Neutral Citation Number: [2009] EWCA Civ 645

Case No: C5/2008/3081

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
(AA/01355/2007)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2009

Before :

LORD JUSTICE PILL
LORD JUSTICE LONGMORE
and
LORD JUSTICE RICHARDS

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Between :

VH (Malawi)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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Alasdair Mackenzie (instructed by **Paragon Law, Solicitors**) for the **Appellant**
Steven Kovats (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 20 May 2009

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Judgment

Lord Justice Richards :

1. This case has a lengthy procedural history. The appellant is a citizen of Malawi who entered the United Kingdom in September 2004 with her husband and their four year old son. She gave birth to a second son in March 2005. In December 2006, by which time she and her husband had separated, she claimed asylum. Her claim was refused by the Secretary of State. An appeal to the Asylum and Immigration Tribunal on asylum and human rights grounds was dismissed by an immigration judge (IJ Salmon), but reconsideration was ordered. At the first stage of reconsideration it was found that IJ Salmon had made a material error of law. At the second stage, however, another immigration judge (IJ Osborne) once more dismissed the appeal. The appellant obtained permission to appeal against that decision to the Court of Appeal, but the matter was then disposed of by an order of Laws LJ, made by consent, that the case be remitted to the tribunal. That resulted in a further reconsideration, this time by a panel consisting of two senior immigration judges (SIJ Storey and SIJ Martin). In a determination dated 29 September 2008 the panel again dismissed the appeal. SIJ Storey was, however, persuaded to grant further permission to appeal to this court. There was some doubt as to whether the grounds of permission were limited, but that doubt was removed by an order of Dyson LJ granting permission on all four grounds advanced by the appellant. So that is the basis on which the case now comes before us.

The panel's determination

2. The appellant's case before the panel was, in outline, that if she and her children were returned to Malawi the children would be taken from her and she would not have any right to custody of, or contact with, them. That risk arose from the fact that she had married under a patrilineal system to which her husband's tribe (though not her own) belonged and which insisted that children of a marriage belonged to the husband's family on dissolution of the marriage. Her family had paid a dowry (a *lobola*) as part of the marriage agreement.

3. She submitted that permanently to lose her children in that way would constitute persecution by reason of her membership of a particular social group (that is as a woman, or alternatively as a woman subject to traditional patrilineal marital customs); and/or would constitute a flagrant breach of her rights under article 8 ECHR. As to article 8, she relied on the decision of the Court of Appeal in *EM (Lebanon) v SSHD* [2006] EWCA Civ 1351 which has since been the subject of a decision by the House of Lords (see [2008] UKHL 64), but the difference in the test applied by the House of Lords is not material to the panel's reasoning.

4. The panel approached the matter as follows. They indicated that it was accepted before them that both the previous immigration judges found the appellant's claims to be credible as to what had happened to her in the past. They then summarised the appellant's account, including her background, her marriage, the birth of her children, the breakdown of the marriage after the couple had come to this country and they had been diagnosed HIV positive, and her fear that if she were returned to Malawi her husband or his family would take over custody of the children and she would be denied contact with them.

5. The panel stated that it was the appellant's case that, whilst she knew her husband had made a claim for international protection, she did not know the outcome nor whether he was even in this country. The panel, however, had access to the tribunal's records and had been able to establish that the husband had been successful on article 8 grounds in his own appeal against removal and that no reconsideration had been ordered. A copy of the husband's determination had been made available to the parties, and an opportunity given for submissions to be made in relation to it and further evidence to be adduced in the light of it. The panel rejected a contention on behalf of the appellant that they should not take account of the determination:

> "20. … While accepting that this is an adversarial system and that the Tribunal should not 'descend into the arena' it seems to us that when the person who is the cause of an Appellant's fear has an appeal before the Tribunal whose outcome is unknown if that evidence is available it should properly be before the Tribunal. To ignore that evidence would be for the Tribunal to close its eyes to what may be a very material aspect of the case in determining risk.
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> 21. We accept of course that the Appellant has been found to be credible in her story on two occasions and therefore we should not find against the Appellant on the basis of discrepant evidence in her husband's determination. We do not do so. However, those positive findings relate to the history and what has happened to the Appellant in the past. We need to assess the credibility of her claims that there is a risk of her losing her children if returned. That is a different issue."

6. The panel went on to consider the content of the husband's determination. The husband had told the immigration judge that the appellant's eldest child was not his and that he and the appellant had separated in early 2006 and had been divorced at the end of that year. He had then met a female Malawian refugee with indefinite leave to remain in the UK. They had been living together since 2007 and intended to marry as soon as possible. The immigration judge allowed the husband's appeal on the basis of his now settled family life with his new partner in the United Kingdom, a partner who could not return to Malawi.

7. The appellant was able to produce the eldest child's birth certificate which clearly named her husband as the father. She also gave evidence, which the panel accepted, that she had been unaware of the divorce proceedings and that the divorce had been obtained fraudulently. The panel said that the husband's evidence in his own appeal had not in any way damaged the credibility of the appellant's account. The relevance of his evidence was not in terms of what he said but as evidence of his lack of ongoing interest in the appellant and her two children. It also indicated that he was clearly determined to stay in the United Kingdom and had been successful in that application. There was no reason to think that he was now in Malawi or would be again.

8. That was the basis on which the panel went on to consider the risk that the appellant's family life under article 8 would be breached on return to Malawi owing to her enforced separation from her children. They referred to expert evidence dealing with

the tribal system and the customary marriage system in Malawi, and to a statement from a matrimonial lawyer in Malawi. I will need to consider that evidence later. Among further points then made by the panel were that the appellant was from a matrilineal tribe and had a professional background; and that her husband had taken no steps to seek contact with, let alone custody of, the children in the United Kingdom and had distanced himself from them in the way he presented his case to his immigration judge.

