OUTER HOUSE, COURT OF SESSION

[2007] CSOH 34

P1860/06

OPINION OF LORD PENROSE

in the Petition of

HEMAN MOHAMMED ABDULLA
(AP)

Petitioner;

for

Judicial Review

Against

THE SECRETARY OF STATE FOR
THE HOME OFFICE

Respondent:

Petitioner: Bovey, Q.C., Stewart; Wilson Terris & Co
Respondent: Carmichael; H Macdiarmid

16 February 2007

[1] The petitioner is a national of Iraq of Kurdish ethnic origins. He was born on 27 December 1977. He entered the United Kingdom clandestinely on 1 July 2000. He claimed asylum on that date. His claim was refused by the Secretary of State by letter dated 26 June 2002 and served on 2 July 2002. The letter contained directions against the petitioner for his removal to Iraq as an illegal immigrant.

[2] The petitioner appealed to an adjudicator. Following a hearing at which the petitioner gave evidence, the adjudicator refused the appeal by determination promulgated on 6 April 2004. The petitioner applied to the Immigration Appeal Tribunal for permission to appeal against the adjudicator's decision. The Tribunal refused permission to appeal on 11 August 2004. Thereafter the petitioner made an application under section 101(2) of the Nationality Immigration and Asylum Act 2002 and the relative Rules of Court for review of the Tribunal's refusal of leave to appeal. That application was refused by a single judge on 1 October 2004.

[3] Counsel was instructed to prepare the present petition for judicial review on 8 April 2005. It was not available for presentation until about February 2006. It was initially refused as incompetent by administrative decision at the beginning of March and on later occasions during the spring and summer of that year. A first order for intimation and service was pronounced in September 2006 and a first hearing was fixed for 1 October. That diet was discharged of consent on the ground of inadequate time.

[4] The petitioner seeks (a) declarator that in reaching the determination promulgated on 1 April 2004 to dismiss the petitioner's appeal, the adjudicator erred in law *et seperatim* reached an irrational decision; (b) reduction of the adjudicator's decision to refuse his appeal; (c) declarator that in reaching its decision of 11 August 2004 to refuse permission to appeal against the decision of the adjudicator, the Tribunal erred in law; and (d) reduction of the Tribunal's decision of 11 August 2004.

[5] Although Mr Bovey for the petitioner declined, as he put it, to "legislate" by providing a succinct statement of the general and specific propositions of law on which the present petition depended, preferring to drip feed particular propositions into the discussion as it proceeded, it is necessary to attempt to identify the core

features of his approach before narrating the details of his submissions. On his approach the supervisory jurisdiction of the court was, in principle, untrammelled by rule: the objective of the court was to do justice in the circumstances of the instant case. It followed that the objective merits of the case were central to the exercise of the judge's discretion. The stronger the merits of the case, the more likely it was that a remedy would be provided. An application without merit would be dismissed. At the other end of the scale, an application that was objectively meritorious would succeed.

[6] On this approach, the availability and the use of statutory procedures were, essentially, factors of no interest. The procedures were relevant only if they achieved the objective sought by the applicant. Patently, in the petitioner's case, they had not achieved that objective. On Mr Bovey's approach, the merits of the present petition would be seen to be irresistible in substance, and the petition for judicial review would have succeeded but for the objection that the petitioner had used the statutory appeal procedure and failed. It was necessary, in the first place, to set the procedural aspects aside, and to consider the merits of the petitioner's case.

[7] Mr Bovey's critical analysis of the adjudicator's determination focussed initially on paragraphs 29 and 30. The factual background to that paragraph was summarised by the adjudicator in paragraphs 9 to 13 of his determination. Before the adjudicator the petitioner's account of his background and personal history was accepted as credible. He supplemented his written statement in oral testimony in minor respects. So far as these were narrated by Mr Bovey, they are incorporated into the factual narrative that follows.

[8] In 1993 the petitioner was living in his parents' home in Sulemaniah, in the Iraqi Kurdistan region, otherwise referred to as the "Kurdish Autonomous Zone" (the KAZ). By then his father had been a member of the Patriotic Union of Kurdistan (the

PUK) for some years. He had been arrested in May 1986 for his activities and detained for two years before being released under amnesty. The petitioner's father was a member of the PUK's militia force and on 10 March 1993 was appointed a deputy commander of the force. The PUK militia and the forces of the Kurdistan Democratic Party (the KDP) were in armed conflict with the government of Iraq, then supported in the KAZ by the Islamic Movement of Kurdistan (the IMIK), from at least 1988. The petitioner's father was wounded in a clash with the IMIK on 12 July 1993.

[9] The petitioner joined the PUK militia in 1992. Paragraph 10 of the determination states:

> "On 22 November 1993, a messenger claiming to be from the PUK delivered a package at the family home. He was in fact from IMIK. The message said that it was a book for his father and his father's sons to read. The appellant opened the book and a bomb exploded. The appellant suffered injuries to his face, neck, chest and hands. He lost his hands and suffered permanent scarring. His brother lost an eye."

[10] Other siblings of the petitioner were also members of the militia. On 5 April 1994, the petitioner's father and one of the petitioner's brothers took part in a military action against the IMIK. The petitioner could not take part because of his injuries. There was further conflict in October 1994. The adjudicator found that the conflict subsided in 1995 or 1996. But, on 24 March 1997 the petitioner's father and one of the petitioner's brothers were killed in an ambush on a PUK convoy. Another brother was taken prisoner and held until he was released on 19 June 1997 in a prisoner exchange. On 22 February 1998 the petitioner's mother was killed when a grenade was thrown at

the family home. One brother and a sister left Iraq as a result. On 1 October 1999 the petitioner's brother Amer was fired on, but the shot missed him.

[11] The petitioner and his brother Amer left Iraq and went to Iran in fear, presumably of the IMIK. But they were discovered and deported back to Iraq on 10 January 2000. There they remained in hiding until they left and made their way to the United Kingdom.

[12] The adjudicator made findings about the current situation in Iraq. He noted that the American led coalition had brought down the regime led by Saddam Hussein in April 2003, and that coalition troops were still on the ground. There was not a properly functioning civil administration, police or court system outwith the KAZ. Crime rates were high and many civilians were armed. His finding on the evidence before him, however, was that the level of violence was not such as to make it impossible to return persons to Iraq.

[13] In relation to the IMIK, the adjudicator had found in Amer's case, relying on a CIPU assessment of October 2002, that the organisation had split into a "myriad of groups". He noted that there was no dispute in the instant case that IMIK no longer existed as such, and referred to the petitioner's statement that the party had split into different groups such as Ansar al Islam. In relation to that organisation, in the determination in the petitioner's case, he quoted paragraph 3.22 of the CIPU Bulletin 7/2003 which stated that:

> "Ansar al Islam was effectively removed as a threat in military actions by Peshmerga and US Special Forces in March 2003. There is a suggestion that some Ansar fighters may have gone underground and will continue terrorist activity but no evidence for this has so far emerged";

and paragraph 3.23 which stated that:

"Even if the remnants of Ansar al Islam were to present a continuing threat, the KDP and PUK are in de facto control of the Kurdish Autonomous Zone. They are capable of offering protection to those who reside within their respective territories and there is a system in place to provide such protection".

