against him, of the basis upon which they rejected detailed medical evidence. It was not enough for them to state in a single sentence that his injuries were equally consistent with other incidents of violence in Sri Lanka.

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[30] [2006] EWCA Civ 1363 (4 October 2006).
[31] [2007] EWCA Civ 386 (26 April 2007).
[32] [2006] EWCA Civ 1153; [2007] INLR 60 (5 July 2006).
[33] [2005] EWCA Civ 367. Recently applied in *AJ (Cameroon) -v Secretary of State for the Home Department* [2007] EWCA Civ 373 (22 February 2007) (PQBD, Laws ans Scott Baker LJJ)
[34] [2006] EWCA Civ 1736 (Sir Mark Potter, Maurice Kay LJ, Hughes LJ) (15 December 2006).
[35] [2007] EWCA Civ 62 (18 January 2007) (Pill, Wall, Richards LJJ).

8.4.9 In *Reza Fatemi Reka -v- Secretary of State for the Home Department* (see paragraph 8.3.1 above), the appellant claimed to have been tortured in Teheran but when he claimed asylum three weeks later he had no physical marks on his body. He claimed that he had had **BRUISES** but they had faded away. The Adjudicator disbelieved the appellant on the basis that had he been beaten, he would still have marks on his body. The Court of Appeal found that the adjudicator was in effect making a finding as to the lasting nature of scars and bruises, not on the basis of any medical evidence, but on the basis of his own knowledge and experience and accordingly there was some doubt as to the soundness of that finding.

It held that an adjudicator should hesitate to regard the absence of marks as *positive* evidence that the appellant had *not* been beaten. Rather, the absence of marks provides no support for the appellant's claim that he had been tortured.

Burden of Proof

8.4.10 In *AA (Iran) -v- Secretary of State for the Home Department*,[36] the Court of Appeal held that an immigration judge should not be regarded as having inverted the burden of proof by considering whether the appellant's evidence was "**LIKELY**" as opposed to considering whether it was "**REASONABLY POSSIBLE**". Further, where the appellant's evidence has been inconsistent (for example, how he came by particular documents), it is not an error to place no reliance on those documents, even when the immigration judge does accept other documents adduced by the appellant.

Standard of Proof

8.4.11 In *IO (Congo) -v- Secretary of State for the Home Department*,[37] the Court of Appeal held that the AIT did not err in focusing on the appellant's own account of events which they found on the lower standard of proof not to be credible, rather than accepting an alternative history put forward by Social Services.

8.5 Miscellaneous Errors

Departure From Policy

8.5.1 In *Fouzia Baig -v- Secretary of State for the Home Department*,[38] the Court of Appeal held that where there is an applicable Home Office **POLICY** (in this case, the "seven year concession" for families with minor children), the appellate body ought not just to consider whether the Secretary of State has taken account of his own policy, but ought to take it into account *themselves* when making their own decision as to whether removal would

[36] [2006] EWCA Civ 1027 (3 July 2006).
[37] [2006] EWCA Civ 796.
[38] [2005] EWCA Civ 1246 (5 October 2005).

be disproportionate. Indeed, an appeal might be allowed purely for failure to apply the policy correctly.

8.5.2 Similarly, in *Jovan Shkembi -v- Secretary of State for the Home Department*,[39] the Court of Appeal held that it might even be possible that, where an appellant is not strictly covered by the terms of a Home Office policy, the facts of his case are nonetheless covered by the *rationale* behind the policy, so that the policy should be taken into account when considering such issues as proportionality under Art.8.

Leave to Enter - Temporary Admission

8.5.3 The nature of "temporary admission" has recently been considered by the Court of Appeal in *S & Ors -v- Secretary of State for the Home Department*.[40] The Respondents had been convicted of hijacking a flight to the UK which landed here in February 2000. However, their criminal convictions were quashed in June 2003 because of a misdirection of the trial judge. Their applications for asylum were refused because they were excluded from refugee status by Art.1F(b) of the Refugee Convention (see paragraph 2.2.2 above). However, they were allowed to remain on the basis that their Art.3 rights would be infringed if returned to Aghanistan. On this basis they should have been given discretionary leave for a period of six months. Instead, the Secretary of State deliberately delayed until he changed his policy to enable him to keep the respondents on temporary admission.

8.5.4 Temporary admission under paragraph 21 of Schedule 2 of the Immigration Act 1971 is available, as an alternative to detention, to someone who was "liable to detention" under paragraph 16(1) "pending his examination [by an immigration officer]" and pending a decision to give or refuse him leave to enter.

8.5.5 Brooke LJ, giving the judgment of the Court, rejected the Secretary of State's reliance on paragraph 2(3) of Schedule 2 to the 1971 which he said envisaged people being required to submit to a *further* examination because notice in writing was required for such a further examination – it was far fetched to consider everyone who had an entitlement to discretionary leave as being *ipso facto* required to submit to a further examination even when no change of circumstances was in question.

8.5.6 In essence the Court held that the Secretary of State's treatment of these appellants as if they merely retained the status of those temporarily admission admitted after winning their appeals was *ultra vires*.

[39] [2005] EWCA Civ 1592 (24 November 2005).
[40] [2006] EWCA Civ 1157 (4 August 2006).

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CHAPTER 9:

SPECIFIC HUMAN RIGHTS ISSUES RELATING TO IMMIGRATION

9.1 General Principles

9.1.1 In two linked appeals, *R (on the application of Ullah) -v- Special Adjudicator*[1] and *R (on the application of Razgar) -v- Secretary of State for the Home Department*, [2] the House of Lords dealt with the issue whether particular articles of the European Convention on Human Rights ("**ECHR**") might be engaged in "foreign cases", where the risk of violation turned on what might happen to the appellant in the country to which the Secretary of State wished to send him. Although much of what was said was *obiter*, it is persuasive authority, especially as the opinions contain a very full survey of relevant Strasbourg jurisprudence.

9.1.2 Only in a case involving a clear risk of **FLAGRANT DENIAL** or **GROSS VIOLATION** of the rights concerned (where the right claimed would be nullified or completely denied in the country of repatriation) in the country of origin would a removal breach the ECHR. Of the ECHR rights, the House of Lords concentrated on the most important rights in the field of immigration and asylum, namely:

(a) Article 2 – The Right to Life;

(b) Article 3 – The Right not to be Subjected to Torture or Inhuman or Degrading Treatment;

(c) Article 4 – The Right not to be Held in Slavery or Servitude or to Perform Forced or Compulsory Labour;

(d) Article 5 – The Right to Liberty and Security;

(e) Article 6 – The Right to a Fair Hearing;

(f) Article 8 – The Right to Respect for Private and Family life, Home and Correspondence; and

(g) Article 9 – The Right to Freedom of Thought, Conscience and Religion.

9.1.3 Lord Bingham, speaking in the context of qualified rights such as Articles 8 and 9, stated that only when a right will be completely denied or nullified in the destination country can it be said that removal will breach ECHR no

[1] [2004] UKHL 26; [2004] 2 A.C. 323; [2004] 3 W.L.R. 23; [2004] 3 All ER 785 (HL).
[2] [2004] UKHL 27; [2004] 3 W.L.R. 58; [2004] 3 All ER 821 (HL).

matter its interpretation nor whatever might be said by or on behalf of the destination state.[3]

9.2 The Immigration and Appellate authorities are subject to the Human Rights Regime

9.2.1 Section 6 of the Human Rights Act 1998 ("**HRA**") provides that it is unlawful for any person exercising public functions and any court or tribunal to act in a way which is incompatible with the terms of the ECHR. The AIT has been held to be caught by s.6.[4]

9.3 All Human Rights are Capable of Being Engaged in Immigration Cases

9.3.1 In *R (on the application of Ullah) -v- Secretary of State for the Home Department*,[5] the House of Lords held that where the ECHR is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Art.3, the English court is required to recognise that any other ECHR right is, or may be, engaged. This is required by the Strasbourg jurisprudence.

9.3.2 An immigrant may rely on any of the rights provided for in the ECHR in immigration claims before the English courts.

9.4 Article 2 – The Right to Life

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

(2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

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[3] At [50] per Lord Steyn and [68] – [70] per Lord Carswell. Lord Steyn said that it would be necessary to establish at least a real risk of a flagrant violation of a right conferred by the Convention before articles other than Article 3 could become engaged. The IAT decision in *Devaseelan -v- Secretary of State for the Home Department* [2002] UKIAT 00702; [2003] Imm AR 1 (IAT) was approved.

[4] *Pardeepan –v- Secretary of State for the Home Department* [2000] UKIAT 01TH2414; [2000] INLR 47 (IAT starred) – dealing with the IAT and Adjudicators. See also *MNM* [2000] UKIAT 00TH02423; [2000] INLR 576 (IAT starred) and *S & K* [2002] UKIAT 05613 (IAT starred).

[5] [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785 (HL).