9. The panel concluded:

> "55. Looking at all the evidence in the round; the objective evidence, the evidence of the Appellant, the expert and the lawyer we find that there is no credible evidence that the Appellant's husband or members of his family have shown any interest whatsoever in her or the children. We do not find it credible, despite the speculation of the Malawian lawyer, that if the husband himself has no interest whatsoever in the children (even denying his paternity of one) that his family will. Furthermore, the Appellant having retained her family name would not instantly be identified as a member of her husband's family. They apparently are unaware that she has maintained that name as evidenced by the divorce document and so would not be looking for her under that name. The Appellant herself has a history of professional employment in the city of Malawi and there is no reason why she could not resume that on return. While we note that the cities in Malawi are not the major urban conurbations we see in the UK, there is no credible evidence that members of her husband's family would be looking for her. In particular, if she were to return to Blantyre where she was born and grew up and where she previously worked, that is one of the largest cities and in an area in the south which is predominantly matrilineal where according to the objective evidence there are some 30% female heads of household. She would in no way stand out as different.
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> 56. The reason this matter came back from the Court of Appeal was on the basis that if the Appellant were to lose custody of her children and also lose contact with them that would potentially be a breach of her Article 8 rights. We accept of course that premise to be correct. If the Appellant were to lose both custody and contact with her children that would infringe her Article 8 rights. Losing custody would not necessarily do so because that would be a matter for the national courts of the country concerned but to terminate her relationship with them altogether would no doubt breach Article 8. It would also breach the Article 8 rights of the children which, following recent House of Lords decisions we must also take into account. However, we find that there is no reasonable likelihood that the Appellant's relationship with the children would be terminated. There is no reasonable likelihood that

> she would lose custody of the children let alone contact. As an educated woman from a matrilineal tribe she would be able to reintegrate herself into a southern city such as Blantyre and [*sic*]. There is no evidence that the husband's family are even in that area. The area to which she moved with her husband was another major city, Lilongwe, some considerable distance from Blantyre.
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> 57. One final matter that we need to deal with is whether or not the Appellant would be a member of particular social group in Malawi. However, as we have decided that there is no real risk that she will suffer harm, persecution or a breach of her protected Human Rights, whether or not she falls into membership of a particular social group is irrelevant as even if she did she has not shown any risk that attaches to that membership."

The scope of the reconsideration following remittal by the Court of Appeal

10. The first ground of appeal is that the panel erred in law by failing to restrict the reconsideration to the matters on which the case had been remitted to the tribunal by the Court of Appeal. To explain the point I need to say more about the remittal itself. The order was made with the consent of the parties, who had put forward a form of consent and statement of reasons pursuant to paragraph 13.1 of the CPR Part 52 Practice Direction. The statement of reasons began by summarising the history of proceedings. Having referred to the determination of IJ Osborne that was the subject of the appeal, it continued:

> "2. In so deciding, the Immigration Judge accepted that there was a possibility that following her return to Malawi, the appellant's husband would successfully obtain custody of her two children by virtue of the fact that they had been married under the customary patrilineal law of the Timbuka tribe, as a consequence of which the children would be viewed in customary law as her husband's property. The Immigration Judge further found that in that event, there was a possibility that 'it may prove difficult for the Appellant to have any ongoing contact with them'. However, the Immigration Judge failed to make any findings as to whether or not there was a real risk that her return to Malawi would lead to a flagrant breach of her rights under Article 8 of the ECHR, in the sense explained by the Court of Appeal in *EM (Lebanon)* .... She accordingly erred in law.
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> 3. Further, the Immigration Judge found that the Appellant could not be considered to be a member of a particular social group for the purposes of the Refugee Convention. In arriving at that conclusion, she erred in law in taking into account irrelevant considerations, namely ….

> 4. The parties accordingly consider it to be expedient that the appeal be allowed and that the case be remitted to the Asylum and Immigration Tribunal for reconsideration."

11. The form of consent recorded the parties' agreement that "the case be remitted to the Tribunal pursuant to section 103B(4)(c) of the Nationality, Immigration and Asylum Act 2002", and the order made by Laws LJ on 10 April 2008 included a paragraph ordering remittal in exactly those terms.

12. After the remittal the tribunal issued a direction dated 23 May 2008 stating that there was to be "… [c]omplete rehearing on all issues", to which no objection was raised by either party at the time. We have not seen a copy of the direction itself, but it is described in those terms in SIJ Storey's reasons for his decision granting permission to appeal.

13. The case advanced by Mr Mackenzie for the appellant is that, as recorded in paragraph 2 of the statement of reasons, IJ Osborne had effectively accepted that there was a possibility (by which she must have meant a real risk) that the husband's family would take action to remove the children from the appellant even if the husband remained in the United Kingdom, and that if the children were to live with the husband's family it might prove difficult for the appellant to have any ongoing contact with them. The effect of the remittal was that those findings had to be accepted and the tribunal was limited to considering (i) whether the acknowledged risk to the appellant on return to Malawi reached the threshold of a real risk of persecution, (ii) whether there was a Convention reason for the harm feared by her, and in particular whether it would be caused by her membership of a particular social group, and (iii) whether the loss of custody and contact with her children would constitute a complete denial of her right under article 8 to respect for her family life. Those were the respects in which IJ Osborne's determination was challenged on appeal and was agreed to have been infected by errors of law: points (ii) and (iii) were referred to expressly in the statement of reasons, and point (i) was implicit, in that IJ Osborne's erroneous approach to the question of membership of a particular social group meant that she did not deal with the point. Yet the panel failed to follow the approach required by the remittal. They concluded, contrary to IJ Osborne's findings, that there was no risk of the husband's family attempting to gain custody of the children; and in consequence they declined to deal with the question of membership of a particular social group or to consider whether the risk that the children would be taken away would amount to a complete denial of the appellant's article 8 rights. They thereby failed to carry out the task which the Court of Appeal had required them to carry out.