[14] Paragraphs 29 and 30 of the adjudicator's determination are in these terms:

"29. The credibility of the appellant was not in issue. He was injured in an IMIK letter bomb intended for his father in November 1993. He suffered grievous injuries, including the loss of both hands and could take no further active part against IMIK. His family continued to suffer, although the death in action of his father and brother were clearly part of the conflict and not a matter of persecution of the family by IMIK. If IMIK had anything particular against the family, it is strange that the brother who was captured in the ambush was released as part of a prisoner exchange. The appellant blames the grenade attack of February 1998 and the shot fired at his brother in October 1999 on IMIK. I accept that for present purposes, even though the attackers are unknown.

30. Things have changed radically in Iraq since the appellant left. IMIK no longer exists. There was no objective information before me that would indicate that the splinter groups to which IMIK gave rise are continuing individual vendettas against those who belonged to PUK, or whose families were PUK members. Realistically, although the Islamists are not a totally spent force, they have their own problems and priorities. There is no credible reason to believe that they have the resources or interest to pursue persons such as the appellant, who left Iraq more than four years ago. He offers no current threat to them as he is unable to fight. There has been no actual attack

on the appellant himself since he was injured in 1993. Former members of IMIK have their own problems. There is no credible reason to believe that any hostile person would know or care about his return to his own area. There is no credible reason to believe that such persons would dissipate their energies upon wreaking revenge on the appellant. I therefore do not believe that he faces the required degree of likelihood of persecution or relevant ill-treatment on return to his own area."

[15] Mr Bovey submitted that it could be inferred from the determination that the adjudicator accepted that the petitioner had left Iraq as a refugee, but that he had ceased to qualify as a refugee because of changes in Iraq in the interval. Paragraph 30 was the key finding: there was now a lack of risk. IMIK did not exist and the resulting groups did not have the resources to threaten the petitioner. They "had their own problems", a meaningless statement, and the petitioner's personal situation reduced any risk to him. The basis for these conclusions was set out in paragraphs 23 to 28 of the determination.

[16] Mr Bovey commented that, although the adjudicator made observations on the ability of the KDP and PUK to offer protection in the KAZ, he did not rely on that factor: his view was that there was no risk to the petitioner. He did not even consider the question of adequate protection on the hypothesis that the petitioner might be at risk. That approach would have caused him difficulty because of the opinion expressed in *Saber* v *Secretary of State for the Home Department* 13 November 2004, unreported, that KAZ could not be regarded as a country, and therefore organisations such as KDP and PUK could not be held to be capable of providing protection. The adjudicator had resolved the issue on the basis that there was no risk, and that was the heart of the matter. His approach might have reflected the views he had expressed in

dealing with the case of the petitioner's brother Amer, where he had found that there was adequate protection. In the present case he had avoided making such a finding.

[17] In relation to the issue whether there was a risk, the adjudicator referred to CIPU Iraq Bulletins 7/2003 and 8/2003, and relied on the former in particular at paragraphs 25 and 26 of his determination. The later Bulletin, and the Christian Science Monitor report of 5 February 2004 which were before the adjudicator undermined the adjudicator's finding that Ansar al Islam had limited resources, and in particular did not have the resources to mount an attack. The evidence showed that Ansar al islam was linked to Al Quaeda, could mount violent attacks, and contradicted the adjudicator's findings.

[18] In these circumstances it was incumbent on the adjudicator to follow the reasoning in *DD* v *Secretary of State for the Home Office*, 2006 S.C.415 paragraphs 11-13. The two Bulletins together with the Christian Science Monitor report, individually and in cumulo, constituted a body of evidence capable of undermining the finding set out in paragraph 30 of the determination. The adjudicator was obliged to deal with the material that was inconsistent with his view that Ansar al Islam did not have the resources to pursue a vendetta against an individual such as the petitioner.

[19] The adjudicator's second error in paragraph 30 was in relying on the finding that the petitioner offered no current threat to Ansar al Islam because he was unable to fight. The adjudicator misdirected himself in considering the petitioner's position. In the first place, he was in error in paragraph 29 in stating that the parcel bomb delivered in November 1993 was intended for the petitioner's father. The evidence he accepted at paragraph 10 was that the book was intended to be read by his father and his father's sons. It was an attack on at least the male members of the family. In the

context of the wider family, it was irrelevant that there had been no attack on the petitioner himself since 1993. There had been violent attacks on members of the petitioner's family in 1997, 1998 and 1999. The petitioner had been out of Iraq since 2000. To ignore the wider context in assessing whether there was a risk to the petitioner was perverse. The whole slant of the passage showed an unreasonable approach amounting to unfair speculation against the interests of the petitioner rather than in his favour as it should have been.

[20] The adjudicator's approach was erroneous. The issue was whether the petitioner was at risk, not whether he was a threat. There was no evidence that his mother was killed because she presented a threat to IMIK, nor that there was any relevant distinction between the petitioner and his mother. There was no basis in the background material or in the facts of this case to provide a foundation for the view that IMIK and its successors had limited their aggression towards those who were previously considered to be threats. The adjudicator had conjured up the whole idea of threat without any basis in the material before him. Indeed the nature of terrorism did not consist in attacking those who presented a threat. By definition terrorism was an attack on civilian rather than military targets. The adjudicator's approach was wholly erroneous.

[21] On his initial approach, therefore, Mr Bovey submitted that the remedies sought should now be granted. However, failing success in that submission in its purest form, he turned to consider the statutory procedure following on the adjudicator's determination, and discussed in the first place the Immigration Appeal Tribunal's refusal of permission to appeal.

[22] The grounds of appeal advanced for permission to appeal to the Immigration Appeal Tribunal were:

"1. The Decision of the Adjudicator is against the objective evidence known about Iraq at the present time and which was before him. There was no documentary evidence before the Adjudicator to conclude that the IMIK no longer exists. (para 30). There was no objective evidence before the Adjudicator which would allow him safely to make the conclusions reached in Para 30 regarding the IMIK. Furthermore, the Adjudicator then proceeds to state that 'the appellant offers no current threat to them as he is unable to fight'. This is an irrelevant consideration. The issue is whether the appellant would be at risk on return due to his family connections with the PUK which was accepted by the Adjudicator as credible and whether there would be a real risk on return to the KAZ. Given the past persecution, against which there was no effective protection, it is submitted that there is a real risk to the appellant upon return. The fact that the former regime of Saddam Hussein, in central Iraq has fallen, is an irrelevant consideration to the appellant's case. There remains no protection available to the appellant on return to Iraq. The *de facto* authorities are incapable of offering effective protection to the appellant.

2. The Adjudicator, in paragraph 27, distinguishes the case of SABER. It is respectfully submitted that the Adjudicator has mis-directed himself in this regard.

3. The Adjudicator has failed to properly consider the appellant's claim under the Human Rights Convention and his rights as secured by Article 3 (reference to para 31). The Adjudicator has failed to indicate which part of the appellant's claim he accepts and which he rejects."

[23] The tribunal refused permission to appeal, generally supporting the adjudicator's approach and observing that the grounds amounted to a series of

disagreements with the adjudicator's determination that disclosed no error of law. Mr Bovey submitted that the grounds of appeal left something to be desired, but that they did focus the issues on which he relied in the current proceedings. Further the Tribunal had before it the whole materials that had been before the adjudicator, and one assumed that the Tribunal read the material before reaching a decision. In the circumstances he adopted the criticisms he had made of the adjudicator as criticisms of the Tribunal in turn, without further development.