9.4.1 In principle it would be possible for an immigrant to rely on Art.2 if the facts were strong enough. The loss of life on return would, however, have to be shown to be a near certainty (*Ahsan Ullah*).[6]

9.5 Article 3 – The Right Not to be Subjected to Torture or Other Inhuman or Degrading treatment

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

9.5.1 In *Nsona -v- the Netherlands*,[7] the European Court of Human Rights summed up Art.3 as it applied to the immigration regime as follows:

(a) States have the right, subject to their treaty obligations, to control the entry, residence and expulsion of aliens.

(b) Expulsion or removal of a non-national may give rise to an issue under Art.3 where *substantial* grounds have been shown for believing that the person concerned faced a real risk of being subjected to inhuman or degrading treatment of punishment in the country to which he or she was returned.

(c) The risk must be assessed primarily with reference to those facts which were known or ought to have been known to the State at the time of the expulsion. The Court is not, however, precluded from relying on evidence which comes to light after the expulsion.

(d) Ill-treatment must attain a minimum level of severity if it is to fall within the ambit of Art.3. The minimum is relative and will depend on the facts of the particular case, such as the nature and context of the treatment complained of, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.

9.5.2 In *Kacaj -v- Secretary of State for the Home Department*,[8] the IAT stated that the correct test under the ECHR was whether substantial grounds had been shown for believing that the immigrant, if returned, faced a real risk that his Art.3 rights would be breached. This approach was upheld by the House of Lords in *Ahsan Ullah* , where Lord Bingham said that it was necessary to show *strong grounds* for believing that the person, if returned,

[6] [15], [24] per Lord Bingham and [40] per Lord Steyn.
[7] (2001) EHRR 170.
[8] [2001] UKIAT 01TH0634; [2002] Imm AR 213 (starred determination), [8]. Although the Court of Appeal remitted the case to the IAT on the facts (see [2002] EWCA Civ 314; [2002] Imm AR 213 (CA)), it did not hear full argument on its conclusions of law.

faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.[9]

9.5.3 In *N -v- Secretary of State for the Home Department* [10] the House of Lords held that Art.3 applies irrespective of the reprehensible conduct of the applicant. It makes no difference however criminal his acts may have been or however great a risk he may present to the public if he were to remain in the expelling state's territory.

9.5.4 In *Mukarkar -v- Secretary of State for the Home Department*,[11] the Court of Appeal held that the **HIGH THRESHOLD** of suffering or degradation required to engage Art.3 was not reached where the appellant's medical condition had deteriorated while in the UK and who required **CONSTANT CARE**.

9.5.5 In *J -v- Secretary of State for the Home Department*,[12] a case where the applicant was a **SUICIDE** risk, the Court of Appeal explained the principles to be applied in foreign, as opposed to domestic cases, following the House of Lords' identification of these two categories of case in *Ahsan Ullah*.

(a) ***Foreign Cases***: Where the removal of a person from one State to another State would lead to a violation of that person's ECHR rights in that other State.

The test is whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment (*Ahsan Ullah*). The Court of Appeal in *J* further amplified this test:

i. First, the test requires an assessment to be made of the severity of the treatment which it is said the applicant would suffer if he were removed. Although each case would turn on its own facts, the treatment must attain a minimum level of severity such that it is "an affront to fundamental humanitarian principles to rem ove an individual to a country where he is at risk of serious ill-treatment" (Lord Bingham in *Ahsan Ullah*).

ii. A **CAUSAL** link must be shown between the act or threatened act of removal and the inhuman treatment relied upon as violating the person's Art.3 rights.

iii. The threshold in Art.3 cases is particularly high, but all the higher where the inhuman treatment is not the direct or indirect

[9] [24] per Lord Bingham; [31] per Lord Steyn.
[10] [2005] UKHL 31; [2005] 2 AC 296; [2005] 2 WLR 1124; [2005] All ER (D) 55 (May); The Times, 9 May 2005 (HL) at [48]. Lords Nicholls, Hope, Walker and Brown and Baroness Hale.
[11] [2006] EWCA Civ 1045 (25 July 2006).
[12] [2005] EWCA Civ 629, [2005] All ER (D) 359 (May) (CA). Applied in *CN (Burundi) -v- Secretary of State for the Home Department* [2007] EWCA Civ 587 (Pill, Tuckey and Maurice Kay LJJ).

responsibility of the public authorities of the receiving state, but results from some naturally occurring illness (physical or mental).

iv. An Art.3 claim can in principle succeed in a case where it is claimed that the Applicant would be at risk of suicide on return.

v. In deciding whether there is a real risk of a breach of Art.3 in a suicide case, an important question is whether the applicant's risk of ill-treatment on which the risk of suicide is said to be based is well founded. If it is not found to be well-founded, that will tend to weigh against there being a real risk that removal will be in breach of Art.3.

vi. Finally, a further question of considerable relevance is whether the removing and/or receiving state has effective mechanisms to reduce the risk of suicide. The existence of effective mechanisms will weigh heavily against there being a real risk that removal will be in breach of Art.3.[13]

(b) ***Domestic Cases***: Where the State has acted within its own territory in a way which infringes an ECHR right within that territory. In such cases, point (iii) above is absent, given the mechanisms in place in signatory States to protect vulnerable members of society. However, the remaining five points are applicable, with point (vi) being of particular significance.[14]

9.5.6 In *N -v- Secretary of State for the Home Department*, [15] the Applicant suffered from HIV/AIDS and claimed that her repatriation to Uganda would violate her Art.3 rights on the grounds that adequate medical care was not available in that country. The Court of Appeal held that where the complaint is the want of resources in the immigrant's own country, Art.3 will only apply where "*…the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised state*".[16]

9.5.7 This decision was upheld in the Lords where Lord Nicholls stated that Art.3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment or 'medical care' lacking in their home countries.This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. [17]

9.5.8 Baroness Hale set the following test: whether the applicant's illness has reached such a *critical stage* that it would be inhuman treatment to deprive

[13] *ibid.* at [26] – [31].
[14] *ibid.* at [33].
[15] [2003] EWCA Civ 1369; [2004] 1 WLR 1182; The Times, 23 October 2003; [2003] All ER (D) 265 (Oct) (CA) (Laws and Dyson LJJ, Carnwath LJ dissenting).
[16] See Laws LJ at [40], although when *N* came before the House of Lords, Baroness Hale of Richmond said (at [67]) that she did not find the concept invoked by Laws LJ at [40] to be helpful.
[17] *N -v- Secretary of State for the Home Department* [2005] UKHL 31 at [15].

him of the care he is receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity.[18]

9.5.9 In *CA -v- Secretary of State for the Home Department*,[19] Laws LJ held that are *'no sharp legal tests'* in Art.3 cases. On the facts of that case, he held that, as a matter of humanity, for a mother to witness the collapse of her newborn child's health and perhaps its death may be a kind of suffering far greater than might arise by the mother's confronting the self-same fate herself.

9.5.10 In *Bagdanavicius -v- Secretary of State for the Home Department*,[20] the House of Lords explained that non-state agents do not subject people to torture or other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into Art.3 ill-treatment would be the state's failure to provide reasonable protection against it.

9.5.11 In *R (Tozlukaya) -v- Secretary of State for the Home Department*[21] the appellant claimed he would be at a greater risk of suicide if deported to Germany. The Court of Appeal, in applying *J* (see paragraph 9.5.5 above), held that although an increased risk of suicide did not in itself amount to a breach of Art.3, it was capable of being a breach in certain circumstances.

9.6 Article 4 – The Right Not to be Held in Slavery or Servitude or to Perform Forced or Compulsory Labour

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this article the term "forced or compulsory labour shall not include:

(a) Any work required to be done in the ordinary course of detention imposed according to the provisions of article 5 of this Convention or during conditional release from such detention;

(b) Any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) Any service exacted in case of an emergency or calamity threatening life or well-being of the community;

(d) Any work or service which forms part of normal civic obligations.

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[18] [69].
[19] [2004] EWCA Civ 1165; The Times, 3 August 2004; [2004] All ER (D) 354 (Jul) (CA) at [26].
[20] [2005] UKHL 38; [2005] 2 WLR 1359; The Times, 30 May 2005; [2005] All ER (D) 407 (May). At [24].
[21] [2006] EWCA Civ 379 (11 April 2006) (Buxton, Lloyd and Richards LJJ).

9.6.1 *Ahsan Ullah* established that a claim under Art.4, if strong enough, would probably succeed under Art.3. However, Lord Bingham accepted that, if the facts were strong enough, a claim ought to be allowed on Art.4 grounds alone.[22]

9.7 Article 6 – The Right to a Fair Hearing

9.7.1 Article 6(1) of the ECHR states:

> **In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, here the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice**

9.7.2 In *Maaouia -v- France*,[23] the European Court of Human Rights held that a person's immigration status was not a civil right or obligation nor a criminal charge, and hence did not fall within the ambit of Art.6. However, the IAT in *MNM*[24] held that even so, where unfairness was alleged the IAT would apply the same tests as would have been applicable if Art.6 had applied.