14. I do not accept that the order for remittal had the effect contended for by Mr Mackenzie. The Court of Appeal certainly has power to limit the ambit of what is remitted to the tribunal: see *ND (Guinea) v Secretary of State for the Home Department* [2008] EWCA Civ 458. But I can see no such limitation in this case. The order itself provides only that "the case be remitted". I do not regard the statement of reasons as forming part of the order: its purpose, as appears from paragraph 13.1 of the Part 52 Practice Direction, is to "set out the relevant history of the proceedings and the matters relied on as justifying the proposed order". In any event the statement of reasons in this case did not purport to limit the terms of the remittal. It identified two errors of law in the immigration judge's determination and

then stated in unqualified terms that the parties considered it expedient that the case "be remitted" to the tribunal. Accordingly, I do not accept that the remittal by the Court of Appeal required the tribunal to reconsider only the points identified in the statement of reasons or imposed any jurisdictional limitation on the scope of the reconsideration.

15. The tribunal was, however, bound to approach the reconsideration in accordance with the principles laid down in *DK (Serbia) and Others v SSHD* [2006] EWCA Civ 1747. In his judgment in that case, Latham LJ said this:

> "22. As far as what has been called the second stage of a reconsideration is concerned, the fact that it is, as I have said, conceptually a reconsideration by the same body which made the original decision, carries with it a number of consequences. The most important is that any body asked to reconsider a decision on the grounds of an identified error of law will approach its reconsideration on the basis that any factual findings and conclusions or judgments arising from those findings which are unaffected by the error of law need not be revisited. It is not a rehearing: Parliament chose not to use that concept, presumably for good reasons. And the fact that the reconsideration may be carried out by a differently constituted tribunal or a different Immigration Judge does not affect the general principle of the 2004 Act, which is that the process of reconsideration is carried out by the same body as made the original decision. The right approach, in my view, to the directions which should be considered by the immigration judge ordering reconsideration or the Tribunal carrying out the reconsideration is to assume, notionally, that the reconsideration will be, or is being, carried out by the original decision maker.
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> 23. It follows that if there is to be any challenge to the factual findings, or the judgments or conclusions reached on the facts which are unaffected by the errors of law that have been identified, that will only be other than in the most exceptional cases on the basis of new evidence or new material as to which the usual principles as to the reception of such evidence will apply, as envisaged in rule 32(2) of the Rules. It is to be noted that this rule imposes the obligation on the parties to identify the new material well before the reconsideration hearing. This requirement is now underlined in the new Practice Direction 14A. This sets out in some detail what is required in such a notice.
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> …
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> 25. Accordingly, as far as the scope of reconsideration is concerned, the Tribunal is entitled to approach it, and to give directions accordingly, on the basis that the reconsideration will first determine whether or not there are any identifiable errors

> of law and will then consider the effect of any such error or errors on the original decision. 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 have been infected by the identified error or errors of law. If they have not been infected by any error or errors of law, the Tribunal should only revisit them if there is new evidence or material which should be received in the interests of justice and which could affect those findings and conclusions or if there are other exceptional circumstances which justify reopening them."

16. The reference in that passage to "the Rules" is to the Asylum and Immigration Tribunal (Procedure) Rules, which provide in rule 32(1) that the tribunal may consider as evidence a note or record made by the tribunal at any previous hearing at which the appeal was considered, and in rule 32(2) that if a party wishes to ask the tribunal to consider evidence which was not considered on any previous occasion when the appeal was considered he must file and serve written notice indicating the nature of the evidence and explaining why it was not submitted on any previous occasion.

17. The tribunal's direction, issued after remittal of the case by the Court of Appeal, that there was to be a complete rehearing on all issues appears to have been issued without consideration of what, in the light of the principles in *DK (Serbia)*, the scope of the reconsideration ought appropriately to be. Insufficient attention was then given to the matter at the outset of the hearing before the panel. Indeed, in his reasons for granting permission to appeal to this court, SIJ Storey states that "it is accepted that we should have sought to clarify (1) what were the findings of fact made by the IJ that stood to be preserved (in the light of the Court of Appeal remittal and its terms); and (2) what Court of Appeal authority dictated as regards the reconsideration process; and (3) why we considered, in line with that authority, that there were exceptional circumstances justifying a second-stage reconsideration panel in looking afresh at certain factual issues".

18. Although those matters were not clarified at the outset as they should have been, it is evident from the panel's determination that they approached the matter on the basis that the previous immigration judges' findings as to the credibility of the appellant's historical account were to be preserved but that it was open to the panel to reassess, in the light of the additional evidence before them, the factual position that would exist on the appellant's return to Malawi and to consider the legal issues in the light of the findings of fact so made. Thus the panel were scrupulous to respect IJ Osborne's findings of historical fact, which depended upon her acceptance of the appellant's credibility, and departed from her findings only in relation to what might happen in the future on the appellant's return.