[24] Turning to the petition for statutory review, Mr Bovey dismissed it summarily on the basis that, unlike the grounds of appeal to the Tribunal, it failed to focus any coherent criticism of the adjudicator or the Tribunal. At this stage, in response to questions, Mr Bovey advanced a number of over-lapping propositions. He submitted that in a situation where a party has failed to exercise effectively the statutory remedies available, the court would not normally allow judicial review, but would do so when that was necessary to produce justice. The existence of the statutory remedy did not exclude judicial review, but limited the circumstances in which the court would exercise its jurisdiction. Though the court would not exercise its jurisdiction in the absence of exceptional circumstances, emphasis on a free-standing test related to the availability of a statutory remedy was inconsistent with the equitable nature of the jurisdiction.

[25] Mr Bovey discussed a series of cases relating to common law reduction, relying on observations in *Ingle* v *Ingle's Trustees* 1999 SLT 650 for equiparation of the principles applicable in judicial review. In support of the proposition that the court's jurisdiction was equitable in nature, Mr Bovey referred to *Zannetos* v *Glenford Investment Holdings Ltd* 1982 SLT 453. From it he derived the propositions: (a) that the principal issue in judicial review was substantial justice, though he preferred to

omit the reference to "substantial" as adding nothing; (b) it followed that the merits of the instant case were to the fore: there was no point in resort to judicial review if in fact there was no merit in the case; and (c) conversely, if one took the example of a case in which the respondent acknowledged that the substance of the case was well founded, but took his stance on mere technicalities, the substantial equities would favour the petitioner. Between the extremes it was a matter of weighing the circumstances. The more just the claim for relief, the more likely that the court would provide a remedy by judicial review notwithstanding a failure to exhaust remedies in an effective manner. The second point derived from *Zannetos* was that the court would look to the realities of the situation and to how the failure to achieve an effective remedy by use of statutory procedures came about without fixing the individual with faults or failures on the part of his lawyers. Mr Bovey argued that the issue of fault of lawyers was something of a red herring because if one considered the hypothesis that an individual had acted without legal representation in circumstances that were otherwise the same, the court would have arrived at the same conclusion. The employment of lawyers who did not in the event do a good job was a factor, but the substantial point was that in each case there had been a failure to achieve effective justice. Personal fault of the litigant might or might not be a factor to which the court would give weight. But whether that is reflected through the interposition of a lawyer was irrelevant. It would be curious if the outcome of judicial review proceedings differed materially depending on whether or not a lawyer was engaged.

[26] Mr Bovey referred next to *Bain* v *Hugh L. S. McConnell Ltd* 1991 SLT 691. The court had referred to *Zannetos* with approval. It did not distinguish between cases in which a statutory remedy had been exercised and cases in which it had not. It applied a single approach, of achieving substantial justice. That was a significant

factor. The petitioner in the present case would be in the same position, legally speaking, if statutory review had not been sought. It followed that it was irrelevant that another first instance court had arrived at a view inconsistent with the view now pressed on the court. There could be no sense in which one Lord Ordinary could be said to be reviewing the decision of another. In effect it was immaterial whether one had failed to engage the statutory procedures at all, at one end of the spectrum, or, at the other, had presented the most persuasive case consistent with the rules: the legal positions were identical. The only material consideration was whether it was necessary for justice for a court of first instance to exercise its supervisory jurisdiction when there had been a failure to achieve an effective remedy by statutory procedure.

[27] Under reference to *Ingle* v *Ingle's Trustees*, Mr Bovey submitted that the case underlined the equitable nature of the remedy of judicial review; the similarity between reduction and judicial review; the general approach that judicial review is not normally available when there is a statutory alternative that could provide an effective remedy; that support for general principle could be drawn from Scottish private law sources and English public law sources; that the issue was not whether the statutory and common law remedies were in competition; that the general rule that the common law jurisdiction is excluded by the availability of a relevant statutory remedy could be relaxed in exceptional circumstances; and that if exceptional circumstances are relied on they require to be adequately pled.

[28] Turning to immigration cases, Mr Bovey referred first to *Alagon* v *Secretary of State for the Home Department* 1995 SLT 381. In that case the petitioner had not applied to the statutory tribunal, but raised proceedings for judicial review. The Lord Ordinary had in the event taken an extreme view and in addition to reducing administrative decisions had declared the petitioner entitled to residence in the United

Kingdom on the view that she had plainly been entitled to permanent residence, had been denied that on unacceptable grounds, and could not, because of her age, exercise any right to seek statutory review. She had an unanswerable case on the merits, and judicial review provided an equitable remedy. It was a factor that there was no means of compensating the petitioner by financial award. There were parallels with the present case. A financial award would not provide adequate compensation for the failure of counsel effectively to draft pleadings for statutory review. In the present case if the petitioner were entitled to refugee status, the state had not only no interest in excluding him: it had a positive interest and duty in extending that status to him. Otherwise the United Kingdom would be in violation of international obligations. On the merits the petitioner's position was in substance similar to that of the petitioner in *Alagon*. Although Mr Bovey accepted that the circumstances in that case were exceptional, he submitted that the circumstances in the present case were also exceptional. Since there was no definition of "exceptional", it was a matter for the court in each case to decide whether the circumstances fitted the test. In weighing the interests of the state and the individual, when life was at risk, as it would be in this case, the interests of the state were not a weighty consideration against the exercise of the court's discretion.

[29] Mr Bovey recognised that the Lord Ordinary's opinion in *Sangha* v *Secretary of State for the Home Department* 1997 SLT 545 was inconsistent with the approach adopted in *Alagon*. He submitted that in setting a test of exceptional circumstances that ignored the merits of the case, the Lord Ordinary in *Sangha* had misconstrued the correct approach to considering whether it was necessary to intervene in the interests of justice. In a case where the merits were conceded by the respondent, it would be arbitrary and unreal to exclude that as a factor in considering whether the court should

grant a remedy. In seeking to do justice, in the circumstances of the instant case, the merits were always a factor.

[30] Mr Bovey submitted that the authorities demonstrated that the availability of a statutory remedy did not exclude the court's equitable jurisdiction: it only limited the circumstances in which the jurisdiction would be exercised. There was an issue whether on this approach judicial review simply added another layer of procedure, which Parliament had sought to avoid in adopting the framework of the immigration and asylum legislation. Mr Bovey drew attention to the procedural rules. Notice of appeal had to be lodged in fourteen days. The procedure was wholly written. It was therefore speedy. But it had the disadvantage inherent in speedy written procedure. There was no time for a preliminary opinion to be sought, or for mature consideration of the issues. It was a form of procedure appropriate for weeding out the obvious winners and losers, but there would always be hard cases and difficult cases, of which this was one, for which the statutory procedure was inappropriate. He did not set statutory review at naught, but submitted that one had to recognise the limitations inherent in it, among which was the fact that relatively few counsel were willing to undertake the work.

[31] Mr Bovey turned to read extensively from the opinion of the temporary judge in *Mahmood* v *Secretary of State for the Home Department* 15 April 2005, and from *FP (Iran)* and *Secretary of State for the Home Department* [2007] EWCA Civ 13. These cases discussed the question whether a party had to answer for the actions of his lawyer in the sense of being fixed with the lawyer's error. The temporary judge was wrong to follow the cases of *Al-Mehdawi* v *Secretary of State for the Home Department* [1990] AC 876. The previous case decided in the Outer House *Mensah* v *Secretary of State for the Home Department* 1992 SLT 177 illustrated the position in

this case. There had been an appeal to the Immigration Appeal Tribunal in which the critical argument had not been taken. It was entertained on judicial review. In *Mahmood* it was argued that the petitioner had failed to exhaust his remedies by statutory review.