9.7.3 Where the Secretary of State's representative is absent from proceedings before an Adjudicator, the Adjudicator is not expected to cross-examine witnesses and thereby conduct the Secretary of State's case for him (*MNM*).[25] The Adjudicator in that situation could and should probe apparent improbabilities in evidence. However he ought not to involve himself directly in questioning appellants or witnesses save as absolutely necessary to enable him to obtain the truth.

9.7.4 In *A and Others -v- Secretary of State for the Home Department*,[26] the Court of Appeal held that proceedings before SIAC are not criminal proceedings for the purposes of Art.6 and that Art.6 does not therefore apply to such proceedings. In December 2004 the Court's judgment was reversed by the House of Lords,[27] although the Appellate Committee did not express a view as to whether Art.6 applied to proceedings before SIAC.

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[22] [2004] UKHL 26 at [16], citing a Strasbourg case which referred to the possible relevance of expulsion to a country where there was an officially recognised regime of slavery. See also Lord Steyn at [41].
[23] *Maaouia –v- France* (2001) 33 EHRR 1037.
[24] [2000] INLR 576 (IAT starred determination).
[25] [2000] INLR 576 (IAT starred determination).
[26] [2002] EWCA Civ 1502; [2004] QB 335; [2003] 2 WLR 564; [2003] 1 All ER 816 (CA) (per Woolf CJ). The judgment of the Court of Appeal was reversed by the House of Lords [2004] UKHL 56; [2004] All ER (D) 271 (Dec) (HL).
[27] [2004] UKHL 56; [2004] All ER (D) 271 (Dec) (HL).

9.7.5 In *Ahsan Ullah*[28] the House of Lords said that in principle Art.6 could be relied upon in immigration claims before the English courts if it is shown that a a person has suffered or risks suffering a **flagrant denial** of a fair trial in the receiving state (reliance on art.5 would have to meet no less exacting a test). Lord Bingham noted that stringency of the test is reflected in the fact that few applicants succeed on articles 2, 5 and 6 claims before the Strasbourg court.

9.7.6 The entitlement to **STATE WELFARE BENEFITS** whilst an immigrant is seeking asylum has been held to be a civil right to which Art.6 ECHR applies.[29]

9.8 Article 8 – Right to Respect for Private and Family Life, Home and Correspondence

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

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

PROPORTIONALITY

9.8.1 The starting point in any assessment of proportionality was set out by Lord Bingham in *R (on the application of Razgar) -v- Secretary of State for the Home Department*.[30] The task of a (then) adjudicator was to ask:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?

- If on consideration of the materials before it and those that would be before an Adjudicator, the answer is no, then it would not be possible to challenge a certificate issued by the Secretary

[28] [2004] UKHL 26 at [24]; see also the remarks of Lord Steyn at [43] and [44].

[29] *R (on the application of Hamid Ali Husain) –v- Asylum Support Adjudicator* [2001] EWHC Admin 852; The Times, 15 November 2001; [2001] All ER (D) 107 (Oct) (Admin Court), per Stanley Burnton J. The Court of Appeal has held that Judicial Review is an adequate remedy for the purposes of the ECHR in respect of the support provisions of the 2002 Act – see *R (on the application of Q) -v- Secretary of State for the Home Department* [2003] EWCA Civ 364; [2004] QB 36; [2003] 2 WLR 365; [2003] 2 All ER 905 (CA).

[30] [2004] UKHL 27; [2004] 2 A.C. 368; [2004] 3 W.L.R. 58 at [17]. This analysis had the assent of Lords Steyn, Carswell and Walker (in large part) and Baroness Hale, notwithstanding the latter two's dissent as to the outcome.

of State that the immigrant's claim for breach of his Art.8 rights was manifestly unfounded.

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Art.8?

- This formulation is consistent with Strasbourg jurisprudence: conduct must attain a minimum level of severity to engage the ECHR (*Costello-Roberts v UK*).[31] See paragraph 9.8.14 below.

(3) If so, is such interference in accordance with the law?

- This question is likely to permit an affirmative answer only.

(4) If so, is such interference *necessary* in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference *proportionate* to the legitimate public end sought to be achieved?

- Answering this question requires a careful assessment: striking a fair balance between the indivual's rights and the interests of the community. The Secretary of State must exercise his judgement in the first instance. On appeal the adjudicator must exercise his own judgement, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgement which would or might be made by an adjudicator on appeal.

- Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.

9.8.2 Since March 2005, Court of Appeal's decision in *Huang and others -v- Secretary of State for the Home Department*[32] has been the leading authority on proportionality in the Art.8 ECHR context (interpreting the dicta in paragraph 9.8.1 above). However, on 21 March 2007, it was superceded by the Lords' decision *Huang*.[33] Hence where the Court of Appeal decision is referred to elsewhere in the Bench Book, it is followed by '[OUTDATED]'. Discussion of the Court of Appeal's decision in this context and the subsequent interpretation of it is bound to cause confusion and has been left out of the following discussion.

9.8.3 The Lords' decision sought to explain the function of immigration appellate authorities when deciding appeals, on ECHR grounds, against refusal of leave to enter or remain in the UK (s.65 of the Immigration and Asylum Act 1999 and Part III of Schedule 4 to that Act). Section 65 deals with

[31] (1993) 19 E.H.R.R. 112.
[32] [2005] EWCA Civ 105; [2005] All ER (D) 12 (Mar) (CA).
[33] [2007] UKHL 11; [2007] 2 W.L.R. 581 (21 March 2007) (Lords Bingham, Hoffmann, Carswell, Brown and Baroness Hale).

appeals to adjudicators on either discrimination or human rights grounds. The Lords' decision was solely concerned with the position of individuals who do not qualify for entry under the Immigration Rules (including supplementary administrative directions) and base their claim on the family life component of Art.8 ECHR.

9.8.4 The function of the immigration appellate authority is to decide whether the challenged decision is unlawful as incompatible with an ECHR right or compatible and so lawful ([11]).

9.8.5 Its function is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety ([11]).

9.8.6 It must decide for *itself* whether the impugned decision is lawful and, if not, but only if not, reverse it ([11]).

9.8.7 Its first task is to establish the relevant facts, and it should make its decision on the basis of **UP-TO-DATE FACTS**, which must be fully explored and carefully summarised.

9.8.8 It must consider and weigh all the factors in favour of the refusal of leave, with particular reference to justification under Art.8(2). It is not only necessary to consider the questions referred to in *De Freitas -v- Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[34] but also to strike a **FAIR BALANCE** between the rights of the individual and the interests of the community. The following are some of the general considerations that should be borne in mind ([16]):

(a) the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another;

(b) the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; and

(c) the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.

9.8.9 Weighing these considerations is not aptly described as deference. It is the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice ([16]).

[34] [1998] 3 W.L.R 675, [1999] 1 A.C. 69, [1998] UKPC 30, 4 BHRC 563 (Decision of the Privy Council).

9.8.10 The immigration appellate authority must ask whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a *manner sufficiently serious* to amount to a breach of Art.8 ([20]).

9.8.11 Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant ([18]).

9.8.12 As Buxton LJ commented in *MT (Zimbabwe) -v- Secretary of State for the Home Department*,[35] there is no doubt that Art.8 will not usually prevail over the interests of immigration control. He openly acknowledged the reality of the situation (echoing Carnwath LJ in *Mukarkar -v- Home Secretary*)[36]: a general understanding or any sort of guiding rule or principle is difficult to formulate. Terms like 'exceptional' or 'rare' cases do nothing to explain what principle should be applied in identifying such cases.

9.8.13 The tribunal did not have to ask itself whether the case met a test of **EXCEPTIONALITY**. Lord Bingham had not purported to lay down such a test in *Razgar* .

9.8.14 In *AG (Eritrea) -v- Secretary of State for the Home Department*,[37] the Court of Appeal has given its most comprehensive interpretation of the Lords' decision in *Huang*. Sedley LJ characterised the task in this case as interpreting Lord Bingham's dicta in *R (on the application of Razgar) -v- Secretary of State for the Home Department* [38] that Art.8 could be engaged by the foreseeable consequences for health and welfare of removal even where removal does not breach Art.3. He explained that the minimum level severity required to bring a case within Art.8 (Question 2 in *Razgar*) is NOT 'a special or a high one' ([27]). Once Art.8 is engaged the focus moves to the process of justification Art.8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article.

9.8.15 He went on to adopt the reasoning of Carnwath LJ in *Mukarkar -v- Home Secretary*,[39] where Carnwath LJ held that, even though in normal circumstances interference with family life would be justified by the requirements of immigration control, a different approach may be justified in a small minority of exceptional cases identifiable only on a case by case

[35] [2007] EWCA Civ 455 (Waller, Buxton and Lloyd LJJ) (25 April 2007).
[36] [2006] EWCA Civ 1045 (Auld, Sedley and Carnwath LJJ) (25 July 2006).
[37] [2007] EWCA Civ 801 (Sedley, Maurice Kay and Lawrence Collins LJJ) (31 July 2007).
[38] [2004] UKHL 27; [2004] 2 A.C. 368; [2004] 3 W.L.R. 58.
[39] [2006] EWCA Civ 1045 (Auld, Sedley and Carnwath LJJ) (25 July 2006).

basis. As the House of Lords has declined to lay down a more precise legal test, whether a particular case falls within that limited category is a question of judgment for the tribunal of fact, and normally raises no issue of law.