19. I regard that as a proper, indeed inevitable, approach for the tribunal to have taken, given the existence of the additional evidence. Whether they were right to admit the evidence of the determination in respect of the appellant's husband is a separate issue to which I will turn next; but once that evidence was admitted, together with the further evidence submitted by the appellant in response, it bore so obviously upon the

factual question of risk of loss of custody of, and contact with, the children on the appellant's return to Malawi that a re-evaluation of the relevant facts was an appropriate and necessary exercise for the panel to undertake. If, therefore, the panel erred in law in failing to consider and set the parameters of the reconsideration at the outset of the hearing, the error was not material since it did not result in practice in a flawed approach to the reconsideration.

20. For those reasons I would reject the arguments advanced by Mr Mackenzie in relation to the scope of the panel's reconsideration, including the specific issue raised under the first ground of appeal.

The determination in respect of the appellant's husband

21. It is convenient to move straight to the third ground of appeal, concerning the status of the separate determination in respect of the appellant's husband. Mr Mackenzie submitted that the husband's determination was not admissible in evidence in the appellant's appeal and should not have been taken into account by the panel. He accepted that the tribunal has a limited inquisitorial function (as to which, see Macdonald's *Immigration Law and Practice*, 7th ed. (2008), paragraph 18.134), but in his submission the tribunal overstepped the limits of that function and descended impermissibly into the arena. He submitted that the fundamental rule is that the tribunal must decide the case on the basis of the evidence placed before it by the parties; it may have regard to other evidence as to the objective conditions in a country, but it is not entitled to seek out evidence relating to the personal circumstances of an appellant.

22. In *Gnanavarathan v Special Adjudicator* [1995] Imm AR 64 one of the questions before the Court of Appeal was whether an adjudicator had erred in taking into account other decisions of the tribunal on whether France was a safe third country. On the issue of principle, Glidewell LJ (with whom the other members of the court agreed) said this, at page 70:

> "How far, if at all, was [the adjudicator] required to take those decisions into account? In my view, he was under no obligation to search the files for other decisions. Normally an adjudicator must decide on the material placed before him. However, if he already knows of other earlier decisions, he is entitled to take them into account as a record of the facts upon which they were based. But, if he is going to do that, he must draw to the attention of the parties those decisions, and give the parties an opportunity to comment upon them."

That was followed by Jowitt J in *R v Secretary of State for the Home Department, ex parte Fortunato* [1996] Imm AR 366. Similarly in *Junaid*, an unreported decision of the Immigration Appeal Tribunal notified on 24 October 2001, an adjudicator had relied heavily on a report on country conditions in Sri Lanka which she had looked at only after the hearing; but the tribunal criticised her only on the basis that she had not given the appellant a fair opportunity to deal with the document.

23. Mr Mackenzie submitted that the principle applied in those cases relates only to evidence concerning country conditions and does not extend to evidence concerning

the personal circumstances of an appellant or her family. I disagree. It is true that the particular subject-matter of the cases was evidence concerning country conditions, but the principle was expressed in general terms and I see no justification for cutting it down. In the present case it is clear that the panel found the determination relating to the appellant's husband on a check of the tribunal's records. In my view the panel did not overstep the mark in carrying out that check or in having regard to the determination discovered as a result of the check. They also complied with the requirements of procedural fairness by bringing the determination to the attention of the parties and giving time, albeit only a short time, for it to be considered and for further evidence to be filed in the light of it; and the grounds of appeal do not contend that insufficient time was allowed.

24. In support of his contention that the panel descended impermissibly into the arena, Mr Mackenzie cited a passage from the determination of the tribunal in *JK (Conduct of Hearing) Côte d'Ivoire* [2004] UKIAT 00061, concerning the questioning of witnesses by an adjudicator on points of inconsistency and other matters of concern. At paragraph 43 the tribunal said:

> "What is important, however, in relation to those matters is that the Adjudicator should not develop a different case from that being presented by the other party or pursue his or her own theory of the case."

Mr Mackenzie submitted that that is what happened here. At the hearing before the panel the Home Office Presenting Officer took a neutral position on the husband's determination, declining to make further submissions on it but noting simply that the burden of proof was on the appellant. The panel then proceeded to develop a case of their own on the basis of the determination.

25. I do not accept that submission. If, as I have held, the husband's determination was admissible in evidence, then it seems to me that the panel were entitled (and, indeed, were required) to consider it in conjunction with the other evidence in reaching their findings on the key issues before them. This was not an exercise of the kind that the tribunal can have had in mind in saying what it did in *JK (Conduct of Hearing) Côte d'Ivoire*; and in any event I do not think that the panel can be said to have trespassed beyond their permitted function in the present case and to have fallen into legal error by taking the husband's determination into consideration even in the absence of any positive reliance on it by the Home Office Presenting Officer. I agree with the panel's own observation at paragraph 20 of their determination (quoted above) that "[to] ignore that evidence would be for the Tribunal to close its eyes to what may be a very material aspect of the case in determining risk".

26. There remains a further strand to Mr Mackenzie's submissions under this ground of appeal. He submitted that there was no possible basis on which the panel could reasonably place weight on what the husband had told the immigration judge in his own appeal or draw any meaningful inferences from it. The husband was accepted by the panel to have lied to both the United Kingdom and the Malawian courts. He was not available for cross-examination. There was no evidence as to why he had falsely told the immigration judge that one of the children was not his. The panel's conclusion that he had done so in order to distance himself from the children was pure speculation. The panel misrepresented the position in referring at paragraph 54 to the

husband's "stated lack of interest in the children": he had stated no such thing, and this was simply an inference drawn by the panel. In summary, in his own appeal the husband had every interest to distance himself from the appellant and her children and put the focus on his new partner in support of his article 8 claim to remain in the United Kingdom; but whatever he said in that context, it did not follow that it represented the true position (and even if he was not personally interested in the children, his extended family might be).