[32] The next case to be cited extensively was *R. (G)* v *Immigration Appeal Tribunal* [2004] 3 All ER 286 and [2005] 1 WLR 1445. Collins J had characterised the use of judicial review in cases where there was a statutory review procedure as an abuse of process. The Court of Appeal did not agree. Its conclusions were not inconsistent with the petitioner's submissions in this case. In the ordinary case, a failure to exhaust statutory remedies by failing to take a material point led to a requirement to set up an argument that there had been a miscarriage of justice in the circumstances of the case, and that in turn led on to the need to satisfy the court that there existed the exceptional circumstances necessary to warrant the exercise of the court's equitable jurisdiction. That process involved the exercise of discretion in arriving at the decisions required in the case. The court's observations should be read in context. The Court of Appeal did not define any bright lines to assist this court in exercising its discretion.

[33] Finally, in rehearsing the authorities, Mr Bovey referred to Clyde and Edwards on Judicial Review at paragraph 12.12 for the authors' review of the cases dealing with exceptional circumstances, emphasising that there was no comprehensive definition but merely a number of cases in which there had been recognition that exceptional circumstances existed.

[34] In the light of the authorities referred to Mr Bovey observed that of the two types of error envisaged, procedural error and substantial error, either of which could result in a miscarriage of justice, this case fell within the category of substantial error.

It would be inconceivable that the classification could make a material difference to the treatment of the case. But the decision of the adjudicator was one which, but for the procedural objections proposed, was clearly open to judicial review. It mattered not to a petitioner whether his case was referred back because the adjudicator erred in substance or the Tribunal made a procedural error. The present petitioner was a refugee and had to be dealt with as such. If one were searching for substantial justice, one did not achieve that end by treating individuals who made an application to the Tribunal less favourably than those who did not make an application. Where, as in this case, there was not simply an arguable case, but a good challenge to the adjudicator's determination on the basis that the petitioner should have qualified as a refugee, there should be no procedural obstacle to providing a remedy.

[35] In summary, Mr Bovey submitted that applying the court's usual approach to judicial review, the application should be granted. There was established a lack of substantial justice having regard to the background of the claim, the petitioner's experiences in Iraq, the limited nature of the remedies otherwise available to him, and the procedural requirements of strict compliance with the timetable for application for permission to appeal the adjudicator's determination. Mr Bovey added as factors the lack of scope for amendment of the grounds of appeal to the Tribunal, or opportunity for second thoughts in relation to the application for statutory review. The petition for statutory review in this case failed to put the substance of the case before the court. It mattered not whether that was the personal fault of the petitioner or of counsel. He moved that the pleas in law for the petitioner should be sustained and that the decisions of the adjudicator and of the Tribunal should be reduced.

[36] For the respondent, Miss Carmichael contended that the respondent's pleas in law should be sustained and that the petition should be dismissed. She emphasised

that the respondent's position was that the petition was incompetent, as focussed in the first plea in law. She acknowledged that in *Ingle* v *Ingle's Trustees* Lord Caplan, in delivering the opinion of the court, had questioned that approach, and suggested that the issue was rather one of the scope of the remedy. But the interlocutor of the Lord Ordinary to which the court adhered, without modification, was that the petition was incompetent, and that was her position in the present case. That was also the effect of *British Railways Board* v *Glasgow Corporation* 1976 SC 224.

[37] Against the background of that explanation of her position, Miss Carmichael had three broad propositions:

> Where there was, as in this case, a co-extensive statutory means of challenge by which the decision under scrutiny could have been challenged on the grounds currently relied on, the court should not exercise its supervisory jurisdiction;
>
> In the present case there were no special or exceptional circumstances disclosed in the averments of the petitioner, or in oral submission, that would permit resort to the court's supervisory jurisdiction; and
>
> If one considered the issue whether, absent any question of competency, the petition should be allowed to proceed at all, it was without merit and should be dismissed as irrelevant.

[38] In expanding on the first chapter of her submissions, Miss Carmichael referred to the provisions of section 101 of the 2002 Act, as it stood at the relevant time, and to chapter 41 of the Rules of Court as set out in Act of Sederunt (Rules of the Court of Session Amendment No 3) (Applications under the Nationality, Immigration and Asylum Act 2002) 2003. She commented that prior to the 2002 Act challenges of immigration and asylum decisions were routinely brought before the court by way of

judicial review. Typically, such applications sought reduction of the prior decision or decisions. Section 101 adopted a different approach, providing in subsection (3) power to the judge to affirm or reverse the decision of the Tribunal, and to do so with finality. Those provisions were reflected in Rule of Court 41.50 which provided, *inter alia*, for additional evidence to be entertained in appropriate circumstances, and which defined the scope of the single judge's power.

[39] As Miss Carmichael understood Mr Bovey, he had accepted that the general rule was that judicial review was excluded where a statutory appeal route was available. He had contended that the statutory procedure would be capable of dealing with some cases, but not others, which he had characterised as hard or difficult. But he had not made any suggestion as to how one would distinguish such hard or difficult cases, or in what respects the statutory procedures would be incapable of accommodating them. Indeed he had refused to define the limits of the jurisdiction for which he contended. Her submission as that, properly viewed, the statutory appeal procedures provided an adequate and proportionate remedy: *R.(G)* v *Immigration Appeal Tribunal* especially at paragraph 26 of the opinion of Lord Phillips of Worth Matravers. She also relied on the observations in paragraph 27 of the opinion emphasising the established principle applicable, namely that judicial review was a remedy of last resort to be tested objectively by the court.

[40] Whether the correct approach in Scotland was to focus on competency or to treat the issue as one of the scope of the court's discretion, the result was the same. Parliament had provided a satisfactory statutory scheme that could have dealt with all of the issues Mr Bovey sought to raise. In these circumstances the petitioner should not be permitted to proceed.

[41] Mr Bovey had submitted that there was an inconsistency in approach between Collins J and the Court of Appeal. Properly understood, and having regard to the opinions as a whole, there was no such inconsistency. In particular paragraph 15 of Lord Phillips' opinion reflected no disapproval of Collins J's observations. The Court of Appeal's analysis did not refer to the possibility of relaxation of the established rule on grounds of exceptional circumstances. But there was no disapproval of Collins J's reference to the factors identified in paragraph 20 of his opinion which could fall within the Scottish understanding of that exception from the general rule.

[42] Further in support of her argument that the petition was incompetent, Miss Carmichael turned to Mr Bovey's observations about the petition for statutory review. Mr Bovey had referred to criticisms of the previous petition, but the petition and the documents submitted included, as was required, the grounds of appeal to the Tribunal, and the decisions of the adjudicator and of the Tribunal. And these were clearly considered by the single judge. In her note she had set out the factors to which she had regard and, while the note was brief, it disclosed that she had had regard to all material considerations. So far as Mr Bovey had contended that the adjudicator was not entitled to make the findings in fact set out in paragraph 30 of his determination, and criticised the adjudicator for failing to give reasons why certain parts of the written evidence failed to persuade him that there was a real risk, the single judge had taken on the task of considering the adjudicator's approach. Miss Carmichael relied on the Court of Appeal's test, but sought support in any event from the fact that the single judge had addressed the very issue of the merits of the petition for statutory review.