9.8.16 Sedley LJ explained: there is NO test of exceptionality – 'the fact that in the great majority of cases the demands of immigration control are likely to make removal proportionate and so compatible with Art.8 is a consequence, not a precondition, of the statutory exercise. No doubt in this sense successful Art.8 claims will be the exception rather than the rule; but to treat exceptionality as the yardstick of success is to confuse effect with cause' ([31]).

9.8.17 Similar reasoning is to be found in *KR (Iraq) -v- Secretary of State for the Home Department*.[40] There is only an *expectation* that Art.8 will succeed in a minority of cases ([39]). Exceptionality – solely as an expectation – only enters the picture at the Art.8(2) justification stage.

Article 8(2): Justification

9.8.18 In *Samaroo -v- Secretary of State for the Home Department*,[41] the Court of Appeal held that in order to rely on Art.8(2), it was not incumbent on the Secretary of State to prove that withholding a deportation order in any particular case would seriously undermine his policy of deterring crime and disorder. The justification need only be "convincingly established". He need only show that he has struck a fair balance between the individual's right to respect for private and family life and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision maker if, despite an allowance for appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable.

Miscellaneous Art.8 Issues

9.8.19 The Court of Appeal held in *Senthuran -v- Secretary of State for the Home Department*[42] that there was no general proposition that Art.8 could never be engaged when the relevant family life was that of **SIBLINGS** living together. Each case where family life is pleaded must be looked at on its own facts and there is an obligation on Adjudicators and the IAT to state why it was that Art.8 was or was not engaged.

9.8.20 In *EM (Lebanon) -v- Secretary of State for the Home Department*,[43] the Court of Appeal held that a claim to asylum was rightly refused where, although the asylum seeker's right to enjoyment of family life with her son

[40] [2007] EWCA Civ 514 (Auld, Sedley and Smith LJJ) (24 May 2007).
[41] [2001] EWCA Civ 1139; The Times, 18 September 2005; [2001] All ER (D) 215 (Jul) (CA) at [39]. The President and Thorpe LJ agreed.
[42] [2004] EWCA Civ 950; [2004] All ER (D) 283 (Jul) (CA).
[43] [2006] EWCA Civ 1531 (21 November 2006).

under Art.8 would be severely restricted if they were returned to Lebanon, it would not be completely denied or nullified, which was the relevant test.

Administrative Delay

9.8.21 In *Shala -v- Secretary of State for the Home Department*,[44] a public body's unwarranted delay in dealing with a case was held to be a relevant factor in determining whether the state's decision to expel an immigrant was a proportionate interference with his right to a private or family life. On the facts, the Court of Appeal found that had the immigrant's application been dealt with efficiently, he would have been granted leave to remain in the UK.

9.8.22 However, in *Janjanin -v- Secretary of State for the Home Department*,[45] Maurice Kay LJ held that the appellant had not established that an application for extraordinary leave to remain would have been successful but for the Secretary of State's delay – *Shala* was distinguished. Wall LJ agreed with Maurice Kay LJ: *Shala* turned very much on its own facts.

9.8.23 *Shala* was considered in *Strbac -v- Secretary of State for the Home Department*. Laws LJ rejected the argument that *Shala* laid down a principle of law. All that it established was that a substantial delay is a factor which a decision-maker is obliged to consider.[46] The Secretary of State had argued that it disclosed a legal principle in relation to Art.8 claims.

9.8.24 In *R (on the application of AA(Afghanistan)) -v- Secretary of State for the Home Department*,[47] the Secretary of State appealed against the a successful judicial review of his removal directions (to Austria where the respondent had first claimed asylum). The Secretary of State had certified the Respondent's asylum under s.25 of the Immigration and Asylum Act in June 2003. However, there was an unexplained delay of two years before the Respondent was served with notice that decisions had been issued for his removal. He claimed that it would be *Wednesbury* unreasonable for the Secretary of State to transfer him to Austria (under) rather than deal with his claim in the UK.

The Court of Appeal held that the Respondent could not raise any Art.8 point as it should have been canvassed on its merits before the judge below. In any case, it was unlikely that the Respondent's circumstances were "truly exceptional" so as to sustain an Art.8 claim. The Court, allowing the appeal, held that while the Secretary of State's delay had been deplorable and

[44] [2003] EWCA Civ 233; [2003] All ER (D) 407 (Feb) (CA).
[45] [2004] EWCA Civ 448; [2004] All ER (D) 133 (Apr) (CA).
[46] [2005] EWCA Civ 848; [2005] All ER (D) 121 (Jul) (CA).At [25]. Longmore and Scott-Baker LJJ agreed.
[47] [2006] EWCA Civ 1550; [2006] 150 S.J. 1570; [2007] A.C.D. 32 (22 November 2006) (May, Laws and Gage LJJ).

unexplained, the Court could not quash the removal directions in order to punish or discipline the Home Office.

9.8.25 In *HB (Ethiopia), FI (Nigeria), EB (Kosovo) and JL (Sierra Leone) -v- Secretary of State for the Home Department*,[48] the Court of Appeal gave guidance on the law concerning the effect of delay by the Secretary of State on claims by immigrants seeking to resist removal from the UK by relying on their Art.8 ECHR rights. The appellants claimed that the delay in dealing with their cases precluded the Secretary of State from asserting that their removal was justified under Art.8(2). Had their claims been dealt with within a reasonable time, it was assumed that exceptional leave to remain in the UK would have been granted to each. However, while their applications were pending, conditions in their home countries improved to the extent that they could safely be returned there. The Court of Appeal set out the following principles:

(a) A claimant first has to show that he satisfied the requirement of Art.8(1) that he had an established family life or private life in the UK. If he were unable to do that, Art.8(2) did not arise and any issues of delay were irrelevant (at [11]).

(b) Delay in dealing with an application might, by increasing the time spent by a claimant in the UK, increase his ability to demonstrate private or family life, bringing him within Art.8(1) – however, this is a question of fact (at [24i]).

(c) The default position is that decisions taken pursuant to the lawful operation of immigration policy would be proportionate in all but a small minority of exceptional cases (*Razgar* and *Huang* OUTDATED) (at [24ii]).

(d) Where delay was relied on as a reason for not applying immigration policy, a distinction had to be made between claimants who had some *potential* right under immigration policy to be in the UK, and those who had none. In the former case, where it was sought to apply burdensome procedural rules to the consideration of a claimant's case, it may be inequitable in some situations to enforce those procedural rules (at [24iii]).

(e) In the case of a claimant who had no potential right to be in the UK, and who had to rely upon his rights under Art.8(1), a delay in dealing with a previous asylum claim would be a relevant factor under Art.8(2), but in order for it to influence the outcome it would have to have very *substantial* effects (at [24iv & v]).

(f) The mere fact that delay had caused a claimant with no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in him obtaining exceptional leave to remain did not, in itself, affect the determination of a subsequent claim based on Art.8(2). It was not clear that the court in

[48] [2006] EWCA Civ 1713 (Buxton LJ, Latham LJ, Longmore LJ); 14 December 2006. Four test cases.

Strbac thought that the failure to obtain exceptional leave to remain on asylum grounds because of delay could ever be relevant to a decision on the substance of a subsequent Art.8(2) claim, as opposed to the procedure (at [24vi]).

(g) It would usually only be in cases when the Secretary of State sought to rely on the particular system itself that arguments based on the breakdown of immigration control or of failure to apply the immigration system properly would be relevant. Those arguments did not follow where an appeal was made in Art.8 proceedings to earlier failures in operating the immigration system (at [24vii]).

9.8.26 In *R (on the application of S) -v- Secretary of State for the Home Department*,[49] the Secretary of State's removal directions were quashed by the Administrative Court on the ground that his delay in the handling of S's application for asylum had been excessive and unfair. S had entered the UK in 1999 at the same time as his cousin and they had both applied for asylum. The cousin's application had been refused in February 2002, but he had been granted exceptional leave to remain and later, indefinite leave to remain. S's application for asylum had never been dealt with. In January 2001, a policy decision had been made to defer consideration of older asylum applications in order to meet performance targets agreed with the Treasury for the processing of new applications. S's application was eventually rejected in 2004 and discretionary leave to remain had also been refused.

9.8.27 The Court of Appeal held that, as S had exhausted all other procedural routes, the sole basis on which he, would ordinarily be able to resist removal, was a claim under Art.8 and the general principle was that mere delay would not normally improve the prospects of such a claim (*Strbac* and *Shala*). The postponement of old applications had been an arbitrary and unlawful decision amounting to an **ABUSE OF POWER**. The decision of *R (on the application of Rashid) -v- Secretary of State for the Home Department*[50] on abuse of power had sought to transform that concept into a magic ingredient able to achieve remedial results which other forms of illegality could not match, and that appeared to be a considerable extension of existing authorities.