27. I have found this the most anxious part of the case before us, since the panel's dismissal of the appellant's appeal depended heavily on the use that they made of the husband's determination. There is undoubted force in the points made by Mr Mackenzie as to the weight that can properly be placed on, and the inferences that can properly be drawn from, what the husband said in support of his own appeal. But the panel's use of that material was a considered decision reached after taking into account submissions to the same broad effect as those made to us. The question therefore comes down squarely to whether the material was so lacking in value that it was unreasonable for the panel to place reliance on it at all. I do not think that one can go that far. Any temptation to substitute one's own judgment on the merits under the guise of a *Wednesbury* test must be resisted, all the more so in relation to a decision of a specialist tribunal consisting here of two senior immigration judges. In my view the panel's deployment of the husband's determination was adequately reasoned and rational. It was not vitiated by any error of law that could justify intervention by this court.

The making of adverse credibility findings

28. The fourth ground of appeal concerns two specific findings which are said to have been inconsistent with the previous immigration judges' acceptance of the appellant's credibility.

29. The first related to certain emails produced by the appellant for the first time for the hearing before the panel. They purported to be from the appellant's husband, and one in particular, dated 24 September 2007, implied that he was in Malawi and stated that he had asked the courts there to grant him custody of the children. The panel, whilst stating that they had found the appellant credible in all respects, expressed doubts about the origin of those emails. They said that all the evidence in the case indicated a lack of interest in the children by the husband. They also noted that the emails referred to the appellant being responsible for the husband having been deported, which made no sense at all since he had never been deported or under threat of deportation and had made a successful human rights claim.

30. The second finding related to the appellant's evidence that she had been told by her sister in Malawi that the sister had been contacted by the husband's family who wanted the children. That evidence had been before IJ Osborne, who made no clear-cut finding in respect of it but certainly did not reject it. It had also been before the first immigration judge, IJ Salmon, who appeared to accept it. The panel, however, said that the evidence could not be reconciled with the way in which the husband's family obtained the divorce. They also pointed out that the sister had reportedly said that the appellant's husband was looking for her, but that this made no sense given the husband's apparent wish to remain in the United Kingdom with his new partner and

his stated lack of interest in the children. The panel did not believe that the sister had been approached as claimed.

31. Mr Mackenzie criticised the panel's findings on those two matters on the basis that the panel were guilty of inconsistency (either the appellant was entirely credible or she was not), they should not have gone back on the findings of the previous immigration judges, and they were wrong and guilty of circularity to reject the appellant's evidence by reference to their findings in respect of her husband.

32. I would certainly accept that the panel could have expressed themselves better on these points. It was strange to refer to the appellant as "credible in all respects" yet to reject these particular aspects of her evidence. From other parts of the determination, however, it is sufficiently clear that the panel intended to accept the credibility of the appellant's historical account but to leave open for re-evaluation any issue of credibility relating to the position on return to Malawi: for example, they stated at paragraph 21 (quoted above) that "[w]e need to assess the credibility of her claims that there is a risk of her losing her children if returned". There was no inconsistency of substance in the panel's approach.

33. In relation to the husband's emails, which were put forward by the appellant as new evidence, the panel plainly had to reach a conclusion of their own, and the conclusion they reached was in my view a rational one, given the strange and unsatisfactory content of the emails themselves.

34. In relation to the sister's evidence, it would have been better to acknowledge what the previous immigration judges had said about it. But this was an issue relating to future risk on which the panel were not bound by the findings previously made and were free to make findings of their own, as they had made clear they intended to do, in the light of all the evidence now before them; and again, the conclusion they reached was in my view a rational one.

35. In relation to neither matter, therefore, do I accept that the panel fell into legal error.

The expert evidence

36. I turn finally to consider the issues raised by the second ground of appeal, which was dealt with last in counsel's oral submissions. They concern the panel's treatment of the evidence of two experts, namely Dr Laurel Aguilar (an anthropologist) and Mr Patrice Nkhono (a Malawian lawyer). Both experts dealt with the dual legal system in Malawi, whereby a modern legal system sits alongside the customary system, and with the attitude towards children in the patrilineal customary system into which the appellant had married. They were both of the view that, notwithstanding the divorce obtained by her husband in Malawi, she would be at risk of losing custody of, and contact with, her children if she returned there.

37. The ultimate conclusion reached by the panel after considering the expert evidence together with the other evidence in the case is set out in paragraphs 55-56 of their determination, which I have already quoted. In my view it was reasonably open to the panel to reach that conclusion on the evidence as a whole even though it involved a rejection of the opinion expressed by the two experts on the issue of risk.

38. In the course of their analysis, however, the panel made various criticisms of, and comments on, the expert evidence to which Mr Mackenzie took objection and which I should therefore examine.

39. One matter of objection was the panel's reference to "speculation" by the experts. Mr Mackenzie submitted that the practice of dismissing expert opinion as speculation has been deprecated by the higher courts (see in particular *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449) and that the panel was wrong so to describe the evidence in this case. For my part, however, I see no substance to the objection here, where the panel provided a reasoned evaluation of the evidence of the experts, referring to opinions as speculative or based on speculation only in relation to certain specific matters where in my view it was reasonable so to describe them. For example, at paragraphs 42-43 the panel set out a passage in Dr Aguilar's third report in which it was said to be highly likely that the appellant would be seen and identified and then reported to her husband's family members. The panel described that view as based largely on speculation, pointing out that there was no credible evidence that the husband or his family were actively seeking the appellant, no evidence as to where the family resided, and, given that the appellant could reasonably be expected to reintegrate herself in an urban area where the custom was matrilineal, no reason to conclude that her presence would be reported or even commented upon.