[43] Turning to the second of her submissions, Miss Carmichael acknowledged that there was an inevitable overlap between the first and second chapters. Mr Bovey's approach to considering the scope of judicial review and the limitations on the

common law remedy seemed to relate to the question whether the remedies were co-extensive. Collins J had identified a narrow range of exceptions from the general rule excluding judicial review. In *British Railways Board* v *Glasgow Corporation* the Lord Justice Clerk had identified a different mix of possible exceptions. But the flavour in each case was the same: the examples went to the very heart of the procedure that had been carried out. In the present case there was no suggestion of any defect that could be brought within any of the examples identified.

[44] Mr Bovey had made much of the underlying merits of the petitioner's case. But the correct approach was that taken by the Lord Ordinary in *Sangha* and that should be preferred to the approach in *Alagon*. Support for the earlier approach was not persuasive. Mr Bovey had relied on the observations of the Lord Ordinary in *Zannetos*. But it was at least curious that it had been thought appropriate to resort to reduction as between private parties when there was a clear case for an appropriate financial remedy against negligent solicitors. The result might have been different if the issue of the solicitor's ostensible authority, as distinct from his lack of positive instructions from his client, had been adequately focused in argument. It was clear that it had not. The case was of limited value.

[45] Mr Bovey's second point based on *Zannetos* was that because the Lord Ordinary had ultimately decided the case on the basis that there was no substantial defence to the petitioner's claim, the petitioner in the present case could expand that into a submission that, except in the extreme case where there was obviously no merit in the application, the court required to look at all the circumstances and decide on the substantial merits of the case. The Lord Ordinary's opinion did not bear the weight Mr Bovey sought to place on it. The general proposition was not the converse of the particular example.

[46] Mr Bovey's next authority, *Bain*, related to an *ultra vires* interlocutor. Mr Bovey had sought to extrapolate from that a proposition that there was no difference in substance between cases in which there had been an unsuccessful use of a statutory remedy and cases in which there had been no attempt to use the statutory remedy available. However, he had ignored the essential aspect of the case which was that the interlocutor involved a fundamental irregularity. Further the pursuer had been excluded from the opportunity to pursue an appeal in ordinary form by the actions of the defender's agents in taking decree which was in breach, at least of the spirit, of the agreement between parties. The circumstances were clearly exceptional, and, in any event, far removed from the present case.

[47] Turning to the question of exceptional circumstances more generally, Miss Carmichael submitted that the approach adopted in *Alagon* was wrong, for the reasons given by the Lord Ordinary in *Sengha*. It might be tempting to adopt that course where it was thought that the merits were strong. Mr Bovey may have had that temptation in mind. But the Lord Ordinary's approach in *Alagon* made it impossible to achieve any degree of certainty in considering whether the court would intervene. One would never know until the court had resolved the issues arising on the merits after a detailed consideration of the circumstances. In many cases that would involve proof of the very facts dealt with in the proceedings complained of.

[48] Miss Carmichael submitted that if she were wrong in that matter, *Alagon* could be distinguished. The Lord Ordinary had arrived at the view that the material before him justified him in going beyond reduction of the determination under attack to declare positively that the petitioner was entitled to entry clearance for settlement in the United Kingdom. The court would normally see that as trespassing on the territory exclusively reserved to the adjudicator, as court of first instance. In the present case

the equivalent course would be for the court to find the petitioner entitled to asylum. That was not sought because it was recognised that such a course would not be open. Mr Bovey had set himself a much lower test of success than had been applied in *Alagon*, while arguing that the petitioner would be entitled to the remedy sought.

[49] In *Alagon*, the factors that established exceptional circumstances were that the petitioner could not, on account of age, re-apply for admission; that her loss could not be compensated by a financial award; and that the adjudicator's refusal was a perversion of the petitioner's rights. The third factor was of particular importance in the Lord Ordinary's reasoning. The doubts express by the Lord Ordinary in *Sangha* about the case were well founded.

[50] In relation to Mr Bovey's criticisms of the petition for statutory review, it should not be taken as read that the petition was necessarily reflective of negligence or fault. Miss Carmichael inferred from Mr Bovey's observations about the inability to recover damages for fault that the submission she had to meet was that the person who had drafted the petition for statutory review had been negligent. But in the light of her analysis of the circumstances, it would be proper to say that competent counsel might well have taken the view that there was no basis for an appeal to the single judge at all. However, if one assumed that there was error in the presentation of the petition, the temporary judge's analysis in *Mahmood* was cogent, helpful and up to date, and he reached the correct conclusion that agent error was irrelevant in considering whether there were exceptional circumstances.

[51] Mr Bovey had relied on the observations on Sedley LJ in *FP (Iran)* especially at paragraph 46 that there was no general principle of law that fixed a party with the procedural errors of his or her representative. The present case did not involve

procedural error, and it was unnecessary to reach a view on whether the observation was applicable in Scots law. The preponderance of authority in Scots law was that the party was fixed with agent error. But the case was distinguishable in any event. There was no suggestion that the petitioner had been deprived of the opportunity of having his case heard. On the contrary, his case had been heard by the Secretary of State, the adjudicator, the Tribunal on his application for permission to appeal, and finally by the single judge. The submissions made now were developed on the assumption of an error of approach that somehow vitiated the procedures that had gone before, especially those before the single judge. If there were an error on the part of the adviser in the present case, that would not give rise to exceptional circumstances such as to justify this court in taking the view that judicial review was available. The circumstances were far removed from those in *FP (Iran).*

[52] Dealing with Mr Bovey's submissions on the underlying merits of the petitioner's case, Miss Carmichael referred first to the submission that the adjudicator had failed to deal with material before him that undermined his findings in paragraph 30 of the determination. In her submission paragraph 30 was clear in its terms. Dealing with the determination as a whole, it was not clear why the adjudicator had gone into the issue of protection when his conclusion was that there was no subsisting risk to the petitioner. But paragraph 30 was clear in the context of the adjudicator's findings generally. There was ample material in the reports before the adjudicator to justify the view that IMIK and its successors, so far as active, had objectives other than targeting individuals such as the petitioner. The high point of Mr Bovey's submissions was the Christian Science Monitor report, but there was nothing in it to suggest that individuals might be targeted.

[53] In any event this was not a case in which there were two conflicting bodies of evidence requiring the adjudicator to explain his preference for one over the other. She relied on the observations in *Mohammed Asif* v *Secretary of State for the Home Department* 2000 SC 219 as authority for the proposition that the adjudicator was not obliged to deal with every conceivable issue. Given that the passages in the reports now relied on were not obviously relevant to the case of an individual such as the petitioner, the adjudicator could not properly be criticised for not mentioning them in his determination.

[54] Mr Bovey's second line of criticism had been related to the adjudicator's finding that the petitioner had no longer been a threat to Islamic militants after his injuries in 1993. The concern of the adjudicator had been to determine whether the petitioner was at risk. In that context he had considered whether there was any basis for thinking that Islamic militants would target the petitioner. That was a reasonable line of enquiry. There was nothing in the passage in particular, nor in the adjudicator's reasoning as a whole, to support the criticism advanced. On its merits, the petition was irrelevant and should be dismissed as such if the respondent failed in the submission that the petition was incompetent. On Mr Bovey' approach, which was not correct in any event, the merits were at best weak, and in Miss Carmichael's submission wholly absent, and should not carry any weight with the court.