9.8.28 The Court of Appeal noted that the courts themselves have no power to grant indefinite leave to remain or to direct the Secretary of State to grant it. However, they can can conclude that a legally material factor in the Secretary of State's exercise of his discretion was the correction of injustice, and in an extreme case, it could hold that the unfairness was so obvious and the remedy so plain that there was only one way in which the Secretary of State could exercise his discretion. A distinguishing feature of this case was that there was an *absence* of a decision, which had been caused, in principle, by a deliberate and unlawful resolution to postpone a category of

[49] [2007] EWCA Civ 546, (Carnwath LJ, Moore-Bick LJ, Lightman J) (19 June 2007).
[50] [2005] EWCA Civ 744, [2005] Imm. A.R. 608.

cases dictated solely by political reasons and without any regard for fairness and consistency.

9.8.29 It is implicit in the statute that claims for asylum would be dealt with within a '**REASONABLE TIME**' and that concept allowed scope for variation depending on volume of applications, available resources and differences in the circumstances and needs of different groups of asylum seekers. Fairness and consistency were also vital considerations. The court was entitled to conclude that S would have obtained exceptional leave to remain and, later, indefinite leave to remain and that his failure to do so was caused by illegality.

9.9 Article 9 –Right to Freedom of Thought, Conscience and Religion

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

9.9.1 In *Ahsan Ullah*, Lord Bingham held that it would be unlikely (but possible) that a person could successfully resist expulsion in reliance on Art.9 without being entitled to asylum either on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on Art.3.

9.10 Article 14 – Right Not to be Discriminated Against

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

9.10.1 In *R (M and G) -v- Immigration Appeal Tribunal and another* the Court of Appeal considered that where Art.14 is invoked, five questions fall to be considered:[51]

[51] [2004] EWCA Civ 1731; [2004] All ER (D) 277 (Dec) (CA). Questions (a), (b), (c) and (e) were originally formulated by the Court of Appeal in *Wandsworth LBC –v- Michalak* [2002] EWCA Civ 271; [2002] 4 All ER 1136; [2003] 1 WLR 617; [2002] All ER (D) 56 (Mar) (CA) and refined by the House of Lords, most notably in *R (on the application of Carson) –v- Secretary of State for Work and Pensions* [2005] UKHL 37; [2005] 2 WLR 1369; The Times, 27 May 2005; [2005] All ER (D) 397

(a) Do the facts fall within the ambit of one or more Convention rights?

(b) Was there a difference of treatment in respect of that right between the complainant and others put forward for comparison?

(c) Were those others in an analogous situation?

(d) Was the difference in treatment attributable to one or more of the proscribed grounds?

(e) Was the difference in treatment objectively justifiable?

9.10.2 The Court found that it questionable whether this regime is, as a matter of procedure, discriminatory in being less favourable than other regimes for challenging administrative decisions.[52] It held that the discretionary denial of judicial review in cases where statutory review was open to the applicant was objectively justified due to the fact that non-nationals seeking entry or asylum 'stand in a fundamentally different legal situation from those who can enter or remain by right…due process does not necessarily mean the same process for all." [53]

9.10.3 In *AL (Serbia) -v- Secretary of State for the Home Department*,[54] a Serbian national, an unaccompanied minor who had lost contact with his parents, had claimed asylum on arriving in the UK from Kosovo. He had been granted exceptional leave to remain until his 18th birthday and thereafter applied for an extension, which was refused by the Secretary of State on the ground that he had no reason to fear persecution if returned.

He maintained that a concession announced by the Secretary of State known as the **"FAMILY AMNESTY POLICY"** and contained in APU Notice 4/2003 applied to him even though he was an unaccompanied minor. He claimed that his removal would be contrary to Art.14 (taken together with Art.8). In essence, he complained that he had been unjustifiably discriminated against because, as someone who had arrived in the UK as an unaccompanied minor, he had been less favourably treated under the policy than people who shared all his characteristics save that they had arrived in the UK with a parent.

The Court of Appeal held that AL's claim fell within the ambit of Art.14, but that the discrimination had been justified. The family amnesty policy had been designed to apply to asylum-seeking families for practical and economic reasons and as the asylum seeker had not been a member of a family at the relevant time, he could not benefit from that policy.

(May) (HL). In *Carson* Lord Hoffmann expressed the view that the *Michalak* questions would not necessarily apply to all Article 14 cases. See para 28ff.

[52] At [32].

[53] At [35].

[54] [2006] EWCA Civ 1619; [2006] 150 SJ 1606 (28 November 2006).

Article 12

9.10.4 In, *R (on the application of Baiai) -v- Secretary of State for the Home Department*,[55] the Court of Appeal considered the lawfulness of a scheme introduced by the Secretary of State and implemented by sections 19 to 25 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 together with the Immigration (Procedure for Marriage) Regulations 2005 and the Immigration Directorate's Instructions, whereby any person subject to immigration control that wished to marry in the UK could only do so if the secretary of state had provided them with a Certificates of Approval ("COA").

The policy was to refuse a COA to anyone who did not have a right to enter or remain in the UK for more than six months, and with more than three months of that period outstanding. The scheme was challenged on the ground that it infringed Art.14 ECHR in conjunction with Art.12 ECHR.

The Court of Appeal found that the scheme failed the test of proportionality for two primary reasons. First, it was not rationally connected to the legislative objectives of avoiding sham marriages since it failed to take account of many factors, including the circumstances of individual cases. Second, it had far-reaching adverse consequences for a person who required a COA but did not receive it, particularly those who were caught by the provision for automatic refusal.

The fundamental flaw in the scheme was that it effectively constructed a statutory *presumption* that a marriage involving a person with less than six months leave to stay was not a genuine marriage (this was equally the case with illegal entrants). The Secretary of State was only entitled to interfere with the exercise of Art.12 rights in cases that involved, or were likely to involve, sham marriages entered into with the object of improving the immigration status of one of the parties.

To be proportionate, a scheme to achieve that end had to either properly investigate individual cases, or at least show that it had come close to isolating cases that very likely fell into the target category. It also had to show that the marriages targeted did indeed make substantial inroads into the enforcement of immigration control.

9.11 Human Rights Generally

National Assistance

9.11.1 In *R (AW, A, Y) -v- Croydon London Borough Council & Hackney London Borough Council & Secretary of State for the Home Department*,[56] the Court of Appeal held that in the case of a failed asylum seeker who satisfied

[55] [2007] EWCA Civ 478 (23 May 2007) (Waller VP, Buxton and Lloyd LJJ).
[56] [2007] EWCA Civ 266 (Sir Igor Judge (President), Laws LJ, Scott Baker LJ). 4 April 2007.

the criteria of sections 21 and 21(1A) of the National Assistance Act 1948 and who was entitled to the provision of support for the purposes of avoiding a breach of his rights under the ECHR, that provision was to be made by the local authority and not the Secretary of State.

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CHAPTER 10:

THE IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006*

10.1 Introduction

10.1.1 The Immigration, Asylum and Nationality Act 2006 (the "**2006 Act**") received Royal Assent on 30 March 2006. The Act is arranged under six headings: Appeals, Employment, Information, Claimants and Applicants, Miscellaneous and General. The main appeals provisions are summarised below. All provisions referred to came into force on 31 August 2006 (SI 2006 No. 2226) unless stated otherwise.

10.2 Appeals

Appeal against decision that no longer qualify as refugee

10.2.1 The new s.83A of the 2002 Act creates a right of appeal for people who are no longer recognised as refugees but who are permitted to stay in the UK on another basis. The right of appeal will be limited to Refugee Convention grounds. This change is in consequence of the new Home Office policy, applied from 30 August 2005, to grant refugees leave to remain for 5 years instead of the previous indefinite leave to remain.

Rights of appeal when indefinite leave is revoked

10.2.2 A decision to revoke a person's indefinite leave to enter or remain under s.76 of the 2002 Act attracts a right of appeal. The amendment to s.82(2)(g) of the 2002 Act[1] also provides a right of appeal against a decision to remove a person whose leave has been revoked. There is therefore a separate right of appeal at each of the two decision stages: the first at the revocation stage and the second at the decision to remove stage. This separation of appeal rights was considered necessary in light of the importance of Refugee Status.[2]

Appeal against refusal of ENTRY CLEARANCE

10.2.3 Sections 88A, 90 and 91 of the 2002 Act are replaced by a new s.88A[3] which limits all appeals against refusal of entry clearance to the limited grounds of human rights and race discrimination. The only exception is family visitors and people wishing to join dependants in the UK, who will retain a full right of appeal. These two categories will be defined in regulations. This provision has not yet come into force.