40. In an earlier passage, at paragraph 39 of the determination, the panel expressed the view that Dr Aguilar had failed to take into account that the appellant herself was from a matrilineal tribe and had never lived in the rural areas of Malawi. As to that, Mr Mackenzie submitted that Dr Aguilar was well aware of both matters and had not failed to take them into account. It seems to me that the panel were commenting on a particular point in Dr Aguilar's report and were entitled in that context to make the remark they did. In any event, however, nothing ultimately turns on this point, since it does not affect the core of the reasoning in paragraphs 55-56 on which the tribunal based its overall conclusion.

41. As to Mr Nkhono, the panel expressed concern about a passage in his evidence where he said that if the custody issue came before the Malawi court the appellant could never be granted custody and it would be impossible for her to gain access to the children. The panel said that that went beyond the objective evidence and that of Dr Aguilar. Mr Mackenzie submitted that the panel were not entitled to reject that part of Mr Nkhono's evidence, but in my view there was a proper basis in the material before the panel for expressing the concern that it did about the evidence.

42. In any event the panel went on to deal with Mr Nkhono's view that the husband's family would pursue the issue. They said that this took no account of the rest of the evidence as to the lack of action thus far, or of the fact that the appellant would be returning to an urban matrilineal area and bore a matrilineal tribal name. Further, the divorce document relied on by the husband in his own appeal indicated that his representative was his uncle, who the lawyer said would be duty-bound to pursue the question of custody in the appellant's absence but who did not in fact do so and had apparently been content to let the matter lie ever since. (I should explain that according to the formal record of the divorce proceedings, the husband's uncle said that "It is our intention that we will be supporting the two children", but it was stated as part of the judgment/order, and included in the formal certificate of divorce, that "The couple will have however got to look after their two sons".)

43. Mr Mackenzie made various criticisms of that reasoning, too, and submitted that there was no proper basis for dismissing Mr Nkhono's evidence. In my view, however, the reasons given by the panel for disagreeing with the lawyer were sound.

44. Thus I would reject the appellant's various arguments that the panel erred in law in their assessment of the expert evidence.

Conclusion

45. For the reasons given I would dismiss the appeal.

Lord Justice Longmore :

46. I agree with the judgment of Richards LJ. I agree, in particular, that the most anxious aspect of the case concerns the weight placed by the tribunal on the determination in relation to the husband and their conclusion (from the evidence given by the husband in the course of that determination) that the husband "lacked interest in the children" (para 54). The question is whether that was a conclusion to which the tribunal could reasonably come.

47. I would, for my part, accept that the tribunal were entitled to have regard to the determination made in relation to the husband. To decide otherwise would be to require the tribunal to proceed without regard to highly relevant evidence which would be wrong. But once it is accepted that that determination (and the evidence on which it was based) was something to which the tribunal was entitled to have regard, the weight which any particular part of the determination is to be accorded is a matter for the tribunal not for this court. This court cannot interfere merely because it might have itself placed less weight on the husband's statements about his children than the tribunal, in fact, did.

48. I have read the judgment of Pill LJ who, while agreeing that the Tribunal was entitled to look at the determination made in the case of the appellant's husband, holds that their approach to it was erroneous. As I see it their approach was to accord the weight which they thought to be appropriate to the husband's lack of interest in the children. Of course, another tribunal might have accorded less weight to the husband's statement, because he was a serial liar with interests of his own to promote, but it is impossible to say that the tribunal was not aware of those factors. How they assessed them was a matter for them. It may well be that mistake as to an established fact which was uncontentious and objectively verifiable can constitute an error of law as stated in E v SSHD [2004] QB 1044. But the weight which is to be accorded to evidence properly before a tribunal cannot, to my mind, fall within that category.

49. In these circumstances I can, for my part, detect no error of law made by the tribunal and I would, like Richards LJ, dismiss this appeal.

Lord Justice Pill :

50. While I agree with most of the reasoning of Richards LJ, set out of course with great clarity, I regret that I have reached a contrary conclusion. In my judgment, the appellant has not had the fair hearing to which she is entitled and there should be a remittal to the Tribunal.

Earlier Remittal

51. Though it is subsidiary to my main concern, I consider first the basis on which the case was, by consent, remitted to the Tribunal by this Court on 10 April 2008, following an earlier appeal from the Tribunal. The remittal was in general terms but followed submission to the Court of an agreed statement of reasons. That is a not uncommon practice and one to be welcomed. Sometimes further explanation is required from the parties to avoid misunderstandings. Even if the remittal order is in general terms, neither party should normally be permitted to resile from their reasons given to the court as the means of obviating the need for a contest and court order.

52. Paragraph 2 of the statement of reasons in this case provided:

> "In so deciding, the Immigration Judge accepted that there was a possibility that following her return to Malawi, the appellant's husband would successfully obtain custody of her two children by virtue of the fact that they had been married under the customary patrilineal law of the Tumbuka tribe, as a consequence of which the children would be viewed in customary law as her husband's property. The Immigration Judge further found that in that event, there was a possibility that 'it may prove difficult for the Appellant to have any ongoing contact with them'. However, the Immigration Judge failed to make any findings as to whether or not there was a real risk that her return to Malawi would lead to a flagrant breach of her rights under Article 8 of the ECHR, in the sense explained by the Court of appeal in *EM (Lebanon) v SSHD* [2006] EWCA Civ 1531. She accordingly erred in law."