[55] Mr Bovey made a short reply. Miss Carmichael had argued that it was implicit in his submissions that he had criticised counsel in the statutory review proceedings as negligent. That was not necessarily so. The two forms of process might arrive at different results following on presentations that reflected different opinions on the approach to adopt. But it did not follow that either approach was negligent. What did follow was that one or the other was wrong, and that one or other of the legal advisers

was at fault. In answer to a question, Mr Bovey confirmed that the late adjustments to the present petition reflected fault on the part of the original draftsman.

[56] As I understood it, Mr Bovey's analysis followed necessarily from the fact that litigation is an iterative process, so that if there were eventually success, all previous formulations of the party's case that differed from that which found favour with the court were necessarily reflective of fault on the part of the pleader. In the present case it would, on Mr Bovey's submission, be indicative of fault, at the stage of statutory review, if his submission prevailed and the petitioner achieved the desired result by judicial review. I do not intend to return to this point. In my view, it would be a perverse form of argument that proceeded on such a basis to assume fault on the part of the previous pleader as a working hypothesis on which to assert the validity of the argument for the petitioner in the current judicial review proceedings, or to pray it in aid in any substantial way. Mr Bovey's submissions require to be considered on their own merits.

[57] Mr Bovey then referred to Miss Carmichael's submission based on the history of the procedures. There had been extensive procedure. However, Mr Bovey submitted that to consider the present application in such a context was unduly strict. One must do justice at each successive stage and achieve a just result. It would be curious otherwise. It would be curious if the court were to restrict remedy by judicial review to cases in which there had been a denial of a hearing.

[58] I have sought to set out the submissions of parties as fully as I could, not least because in the absence of any coherent summary of Mr Bovey's position it would have been impossible otherwise to reflect the contents of his argument. The respective positions adopted by counsel appeared to disclose fairly fundamental and irreconcilable differences of approach. But the submissions did not facilitate

discussion of the issues in the case on the basis of a straightforward comparison of the respective arguments of counsel.

[59] It is appropriate at the outset to consider Mr Bovey's criticisms of the statutory procedure. In summary, these were that the procedure had tight time limits and formal requirements that inhibited parties from seeking advice, and excluded mature consideration of the grounds for appeal. It was a form of procedure appropriate for weeding out the obvious winners and losers, but inappropriate for disposing of hard and difficult cases. One had to recognise the limitations inherent in the procedure, among which was the fact that relatively few counsel were willing to undertake the work. Whether relatively few counsel are willing to undertake this class of work, or very few counsel are instructed, raises issues of practice on which it would be inappropriate to form any view without enquiry. It might raise questions of professional ethics if members of the public in need of advice and representation were denied the services of counsel. That apart, the willingness or otherwise of counsel to act in immigration and asylum cases is not a characteristic of the statutory scheme, and in my view is irrelevant to any test of availability of judicial review.

[60] In relation to asylum, the scheme of the 2002 Act was considered in detail in *R. (G)* v *Immigration Appeal Tribunal.* In my view, the reasoning of the Court of Appeal at paragraphs 14 to 27 sets out an analysis of the statutory scheme which, subject to identification and definition of any difference that might be appropriate in relation to Scots law and practice in relation to judicial review, amply supports the general propositions that:

> "26 ..[The] statutory regime, including statutory review of a refusal of permission to appeal, provides adequate and proportionate protection of the

asylum seeker's rights. It is accordingly a proper exercise of the court's discretion to decline to entertain an application for judicial review of issues which have been, or could have been, the subject of statutory review.

27. We would add two observations. First, the applicability of the well-established principle that judicial review is a remedy of last resort is tested objectively by the court. Thus our conclusion has had regard to the legislative purpose and effect of section 101 but not to any wider policy - if there is one - of excluding recourse to the courts. Secondly, our decision concerns only cases, ..., in which the application for judicial review is co-extensive with the available statutory review. Judicial review remains open in principle in cases of justiciable errors not susceptible of statutory review."

[61] In *West* v *Secretary of State for Scotland* 1992 SC 385, at page 413, Lord President Hope observed that judicial review in Scotland is not confined to cases which English law has accepted as amenable to judicial review. One must have in mind the possibility that the observations of an English court may be less than reliable in any given situation for that reason. However, it was not suggested that there was any special factor affecting the operation of judicial review in Scotland that would make it inappropriate to apply the reasoning of the Court of Appeal in the present proceedings. In my opinion there is no such factor. The reasoning is highly persuasive, and I consider that it disposes of Mr Bovey's criticism of the statutory scheme.

[62] The present case falls squarely into the category of cases in which the available remedies are co-extensive in their results. The remedy sought in this case in relation to the adjudicator's decision would have the same result as would have been achieved before the Immigration Appeal Tribunal if permission to appeal had been

granted and the appeal had succeeded. In this case that does not require particular analysis. Mr Bovey submitted that the grounds of appeal to the Tribunal, though brief and leaving something to be desired, reflected the substance of the grounds on which judicial review was now sought. The remedy sought in relation to the Tribunal's decision would similarly have had the same result as would have been achieved had the application for statutory review succeeded. Mr Bovey did not move for any more far-reaching remedy that only judicial review could provide.

[63] Mr Bovey's approach, as I understood it, though he consistently refused to reduce his arguments to concise propositions, was that the Scottish cases on reduction, read with the observations in *Ingle* v *Ingle's Trustees* equiparating judicial review and reduction, identified an implicit difference in procedure as between judicial review and with statutory review that made judicial review an appropriate remedy in the present circumstances. The statutory procedure was wholly in writing and appeal to the Tribunal was limited to points of law. The function of the single judge on statutory review was limited by the statute and the Rules of Court. But, apart from the extremes (a) where the merits of the petitioner's claim for asylum are conceded and (b) where there is no stateable case on the merits, it is for the court hearing a judicial review case to weigh the merits of the application for asylum and to take into account its strength or weakness in deciding whether to entertain the application.

[64] In my opinion, that approach was wholly misconceived, and contrary to authority. In *West*, Lord President Hope set out a comprehensive analysis of the principles governing judicial review which he summarised helpfully at page 412. So far as material for present purposes, he said:

> "1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any

person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.

2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.

3. The competency of the application does not depend upon any distinction between public and private law ...

> By way of explanation we would emphasise these important points:
>
> (a) Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.
>
> (b) The word 'jurisdiction' best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. ...An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law."

[65] In *Shanks & McEwan (Contractors) Ltd* v *Mifflin Construction Ltd* 1993 SLT 1124 at page 1130, Lord Cullen reinforced the emphasis in paragraph "b" by observing: "I understand (that by Lord President Hope's) reference to a 'failure to understand the law' he meant a failure which was of such a character as to entail an excess or abuse of jurisdiction." The proper focus for judicial review is not in doubt. It is not for the court to enter into the factual merits of an application. The role of the court is restricted.

[66] Mr Bovey did not shrink from the implication that there might require to be proof of the issues on the substantive application as an aspect of the exercise of the court's discretion in deciding whether the application for judicial review should proceed. Miss Carmichael was clearly correct in submitting that that would deprive the statutory proceedings of all finality. But in my opinion it is open to a more fundamental objection. Mr Bovey's approach would involve an enquiry that would supersede the adjudicator as final tribunal of fact in relation to the merits as a whole. Differences between the parties could be resolved only by the judge engaging in an enquiry, limited by no rules other than the ordinary rules of evidence and procedure in civil business, into areas that Parliament has committed exclusively to the adjudicator's jurisdiction. In the absence of binding authority, that is a route I would decline to follow. In my opinion, in relation to immigration and asylum cases, the relevant class for present purposes, judicial review does not provide a vehicle for the resolution of contentious issues of primary fact, or inferential fact, relating to the merits of the underlying application as factors relevant to the determination of the propriety of entertaining the application as a whole.