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* This chapter is written by Sally Meacher.
[1] Section 2 of the 2006 Act.
[2] Immigration, Asylum and Nationality Act 2006 Explanatory Notes, paragraph 16.
[3] Section 4 of the 2006 Act.

10.2.4 In *SB (Bangladesh) -v- Secretary of State for the Home Department*,[4] the AIT decided that, given SB failed to qualify for indefinite leave to remain and her Art.8 ECHR claim had failed, the best way forward would be for her to return to Bangladesh and make an application for leave to enter under paragraph 246 of the Immigration Rules (rights of access to a child resident in the UK).

The Court of Appeal held that the AIT should not attempt to second guess the decision of an **ENTRY CLEARANCE OFFICER**. It would be unfortunate, in terms of time effort and expense, if a tribunal, when deciding whether a claim for leave to remain was truly exceptional, had to consider, almost as a matter of course, how likely an appellant, if removed from the UK, would be to succeed on a subsequent putative application for entry clearance to come back to this country. Given the degree of speculation involved, it would be difficult for he AIT to determine what weight should be given to this consideration.

Rights of appeal against refusal of leave to enter

10.2.5 The new s.89 of the 2002 Act restricts the right of appeal against a refusal of leave to enter at the port to refugee, human rights and race discrimination grounds, unless the applicant has entry clearance issued for the specific purpose for which entry is sought.

Appeals against decisions to make deportation order: national security

10.2.6 A new s.97A of the 2002 Act[5] prevents decisions to make a deportation order based on national security grounds from being appealed inside the UK unless reliance is placed on a human rights argument. The Secretary of State can certify that the decision would not breach the appellant's human rights, which would lead to an out of country appeal, though the certificate decision can be appealed to the Special Immigration Appeals Commission (see Chapter 6).

Appeals abandoned in fewer circumstances

10.2.7 The 2006 Act amends s.104(4) of the 2002 Act so as to limit the circumstances in which an appeal will be regarded as abandoned (see paragraphs 3.5.27 to 3.5.29 above).

- Introduce a power for Authorised Persons to search a ship, aircraft of vehicle for illegal entrants (s.40); and

- Introduce a power to allow Immigration Officers to examine departing passengers (s.42).

[4] [2007] EWCA Civ 28 (31 January 2007) (Ward, Neuberger and Gage LJJ).
[5] Inserted by s.7 of the 2006 Act.

10.3 Claimants and applicants

10.3.1 During a period of statutorily extended leave pursuant to ss.3C(2)(b)[6] or 3D(2)(a)[7] of the 1971 Act, a decision may be made to remove the person if and when the leave ends. Such a decision is appealable under s.47 of the 2006 Act.

[6] Section 3C(2)(b) of the 1971 Act (as inserted by s.118 of the 2002 Act and amended by s.11(2) of the 2006 Act) refers to leave that is extended during any period when a variation appeal could be brought or is pending, while the appellant is in the UK.

[7] Section 3D(2)(a) of the 1971 Act (as inserted by s.11(5) of the 2006 Act) refers to leave that is extended during any period when an in country appeal against curtailment or revocation of leave could be brought or is pending, while the appellant is in the UK.

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CHAPTER 11:

THE QUALIFICATION DIRECTIVE

11.1 Introduction

11.1.1 The full name of the Qualification Directive is the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

11.1.2 It is an attempt by the European Council to standardise European asylum law and to set out minimum standards for the recognition of refugees and the granting of Subsidiary Protection (the UK has termed this **HUMANITARIAN PROTECTION**).

11.1.3 The Directive is binding on all EU Member States and has direct effect in the UK courts and tribunal system. Under Art.38 member states were required to implement the Directive *before* 10 October 2006.

11.1.4 The UK implemented the provisions of the Directive by way of:

- The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI 2006/2525 (the "**QUALIFICATION REGULATIONS**"); and

- a Statement of Changes in the Immigration Rules, Cm 6918, (the "**QUALIFICATION IMMIGRATION RULES**").

There are also resulting changes to the **ASYLUM POLICY INSTRUCTIONS** (APIs).

11.1.5 Broadly stated, the Qualification Regulations have been used for the refugee-related interpretive provisions, while the Qualification Immigration Rules have been used for the humanitarian protection-related interpretive provisions. However, both the Regulations and the Rules provide dual definitions, for example, Regulation 3 covers both actors of persecution and actors of serious harm and defines who they can be in identical terms.

11.2 Commencement

11.2.1 The Regulations apply to any application for asylum which had not been decided and any immigration appeal brought under the Immigration Acts[1] which had not been finally determined on 9 October 2006.[2] 'Finally

[1] As defined in s 64(2) of the Immigration, Asylum and Nationality Act 2006.
[2] Regulation 1 of the Qualification Regulations.

determined' is defined by s.104(2) of the 2002 Act as being when all legal proceedings on the appeal have come to an end.

11.2.2 The changes to the **IMMIGRATION RULES** (Cm 6918), however, simply state that "the changes shall take effect on 9 October 2006" with no provision for how this will be applied procedurally. In order to deal with this oversight, a Practice Direction was issued by the President of the AIT, Mr Justice Hodge, on 9 October 2006 stating that the AIT will treat the changes to the Immigration Rules under Cm 6918 as applying to all applications and appeals pending on 9 October 2006, as well as to decisions made on or after that date.

11.2.3 The Practice Direction also states that in all appeals pending on 9 October 2006, it will treat the grounds of appeal as including, and as *having always included*, such grounds as are needed to enable the AIT to consider matters under the Qualification Regulations and changes to the Rules, both on initial appeal and on any reconsideration.

11.3 Minimum standards

11.3.1 Article 3 states unequivocally that the Directive is setting out minimum standards only and that Member States may introduce more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection. Therefore, standards exceeding those in the Directive can clearly be maintained and introduced, but where UK standards of protection fall below those in the Directive, they must be amended upwards.

11.4 To whom do the provisions apply?

11.4.1 The Directive applies to **THIRD-COUNTRY** nationals and stateless persons only i.e. not persons from other EU Member States.[3]

11.4.2 The Qualification Regulations, however, apply to all non-UK nationals.[4] Cm 6918 would appear to apply similarly although this is not stated expressly. It is unusual, however, for the courts to have to deal with asylum-related appeals brought by persons from other EU Member States.

11.5 The new 3 stage approach in decisions and appeals

11.5.1 Prior to the 9th October 2006, a 2 stage approach was adopted in asylum-related appeals: first, consideration of eligibility for refugee protection and second, consideration of eligibility for human rights protection. The Directive now requires a **3 STAGE APPROACH**: first, consideration of eligibility for refugee protection; second, subsidiary (or humanitarian) protection and third, human rights protection. This 3 stage approach is exemplified in paragraph 339I of Cm 6918.

[3] Article 2.
[4] Regulation 2.

11.6 Actors of persecution or serious harm

11.6.1 Regulation 3 of the Qualification Regulations provides that:

> **In deciding whether a person is a refugee or a person eligible for humanitarian protection, persecution or serious harm can be committed by:**
>
> **(a) the State; or**
>
> **(b) any party or organisation controlling the State or a substantial part of the territory of the State;**
>
> **(c) any non-State actor if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including any international organisation, are unable or unwilling to provide protection against persecution or serious harm.**

11.6.2 Regulation 3 implements Art.6 of the Qualification Directive almost word for word, faithfully transposing it.

11.7 Actors of protection

11.7.1 Regulation 4 of the Qualification Regulations provides a dual definition of actors of persecution for the purposes of both refugee status and humanitarian protection as follows:

> **(1) In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:**
>
> **(a) the State; or**
>
> **(b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.**
>
> **(2) Protection shall be regarded as generally provided when the actors mentioned in paragraph (1)(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.**

(3) In deciding whether a person is a refugee or a person eligible for humanitarian protection the Secretary of State may assess whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2.

11.7.2 Regulation 4 mirrors Art.7 of the Qualification Directive with one exception: Regulation 4(2) omits the words "inter alia" immediately before the reference to "by operating an effective legal system…" which could arguably be said to impose a narrower definition of protection.

11.7.3 Regulation 4 is generally consistent with existing UK case law on the meaning of protection. Indeed, Art.7 of the Directive was closely modelled on principles elucidated in *Horvath -v- Secretary of State for the Home Department*,[5] though they have obviously been simplified.

11.8 Acts of persecution

11.8.1 Regulation 5 of the Qualification Regulations provides that:

(6) In deciding whether a person is a refugee an act of persecution must be:

(a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms[6]; or

(b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).

(7) An act of persecution may, for example, take the form of:

(a) an act of physical or mental violence, including an act of sexual violence;

(b) a legal, administrative, police, or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

[5] See paragraphs 2.4.17 to 2.4.19 above.
[6] Under Article 15(2) ECHR, there can be no derogation from Article 2 (except in respect of deaths resulting from the lawful acts of war), Article 3, Article 4 (1) and Article 7.

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under regulation 7.[7]

(8) An act of persecution must be committed for at least one of the reasons in Article 1(A) of the Geneva Convention.