53. Neither party attempted to resile from that statement of reasons. All that was in issue on this part of the case was the risk on return. It was to consider that risk that the parties requested, and this Court ordered, remittal. I respectfully disagree with Richard LJ's proposition at paragraph 14 that the points identified in the statement of reasons did not impose a jurisdictional limitation on the scope of the reconsideration. When making the order he did, I doubt whether Laws LJ intended the reconsideration to extend beyond the points identified. It will make for additional work, misunderstandings, and will be productive of injustice if Tribunals can ignore statements of reasons prepared by the parties with the care this statement apparently was. In my view, it did impose a limitation on the scope of reconsideration.

54. When granting leave to appeal, Senior Immigration Judge Storey, who was a party to the Tribunal decision challenged, accepted that the Tribunal "should have sought to clarify" matters including which findings of fact made by the Immigration Judge stood to be "preserved", and what authority dictated as regards the reconsideration process. That showed a recognition of the relevance of the statement of reasons and was a frank expression of concern about the procedure which had been followed by the Tribunal. Moreover, in accepting, at paragraph 15, that the Tribunal was bound to approach the reconsideration in accordance with the principles laid down in *DK (Serbia) and Others v SSHD* [2006] EWCA Civ 1747, Richards LJ appears to have accepted the limitation on the scope of reconsideration required by the statement of reasons.

Risk on return

55. I accept that the Tribunal were entitled, and indeed required, to make findings as to the risk on return to Malawi. That would include making findings of fact while, in doing so, keeping in mind that the appellant had, by two previous Immigration Judges, been found to be credible. Where the Tribunal have erred in law, in my judgment, is in their approach to the evidence before them of the appellant's husband.

56. The appellant married her husband M in 1999 she was adopted into her husband's patrilineal tribe on marriage. They had two children, born in June 2000 and March 2005. There were incidents of domestic violence and the appellant suffered, as the Tribunal found, abuse at his hands. They separated. The Tribunal expressed the appellant's fear at paragraph 14:

> "The Appellant's fear is that if she is returned to Malawi her husband and/or her husband's family will with the full support of the law take over custody of her children and she will be denied any contact with them."

57. They referred to the expert opinion of Dr L.B. Aguilar who had long experience of research in Malawi:

> "In her updated report the expert expresses the view that in her opinion it is highly unlikely that the Appellant would be able to maintain custody and provide for her children if returned to Malawi and that it cannot be assumed that the international/constitutional system of law would be available to her and it is more likely that she would face customary practice."

58. The Tribunal concluded, at paragraph 56:

> "The reason this matter came back from the Court of Appeal was on the basis that if the Appellant were to lose custody of her children and also lose contact with them that would potentially be a breach of her Article 8 rights. We accept of course that premise to be correct. If the Appellant were to lose both custody and contact with her children that would infringe her Article 8 rights"

It is the process by which the Tribunal reached their subsequent conclusion that "there is no reasonable likelihood that the appellant's relationship with the children would be terminated" that I consider to be erroneous in law.

59. Having been informed that her husband was seeking to remain in the United Kingdom, the Tribunal, of its own initiative, found the relevant documents. These showed that the appellant's husband had been successful on article 8 grounds in an appeal against removal. The breadth of rule 51 of the Tribunal Rules (The Asylum and Immigration (Procedure) Rules 2005), makes it difficult to argue that the Tribunal were not entitled to look at the determination in his case. The Home Office

Presenting Officer acted not only fairly but correctly in taking a neutral position on the husband's determination.

60. At paragraph 22, the Tribunal set out the evidence given by the husband in his case:

> "Her husband's appeal was successful on the basis of his relationship with a new partner. He told the Immigration Judge that the eldest child of the Appellant's was not his; that they had had another child which they had tragically lost through cot death and the only living child that was in fact his was the one born in the UK. He told the Immigration Judge that they separated in early 2006 and were divorced at the end of that year. [The Malawian court record states that the marriage is dissolved "as per their wishes".] He had then met another lady who was a Malawian refugee with indefinite leave to remain in the United Kingdom. They had been living together since 2007 and intended to marry as soon as possible."

The Tribunal noted that the earlier Tribunal had allowed the husband's appeal "on the basis of his now settled family life with the new partner in the UK."

61. On the appellant's behalf, the admissibility of the husband's decision was challenged. The Tribunal stated, at paragraph 20:

> "To ignore that evidence would be for the Tribunal to close its eyes to what may be a very material aspect of the case in determining risk."

Richards LJ has held, and I agree, that the dismissal of the appellant's appeal depended heavily on the use the Tribunal made of the husband's determination. It is the use made, in context, of the husband's evidence at that hearing that, for present purposes, it is necessary to consider.

62. The Tribunal also considered the appellant's evidence. She had "no knowledge whatsoever of being divorced". She said that both her children were her husband's children and they had not lost a child through cot death. It was not her signature on the divorce document and her alleged representative at the divorce hearing was "most certainly not her brother".

63. On these issues, the Tribunal rejected the evidence the husband had given in his case before the Tribunal:

> "28. We accept the Appellant's evidence that she took no part in the divorce proceedings; was unaware of it and that it was obtained dishonestly. The papers have been obtained from the court itself and so they no doubt exist.
>
> 29. The Appellant's husband's evidence before the Immigration Judge has not in any way damaged the credibility of the appellant's account. It is accepted that she suffered abuse at his hands and that they separated. It is accepted that

> she has two children and that her husband is the father of both and it is accepted that if he has undergone divorce proceedings she took no part in them and was unaware of them."

The judge's note of the divorce proceedings records the husband's lawyer, who was his uncle, saying: "It is our intention that we will be supporting the two children".

64. A Malawian matrimonial lawyer, Mr Nkhono, gave evidence that "under the patrilineal system all aspects of life are generally designed around the male". In view of the patrilineal context of the marriage, it is likely that the family of the husband would pursue the issue of custody in Malawi, "more so in his absence as they would feel obliged to bring them up on his behalf".