[67] In my view Mr Bovey's submissions are inconsistent with the Lord President's opinion in *West*. It is not material whether one has in mind a straightforward attempt

to review the factual findings of the tribunal of first instance, or to propose such a review as an element of a more focused attack on the decision of that tribunal. "It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted." The opinion is unqualified, and is equally applicable however the proposal to enquire into the merits is presented. The notion that there is some sliding scale of "merit" that would allow enquiry into the facts as an element in the identification of "exceptional circumstances" justifying intervention is without support in principle or authority.

[68] There may be cases in which, after exhaustion of the statutory procedures, either by completing the several stages provided for or following default at one or other of the review stages, circumstances come to light that undermine completely the ruling determination or decision. A crucial fact in the first instance proceedings might be undermined by information coming to the notice of the Secretary of State that was so inconsistent with the position adopted before the adjudicator that no Secretary of State could properly maintain resistance to an asylum claim. One would be surprised if an application for judicial review was resisted in such a case if a remedy could not then be granted administratively. But, in any event, such an exceptional circumstance might justify intervention. In the same way there might be cases in which the parties are in agreement that the findings in fact on which the adjudicator, the Tribunal and the single judge proceeded were materially in error, and that some alternative factual basis was established on the objective material later found to be available. If the claim could not be granted administratively, again the circumstances might justify the court intervening. In these cases, and others that can be dealt with without an independent enquiry, the court would not breach the rule prohibiting enquiry.

[69] However, in my view, there is no spectrum: there is no other case that properly identifies the opposite end of a spectrum in relation to the merits of the substantive application. Mr Bovey sought to set up as the opposite extreme a case which had no merit in substance at all. But an application for judicial review on that hypothesis, if counsel could be found to support it at all, might indeed be an abuse of process of the kind envisaged by Collins J at first instance in *R. (G)* v *Immigration Appeal Tribunal* at paragraph 20. Unlike Mr Bovey, I find nothing in the opinion of the Court of Appeal that disapproves of the thrust of those observations, though the Court did not adopt the paragraph in terms. When one once departs from the case properly categorised as exceptional, there would be no definable limit to the scope for examination of the merits of the substantive application if that were a legitimate factor in deciding whether to permit an application for judicial review to proceed.

[70] It is unnecessary to discuss at length the cases on reduction referred by Mr Bovey. None of them dealt with issues such as arise in the present case, and the inferences Mr Bovey sought to draw from them cannot be supported. It is undoubtedly the case that where a competent application is made to the court for judicial review, as in a case of reduction, the court will seek to achieve substantial justice as between the parties. It does not follow that it is sufficient to vest the court with jurisdiction to assert that there may be an arguable case that the interests of justice require the court to intervene. If it were so, the jurisprudence on judicial review, and on the Scots remedy of suspension and reduction, would be altogether more uncomplicated.

[71] Mr Bovey relied heavily on *Alagon* v *Secretary of State for the Home Department*. In that case, the Lord Ordinary discussed the facts of the case

extensively. If he were to justify arriving at the view that he could himself grant the petitioner the remedy she sought, he had indeed to undertake such a review. For present purposes it is unnecessary to express any view on the course the Lord Ordinary took on that branch of the case. The relevant part of the case for present purposes is the prior issue, whether the decision of the adjudicator was vulnerable to judicial review at all. In relation to that aspect of the case, described by the Lord Ordinary as fundamental, the issue was whether the adjudicator had asked himself the wrong question when considering whether the petitioner's mother had "had the sole responsibility" for her upbringing. The Lord Ordinary set out the facts relevant to that issue and, at page 386, concluded that the adjudicator had indeed asked himself the wrong question because he had misinterpreted the statutory conditions governing the test. He noted at page 388:

> "It was accepted on behalf of the respondent that if the adjudicator had indeed asked himself the wrong question then that was not merely an error of law, but was an error of law which meant that he was acting *ultra vires*."

[72] Whether one would have arrived at the same conclusion is irrelevant; the Lord Ordinary focused the issue with which he was concerned in conventional terms of *vires*, and therefore of jurisdiction in the terms set out in *West*, which the Lord Ordinary cites. Understood in that context, there was no requirement in *Alagon* for a general enquiry into the merits of the claim in deciding whether the adjudicator's determination was vulnerable to judicial review: the question could be answered on the evidence before the adjudicator and the primary facts found by him.

[73] If that view of the first issue in *Alagon* cannot be sustained, then I prefer the approach of the Lord Ordinary in *Sangha* v *Secretary of State for the Home*

Department, and of the Temporary Judge in *Mahmood* on this issue. In *Sangha* the Lord Ordinary stated:

> "*Alagon* was the first case in which a view on the 'merits' was itself treated as relevant to the matter of 'exceptional circumstances'. In that regard, with the greatest of respect to Lord Prosser, I cannot but question the logic of considering the merits of an application before deciding as a separate matter, as it seems to me, that the case surmounts the initial hurdle of 'exceptional circumstances'. There might, after all, be just as much 'merit' in a case where admissions by the respondent were made less freely and where, at least as a matter of procedure, proof would be required..."

[74] If the correct view of *Alagon* is that enquiry into the merits was an essential step in answering the question whether there had been an error as to the relevant question and, there having been so, an *ultra vires* act, then I would agree with Lord Marnoch, and with the Temporary Judge in following him.

[75] In the present case there were and are material differences between the parties as to the merits of the petitioner's claim for asylum. Given the nature of those differences, this is not an exceptional case on the merits: it is a typical case in which the parties entertained and advanced opposing views of the factual basis on which the petitioner's claim fell to be judged. It is not necessary to form a concluded view on the resolution of the differences between parties and it would not be appropriate to express a view one way or another on the merits of the application. The findings of the adjudicator must stand unless they are subject to cogent criticism on the basis of some justiciable error that might, subject to limitations on judicial review generally, be entertained in these proceedings. In my view, there is no such error identifiable in the earlier stages in the proceedings. It is enough that I consider that Miss Carmichael

presented a cogent argument in support of the adjudicator's approach to the facts of the case, and that she was able to support the Tribunal's refusal of permission on the same basis as she resisted the present submissions, namely that the Tribunal identified an attempt to have a re-assessment of the factual material with a view to arriving at different factual conclusions but disclosed no error in law.

[76] In the circumstances, it is necessary to approach the other issues in the case on the basis that the substantive merits of the petitioner's claim for asylum are not material to the resolution of the arguments. For the purposes of this case, it seems unnecessary to resolve the issue whether (a) the jurisdiction of the court in judicial review is excluded in cases in which there is a satisfactory alternative statutory procedure, subject to exceptional circumstances, or (b) there is an unlimited jurisdiction which, as a matter of discretion, the court will not exercise, save in exceptional circumstances, where there is a satisfactory alternative statutory procedure. Common to the formulations is the practical restriction of cases that will be entertained to those properly depending on exceptional circumstances. *Clyde & Edwards on Judicial Review* at paragraphs 12.01 and 12.02 provide support for the proposition that subject to the established exceptions to the rule, the availability of alternative statutory remedies constitute an obstacle to recourse to judicial review. The emphasis is on the established exceptions, apart from which a petition for judicial review will not be entertained. In the light of Lord President Hope's comprehensive analysis in *West*, that arises as an issue of competency. Lord Caplan's observations in *Ingle* v *Ingle's Trustees* have to be understood in the context of the Lord Ordinary's interlocutor sustaining a plea to the competency, to which the court adhered, and can only be held to be *obiter*. In any event, the authority of *West* is not undermined by *Ingle*.