11.8.2 Regulation 5 mirrors Art.9 of the Qualification Directive with one exception: regulation 5(2) leaves out an example of persecution that is given in Art.9 which is "acts of a **GENDER-SPECIFIC** or **CHILD-SPECIFIC** nature".

11.8.3 Example (e) may be more restrictive than the current UK case law position on conscientious objection, explicitly covering only one of the three scenarios envisaged in *Sepet and Bulbul -v- Secretary of State for the Home Department*[8] in which a conscientious objector might successfully claim asylum.[9]

11.9 Reasons for Persecution

11.9.1 Regulation 6 of the Qualification Regulations provides that:

(1) in deciding whether a person is a refugee:

(a) the concept of race shall include consideration of , for example, colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall include, for example, the holding of theistic, non-theistic and atheistic beliefs, the participation in , or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall include, for example, membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

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[7] Regulation 7 sets out which persons are excluded from the Geneva Convention under Articles 1D, 1E and 1F.
[8] [2003] UKHL 15.

(d) a group shall be considered to form a particular social group where, for example:

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

(e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom;

(f) the concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in regulation 3 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the person.

(2) In deciding whether a person has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution.

11.9.2 Regulation 6 implements Art.10 of the Qualification Directive almost word for word with one omission. It does not include a section in Art.10(1)(d) relating to a particular social group which states that, "gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article".

Imputed characteristics

11.9.3 Regulation 6(2) makes it clear that the concept of imputed or attributed Convention reasons applies to all the Convention reasons, not just political opinion.

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[9] See paragraphs 2.4.15 to 2.4.16 above.

Religion

11.9.4 The definition of religion in regulation 6(1)(b) *expands* on the position in existing UK case law. The approach in *Omoruyi -v- Secretary of State for the Home Department*[10] in which it was suggested that Nigerian witchcraft-based beliefs were not religious as such, is unlikely to survive the Directive. In addition, claims based on perceived transgressions of religious beliefs or morals would appear to be brought more explicitly within the Convention, particularly given Regulation 6(2).

Nationality

11.9.5 There are very rarely, if any, claims based on nationality that could not also rely on race. The Directive expands the conventional understanding of nationality.

Particular social group

11.9.6 The Directive definition of a particular social group is undoubtedly more *restrictive* than that in *R -v- Immigration Appeal Tribunal ex parte Islam and Shah.*[11] Regulation 6(1)(d)(i) gives a simplified version of the *Shah and Islam* approach and then imposes an additional requirement at regulation 6(1)(d)(ii) such that the group must have a distinct identity within society. The UK case of *Skenderaj -v- Secretary of State for the Home Department*[12] arguably imposes this requirement in cases where the particular social group is persecuted by non-state actors, but the Directive, and thus the Regulation, go much further and impose it in all cases. In light of the Directive providing minimum standards, the higher standards of protection available in the UK on this issue should arguably be maintained. Indeed, Lord Bingham in *Fornah -v- Secretary of State for the Home Department*[13] stated in respect of the Directive, "in my opinion it propounds a test more stringent than is warranted by international authority"[14]. Lord Brown in the same case preferred the definition set out in the UNHCR Guidelines of 2002.[15] The Guidelines define a particular social group as a group of persons who share a common characteristic other than the risk of being persecuted **or** who are perceived as a group by society.[16] In other words, the requirements in Regulation 6(1)(d)(i) and (ii) are treated as alternatives rather than conjunctively. Lord Brown goes on to conclude that the Directive and Regulations will have to be interpreted consistently with the UNHCR definition.[17]

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[10] [2000] EWCA Civ 258; [2001] Imm AR 175.
[11] [1999] 2 AC 629; 2 All ER 545; [1999] 2 WLR 1015; [1999] Imm AR 283.
[12] [2002] EWCA Civ 567; [2002] 4 All ER 555.
[13] Conjoined with *K -v- Secretary of State for the Home Department* [2006] UKHL 46; [2006] 3 W.L.R. 733.
[14] Paragraph 24 .
[15] Paragraph 118.
[16] The relevant section of the Guidelines is set out in Paragraph 15.
[17] Paragraph 118.

Political opinion

11.9.7 The Qualification Directive (and implementing Regulation) suggests a more liberal approach than the current UK position expressed in the starred Tribunal determination of *Gomez (Non-state actors: Acero-Garces disapproved)*,[18] subsequently endorsed by the Court of Appeal (*Suarez -v- Secretary of State for the Home Department*).[19] Single issue campaigners whose campaigns were not necessarily aimed directly at state policy were unlikely to have fallen within the high-level, westernised definition of politics in *Gomez*. However, a feminist or an environmental campaigner against a local polluter may well fall within the new definition. See paragraph 2.7.12 above.

11.10 Exclusion from Refugee Status

11.10.1 Regulation 7 of the Qualification Regulations provides that:

> **(1) A person is not a refugee, if he falls within the scope of Article 1 D, 1E or 1F of the Geneva Convention.**
>
> **(2) In the construction and application of Article 1F(b) of the Geneva Convention:**
>
> **(a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective;**
>
> **(b) the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.**
>
> **(3) Article 1F(a) and (b) of the Geneva Convention shall apply to a person who instigates or otherwise participates in the commission of the crimes or acts specified in those provisions".**

11.10.2 Regulation 7 implements Art.12 of the Qualification Directive and faithfully transposes it.

11.10.3 There are two ways, however, in which Art.12 of the Directive itself is controversial.

- Firstly, the inclusion of a particularly cruel action in the definition of a serious non-political crime (Art.12(2)(b) and Regulation 7(2)(a)

[18] Colombia * [2000] UKIAT 00007.
[19] [2002] EWCA Civ 722; [2002] 1 W.L.R. 2663.

above) is controversial as it possibly diverges from the equivalent Geneva Convention exclusion clause (Art.1F(b)).

- Secondly, a person who has committed a serious non-political crime after arrival in the UK could not fall within the scope of Art.1F(b), since it has been established that Art.1F(b) has a geographical and temporal limitation preventing its application to such a person. However, Art.12(2)(b) and Regulation 7(2)(b) above could allow for the exclusion of such a person, as long as the serious non-political crime was committed before the grant of the refugee status. (See paragraph 11.17.3 below regarding challenges to the legality of the Directive).

11.10.4 The Qualification Immigration Rules at paragraph 334 (iii) state that an asylum applicant will be granted asylum if the Secretary of State is satisfied that, *inter alia*, there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom. This is a wide provision which could be construed as a terrorism clause and now applies in addition to the exclusion clauses above.

11.11 Internal Protection

11.11.1 Paragraph 339O of the Qualification Immigration Rules provides that:

(i) The Secretary of State will not make:

(a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or

(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

(c) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

(ii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return.

11.11.2 Paragraph 339O of the Qualification Immigration Rules implements Art.8 of the Qualification Directive.

11.11.3 These provisions do not use the "**UNDULY HARSH**" wording established in UK case law as the test for whether internal relocation can reasonably be expected. However, in the leading UK case on internal relocation, *Januzi -v- Secretary of State for the Home Department*,[20] their Lordships specifically considered Art.8 of the Qualification Directive and their decision was in line with it. *Januzi*, however, provides a more comprehensive analysis of the meaning of internal relocation than that contained in the Directive and should still be considered by decision-makers. See paragraphs 2.4.21 - 2.4.35 above.

11.12 Subsidiary or Humanitarian Protection

11.12.1 Subsidiary Protection referred to in the Qualification Directive will be known as Humanitarian Protection in the United Kingdom.

11.12.2 Art.18 of the Qualification Directive creates a whole new category of protection. Art.3 ECHR has prevented the removal of those who would face future breaches of that article, but until now this amounted to a mere right of non-removal. New rights are afforded to such persons under the Directive.

11.12.3 Paragraph 339C of the Qualification Immigration Rules states that Humanitarian Protection will be granted in the UK if, *inter alia*, "substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country".

Serious Harm

11.12.4 '**SERIOUS HARM**' is defined in Art.15 of the Qualification Directive and implemented by paragraph 339C of the Qualification Immigration Rules. Paragraph 339C provides:

Serious harm consists of :

(i) the death penalty or execution;

(ii) unlawful killing;

(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal conflict.

11.12.5 Paragraph 339C implements Art.15 almost word for word but for two differences:

- Paragraph 339C adds "**UNLAWFUL KILLING**" to the list of potential types of serious harm. In the **2006 HOME OFFICE CONSULTATION PAPER** it was said that "unlawful killing" should be added since it fell within the scope of the existing Home Office Policy on "**HUMANITARIAN PROTECTION**" and the intention was to align, so far as possible, the existing definition with the definition in the Directive.

- Paragraph 339C(iii) refers to "torture or inhuman or degrading treatment or punishment of a person *in the country of return*". In Art.15 of the Directive the words used are "… *in the country of origin*". In other words, under paragraph 339C(iii), the decision as to risk of serious harm has to be made in relation to the country to which the person will be returned, rather than his country of nationality (or habitual residence, if stateless).