65. I have referred to the Tribunal's finding that the evidence in the husband's determination "may be a very material aspect of the case in determining risk". The Tribunal have attached considerable weight to the evidence of the husband, a serial liar on other issues, on his claimed attitude to the children. The uncle must have been a party to his fraud. The husband's article 8 application, based on a new relationship, gave him every incentive to distance himself from his wife and children who were likely to be returned to the country of nationality and longstanding residence, Malawi. A display of interest in his children would inevitably weigh against the article 8 claim he was making.

66. The Tribunal make numerous references to the husband's evidence about his attitude to the children and they should be considered in that context.

> (a) They refer to the Tribunal's finding in the husband's case that "her husband had not retained links with the children". (Paragraph 23).
>
> (b) "The relevance of the husband's evidence is not in terms of what he says but that evidence of his ongoing interest, or lack of it, in the appellant and her two children". (Paragraph 30).
>
> (c) Notwithstanding the uncle's recorded statement about pursuing the question of custody, "yet he did not in fact do so and was content to let the matter lie and has apparently remained content ever since". (Paragraph 47).
>
> (d) "The appellant's husband has taken no steps to seek contact, let alone custody of his children in the UK . . . not only that but he has openly distanced himself from them in the way in which he presented his case to the AIT". (Paragraph 50).
>
> (e) "The fact that he [the husband] chose to give that evidence would indicate a distinct lack of interest in the appellant and his children". (Paragraph 51).

(f) "The dishonestly obtained divorce document . . . is also silent in terms of the future of the children and indicates that must be decided elsewhere. That does not fit easily with a father and that father's extended family which is determined to have these children". (Paragraph 52).

(g) "All the evidence in this case indicates a lack of interest in the children by her husband". (Paragraph 53).

(h) Her husband's family's wish to have the children "cannot be reconciled with the way in which that same family obtained the divorce". (Paragraph 54).

(i) The husband's "stated lack of interest in the children". (Paragraph 54).

(j) "We find that there is no credible evidence that the appellant's husband or members of his family have shown any interest whatsoever in her or her children". (Paragraph 55).

(k) "There is no credible evidence that members of her husband's family would be looking for her". (Paragraph 54).

67. Their repetition of this point does not improve its quality but these repeated references demonstrate the importance attached by the Tribunal to the husband's evidence on this particular issue. It was used as a basis for discrediting evidence which supports the appellant's fear, that is the emails and the evidence of Dr Aguilar (said to be based on "speculation") and Mr Nkhono, some of the above comments being made in that context. The husband's statements are relied on to find that the expressed fears of a woman found to be credible are unreasonable and unfounded. The reasoning about the expert evidence, legitimately conducted, is influenced by the Tribunal's acceptance of the husband's claimed lack of interest in the children.

68. Yet in invoking an article 8 claim based on a new relationship in the United Kingdom, the appellant had, to say the least, an interest in distancing himself from his children, who were no part of his application to stay and could well be returned to Malawi with their mother. The Tribunal based their conclusion about her fears on return on the evidence, in other proceedings conducted for other purposes, and not susceptible to cross examination, of a serial liar with interests of his own to promote.

Conclusion

69. In my judgment, in those circumstances, the Tribunal's approach to the husband's evidence amounted to an error of law. In both *R v Criminal Injuries Compensation Board Ex Parte A* [1999] 2 AC 330 at 344 and *R Alconbury Developments Ltd & Ors v Secretary of State for Environment, Transport and the Regions* [2003] 2 AC 295 at paragraph 53, Lord Slynn of Hadley cited with approval Wade and Forsyth, Administrative of Law, 7th Ed. (1994), pp316-318 in which it is said:

> "Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact,' or acting 'upon an incorrect basis of fact.' . . . This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong fact are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law"

70. Lord Slynn added, in *Ex Parte A*, at page 345C:

> "For my part, I would accept that there is jurisdiction to quash on that ground in this case, but I prefer to decide the matter on the alternative basis argued, namely that what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness."

71. In *E v SSHD* [2004] EWCA Civ 49, at paragraph 66, Carnwath LJ stated:

> "A mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law"

In *R (Iran) v SSHD* [2005] EWCA Civ 982, this court gave general guidance on the most frequently encountered errors of law. These included: "giving weight to immaterial matters". A more traditional approach was that of Diplock LJ in *R v Deputy Industrial Injuries Commission Ex Parte Moore* [1965] 1 QB 456 at 488. The decision "must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined . . . [the decision maker] may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above".

72. The Tribunal should not have taken into account evidence given in separate proceedings and in the circumstances stated. To regard the evidence as a "very material aspect of the case in determining risk" amounted to an error of law within the principles stated in the authorities. I do not disagree with Richards LJ's finding that the Tribunal were entitled to look at the determination in the husband's case but their approach to its contents was erroneous. It was a misuse of the material they had found.

73. The Tribunal's decision was of course that of a specialist tribunal, as Richards LJ has stated. As assessors of in-country evidence and as judges experienced in fact finding exercises about events in foreign countries, the expertise of the Tribunal is to be respected. On basic issues of fairness, however, the Tribunal is, with respect, no more specialist than any other judicial tribunal. Moreover, the lying husband's successful invocation of article 8 on the basis of a comparatively recent relationship following separation from his abused wife inevitably adds to the sense of unfairness which pervades this case.

74. I do not say that the appellant's case is an easy one but the appellant is entitled to a fair consideration of the evidence. I would allow the appeal and hear submissions on the basis for remittal.