[77] In my opinion, there was evidence before the adjudicator on which he was entitled to arrive at the findings in fact that were crucial to his determination. Mr Bovey's criticisms of the determination no doubt reflected a line of argument that could have been, and appears to have been, developed before the adjudicator. But the merits of that argument are irrelevant given the evidence presented. The reports contained in the CIPU Bulletins and the Christian Science Monitor contained material that might have been held to demonstrate that Ansar al Islam had a continuing capacity for appalling violence. But it was open to the adjudicator to conclude that the targets for such violence were the current governmental institutions in the KAZ and not individuals with a history of active participation in the earlier armed conflict between PUK and KDP on the one hand and IMIK on the other. While the expression used by the adjudicator leaves something to be desired in terms of clarity, I understand the reference to the Islamists having "their own problems and priorities", in paragraph 30, as a reference to the sources of evidence describing the scale and scope of their recent terrorist activities.

[78] Similarly, it seems to me that the adjudicator was entitled to consider whether there was any factor personal to the petitioner that increased or reduced the risk to him as an individual if he were to return to Iraq. He had been a combatant in the military operations at the time of his injuries. The adjudicator's approach cannot be open to criticism as irrational in focussing on the physical disabilities that prevent him, and for many years have prevented him, from further participation in conflict. It is a commonplace of asylum application that the applicant relies on personal factors that make him or her a target for persecution. Identification of a factor that reduces the perceived risk is no less relevant.

[79] The thrust of Mr Bovey's submissions, leaving aside the merits of the petitioner's claim on the facts, was that the adjudicator had failed to deal with the material that was adverse to the view he had formed on risk. In my view the adjudicator was not obliged to deal with the issues in the degree of detail desiderated: *Mohammed Asif.* Nothing in the case of *DD* v *Secretary of State for the Home Department* points to a different conclusion in this case. It is clear from the opinion of the court in *DD* that the IAT had embarked on the issue that was critical to the decision without argument from either party, and had then erred in its approach by concluding that the appellant had the option of internal flight when there was a body of authoritative contrary evidence that the IAT did not deal with, and that the parties were not given an opportunity to deal with in submission. Mr Bovey's attempt to erect on that basis a general proposition that would have obliged adjudicators to deal with all of the evidence identified on judicial review as potentially inconsistent with a view arrived at on evidence that was accepted was bound to fail in light of the observations in *Mohammed Asif.*

[80] So far as the petitioner's wider family is concerned, it was submitted that the adjudicator had been perverse in ignoring the attacks on family members in 1997, 1998 and 1999 in excluding risk to the petitioner. The criticism was unfair. The adjudicator's reasoning is clear. As a matter of history, he found that Ansar al Islam had been effectively removed as a threat in military actions by Peshmerga and US Special forces in March 2003: paragraph 25. He found that things had changed radically in Iraq since the petitioner left. His focus was clearly on the situation following the successful military operations ending in March 2003. The issue of risk was assessed in the context of recent events and the up to date situation as understood by the adjudicator. The adjudicator noted the violence suffered by the petitioner's

family, but it cannot properly be said to have been perverse to deal with the situation as he found it. It is to be noted that the appeal to the adjudicator had proceeded on the basis that the petitioner was at risk because his whole family had been involved with the PUK: at the material time in the 1990s they were members of the PUK militia. They were not civilian targets. It was argued that local protection was not available as a matter of law because of the decision on the court in *Saber*. However, the question of protection arises only if there is risk. The adjudicator was entitled to assess that on the most up to date information that was presented to him. There was nothing perverse in not taking into account information about a historic risk that had been superseded.

[81] It is necessary to deal with the alleged inconsistency between paragraphs 10 and 29. The thrust of the argument was that, having accepted the petitioner's evidence about what was said when the parcel bomb was delivered, the adjudicator then misrepresented the position by referring only to the petitioner's father in the crucial finding, reducing the degree of risk to the petitioner as an individual. In my view, this submission made too much of a change of expression. Paragraph 29 was concerned with assessing the risk to the petitioner in current circumstances. Hence the reference to the inference drawn from the release of the petitioner's brother in the prisoner exchange. The earlier part of the paragraph was concerned with acknowledging that the petitioner and his family had suffered in the past. It would be perverse to read this paragraph as reflecting a degree of discrimination in assessing the credibility of the petitioner.

[82] There remains the question whether error on the part of the petitioner's legal representatives in the preparation and prosecution of the application to the IAT for permission to appeal opens up scope for judicial review. There are differences

between the formulation of the grounds for judicial review and the formulation of the grounds for statutory review in the respective petitions. However, it does not appear to follow that the later of any two formulations is automatically to be preferred over the earlier. Mr Bovey did not subject his predecessor's pleadings to any degree of critical analysis. On his approach it was sufficient that they were different, provided only that his argument succeeded. Given the iterative process by which pleadings are adjusted and amended within a single process, the scope for developing argument on the basis of a predecessor's "error" must be practically without limitation in a case where successive stages involve different pleaders.

[83] However, it is necessary to bear in mind the object of this stage of Mr Bovey's argument, namely to vest the court with jurisdiction to grant orders for judicial review. At its foundations there appeared to be the implied proposition that judicial review is available where the grounds relied on demonstrated development of or deviation from the grounds on which some prior statutory procedure had been conducted, or by reference to which there had been a failure or default in pursuing a statutory remedy. If this is a correct understanding of the position, then it appears to me that Mr Bovey was correct in arguing that it would matter not whether the "error" affecting the efficiency of the earlier procedures was personal to the party or was attributable to his or her professional advisers. The deficiency in the statutory procedure would be identified objectively from the grounds submitted. It would make little substantial sense to favour party error over agent error or *vice versa*. The answer to the argument, however, is that contained in *R. (G)* v *Immigration Appeal Tribunal*:

"26 ... It is .. a proper exercise of the court's discretion to decline to entertain an application for judicial review of issues which have been, or could have been, the subject of statutory review."

[84] The question does not depend solely on the grounds that were advanced before the statutory tribunal. It has regard to the grounds that could have been advanced. In the event, Mr Bovey accepted that the grounds of application to the IAT for permission to appeal reflected the substance of his current argument. It is clear from her note that, whatever might have been the deficiencies of the petition for statutory review, the single judge considered the issue broadly, and expressed her view on the case without restriction to the grounds set out in the petition.

[85] At the end of the day, generally, Mr Bovey's primary argument appeared to me to amount to an attempt to re-argue the merits of the petitioner's case from the beginning. That is not competent and the averments in support, in particular in paragraphs 9A, 9B and 11.1 are irrelevant. In my view it does not follow that the petition as a whole is incompetent, however, and I shall refuse to sustain the first plea-in-law for the respondent. I consider that the remaining averments fail to provide any relevant basis for the remedies sought, for the reasons set out in this Opinion. I shall sustain the second plea-in-law for the respondent and I shall dismiss the petition.