11.12.6 The types of harm listed in paragraph 339C do not constitute an exhaustive list. They are simply examples of serious harm.

11.12.7 Paragraph 339C (iv) requires the Appellant to show an individual threat of indiscriminate violence. This may be difficult as the two terms are more or less mutually exclusive. This provision appears to be a qualification of the *R -v- Secretary of State for the Home Department, ex parte Adan*[21] differential impact principle and there is likely to be litigation on this.

11.13 Subsidiary / Humanitarian Protection v Article 3 ECHR

11.13.1 There are two ways in which Humanitarian Protection is narrower than the protection provided under Art.3 ECHR.

- Firstly, Humanitarian Protection is restricted by an exclusion clause (see below) and a cessation clause (found in Art.16 of the Qualification Directive and implemented by paragraph 339G (i) of the Qualification Immigration Rules) for which no similar provisions apply under Art.3 ECHR.

- Secondly, the definition of serious harm in paragraph 339C (iii) (see above) copies the wording of Art.3 precisely, save for adding the italicised words, "torture or inhuman or degrading treatment or punishment *in the country of return"*. In other words, Art.3 can cover

[20] [2006] UKHL 5.
[21] [1998] Imm AR 338.

"domestic" expulsion cases[22] (where the threat of torture or inhuman or degrading treatment is in the territory of the Member State) as well as "foreign" expulsion cases (where the risk is in the country of origin or return), however, paragraph 339C (iii) applies only to "foreign" cases.

11.14 Exclusion from Subsidiary/Humanitarian Protection

11.14.1 Paragraph 339D provides that a person may be excluded from a grant of Humanitarian Protection where:

(i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;

(ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;

(iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom; and

(iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment were it committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime.

11.14.2 Paragraph 339D implements Art.17 of the Qualification Directive and faithfully transposes it.

11.14.3 The application of this exclusion clause (and the cessation clause at Art.16 of the Directive and implemented by paragraph 339G (i)) to those eligible for Humanitarian Protection makes the criteria for Humanitarian Protection narrower than the Art.3 ECHR criteria which apply no exclusion or cessation clauses.

11.15 Lack of Documentary Evidence

11.15.1 Paragraph 339L of the Qualification Immigration Rules provide:

[22] Using the terminology of the House of Lords in *Ullah* [2004] UKHL 26.

Where aspects of the person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all the following conditions are met:

(i) The person has made a genuine effort to substantiate his asylum claim or establish that he is a person eligible Humanitarian Protection or substantiate his human rights claim;

(ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;

(iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;

(iv) the person has made an asylum claim or sought to establish that he is a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, unless the person can demonstrate good reason for not having done so; and

(v) the general credibility of the person has been established.

11.15.2 Paragraph 339L implements Art.4(5) of the Qualification Directive and faithfully transposes it. It appears to subvert the burden of proof and run contrary to accepted UK case law that all evidence should be considered in the round with as much or as little weight being given to it as the facts and evidence of the particular case dictate.[23]

11.16 Past Persecution

11.16.1 Paragraph 339K of the Qualification Immigration Rules provide:

The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

[23] See for example, *Karanakaran -v- SSHD* [2000] EWCA Civ 11, [2000] Imm AR 271, [2000] INLR 122, [2000] 3 All ER 449 [2000] Imm AR 271

11.16.2 This precisely mirrors the wording in Art.4(4) of the Qualification Directive.

11.16.3 The leading UK case on past persecution, *Demirkaya -v- Secretary of State for the Home Department*,[24] closely reflects the principles set out in paragraph 339K. *Demirkaya*, however, provides a broader analysis on the issue, for instance, casting light in addition on the burden of proof in this context (see paragraph 2.4.5 above).

11.17 *Sur Place* claims

11.17.1 A refugee does not have to have left his country of origin because of a well-founded fear of persecution. A person can become a refugee by reason of events after his departure. Such a person is referred to as a 'refugee *sur place*'. There is no reason why the fear should not arise from the refugee's activities abroad.

11.17.2 Paragraph 339P of the Qualification Immigration Rules makes provision for *sur place* claims. It implements Art.5(1) and (2) of the Qualification Directive and provides:

> **339P. A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activities which have been engaged in by a person since he left the country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return.**

Sur Place claims made in bad faith

11.17.3 The leading case on *sur place* claims in bad faith is the Court of Appeal case of *Danian -v- Secretary of State for the Home Department*.[25] It held that an applicant who could establish that he had a well-founded fear of persecution on Convention grounds should fall within the scope of the Geneva Convention irrespective of whether the actions giving rise to such a fear had been carried out in good or bad faith.

11.17.4 Paragraph 339J deals with *sur place* claims made in bad faith (and paragraph 339J (iv) faithfully transposes Art.4(4) of the Qualification Directive). It provides:

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[24] [1999] Imm AR 498, CA
[25] (2000) Imm AR 96

The assessment by the Secretary of State of an asylum claim, eligibility for a grant of Humanitarian Protection or a human rights claim will be carried out on an individual basis. This will include taking into account in particular:

…

(iv) whether the person's activities since leaving the country of origin or country of return were engaged in for the sole or main purpose of creating the necessary conditions for making an asylum claim or establishing that he is a person eligible for Humanitarian Protection or a human rights claim, so as to assess whether these activities will expose the person to persecution or serious harm if he returned to that country.

11.17.5 The Qualification Directive however, at Art.5(3), permits refugee status to be withheld where the applicant has deliberately created a risk of persecution, for example, by deliberately bringing himself to the hostile attention of the authorities of his country of origin. It provides:

Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

11.17.6 In addition, Art.20(6) of the Qualification Directive provides:

Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.

11.17.7 The Qualification Immigration Rules do not exclude 'bad faith' claims and are thus more generous than the Directive on this aspect of the Refugee definition. The Rules are more in line with existing case law in this area.[26]

11.18 Grounds of Appeal

11.18.1 As a result of the Qualification Regulations and Immigration Rules, all appeals that are asylum-related will require a decision to be made as to eligibility for Humanitarian Protection as well as asylum and human rights eligibility (see paragraph 11.5 above: the new 3 stage approach). The government, however, has chosen not to create a distinct ground of appeal against refusal of Humanitarian Protection. Therefore, any appeal in respect of a grant or refusal of Humanitarian Protection will have to be framed in terms of the decision being "not in accordance with the law" under s.84(1)(a) of the 2002 Act. Section 84(1)(e) ("that the decision is otherwise

[26] See 11.17.3 above.

not in accordance with the law") may sometimes also be involved, for example, when it is said that a policy should have been applied so as to recognise the Appellant's eligibility for Humanitarian Protection.

11.18.2 If a decision is made on appeal to grant the Appellant asylum, then the appeal cannot also be allowed on humanitarian protection grounds. This is because being a refugee and being a person eligible for humanitarian protection are mutually exclusive: paragraph 339C(ii) of the Qualification Immigration Rules. Given that a decision is required on the humanitarian protection grounds, it will in such a case have to be expressed as a dismissal under the Immigration Rules on the matter of a grant of humanitarian protection.

11.19 Challenges reliant upon the Directive

The doctrine of indirect effect

11.19.1 EU law principles require that the interpretation of national law implementing a directive must be done in the light of the directive and be purposive. Therefore, the AIT and the higher courts are obliged to construe the Qualification Regulations and Immigration Rules in such a way as to give effect to the meaning of the Qualification Directive. A challenge can legitimately be brought, therefore, based on the argument that the Qualification Regulations and/or Immigration Rules require to be read in the light of the provisions of the Directive.

The doctrine of direct effect

11.19.2 There will also be challenges alleging that specific aspects of the UK implementing legislation have incorrectly implemented the Directive. If it can be demonstrated that a Member State has failed to implement a provision of a directive correctly, then, so long as the provision concerned is one which has "direct effect" (i.e. is one which imposes a clear, precise, unconditional right and/or obligation)[27] then that provision can be relied on directly.

Challenges to the Legality of the Directive

11.19.3 There may be challenges to the effect that the implementing legislation is wrong because it is based on a Directive which is illegal or invalid as being contrary to EU law. Such a challenge could be brought for instance regarding Art.12(2)(b) of the Qualification Directive regarding exclusion from Refugee Status (see paragraph 11.10.3). Any such challenge would be illegitimate as it is an established principle of EU law that only the ECJ can rule on the invalidity of a Community instrument. A national court or

[27] Case 41/74 *Van Duyn -v- Home Office* [1974] ECR 1337; Case 118/75 *Re Watson and Belmann* [1976] ECR 1185; Case 44/85 *Hurd* ECR 29, para 47.

tribunal, even if it is convinced that the relevant instrument is illegal, is still obliged to apply it.[28]

[28] Case 314/85 *Foto-Frost* [1987] ECR 4199; Case C-143-88 and C-92/89 *Zuckerfabrick Suderdithmarschen* [1991] ECR I-415; C-465/93 *Atlanta* [1995] ECR I-3761.