Case Nos: C1/2003/1394 & C1/2003/2203

Neutral Citation Number: [2004] EWCA Civ 49
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 2nd February 2004

Before :
THE MASTER OF THE ROLLS
LORD JUSTICE MANTELL
and
LORD JUSTICE CARNWATH

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Between :

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| "E" | Appellant |
| - and - | |
| SECRETARY OF STATE FOR THE HOME DEPARTMENT | Respondent |

AND

| | |
|---|---|
| "R" | Appellant |
| - and - | |
| SECRETARY OF STATE FOR THE HOME DEPARTMENT | Respondent |

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(Transcript of the Handed Down Judgment of
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Mr M S Gill QC and Mr A Mahmood (instructed by TRP Solicitors) for the appellant "E"
Mr S Kovats and Mr P Patel (instructed by The Treasury Solicitor ) for the Secretary of State
Mr R Husain (instructed by TRP Solicitors) for the appellant "R"
Mr S Kovats and Mr P Patel (instructed by The Treasury Solicitor ) for the Secretary of State

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# Judgment

Lord Justice Carnwath :

Introduction

1. This is the judgment of the Court. These two appeals have been heard together because they raise a common issue as to the powers of the Immigration Appeal Tribunal ("IAT") and the Court of Appeal (a) to review the determination of the IAT, where it is shown that an important part of its reasoning was based on ignorance or mistake as to the facts; and (b) to admit new evidence to demonstrate the mistake.

2. Doubt has been thrown on these issues by apparently conflicting approaches in two separate lines of Court of Appeal authority. A strict approach was taken in *Kibiti v Home Secretary* [2000] Imm AR 594, and more recently in *AE and FE v Secretary of State* [2003] EWCA Civ 1032. A more flexible approach was developed in three cases: *R v Home Secretary ex p Turgut* [2001] 1All ER 719*; R v IAT ex p Haile* [2002] INLR 283; and *A v Secretary of State* [2003] INLR 249. This more flexible approach has been followed without detailed argument in several other cases, including: *Khan v Secretary of State* [2003] EWCA Civ 530; *R (Tataw) v Secretary of State* [2003] EWCA Civ 925, [2003] INLR 585; *Polat v Secretary of State* [2003] EWCA Civ 1059; and *Bagdanavicius v Secretary of State* [2003] EWCA Civ 1605. In another, the Secretary of State himself relied, without objection, on new evidence (about conditions in Russian prisons) produced for the first time in the Court of Appeal: *Batayav v Secretary of State* [2003] EWCA Civ 1489.

3. However, doubts have been expressed. In *Polat* (at para 28), May LJ noted the suggestion that previous decisions of this court had been *per incuriam* which he said "may need to be considered upon full argument in a case in which it really matters". In *Bagdanavicius*, Auld LJ (in a judgment agreed by the Lord Chief Justice and Arden LJ) having referred to the second line of authority, commented (para 72):

> "What all that does for the integrity of our present system of judicial review… or for the appellate process and the reality of what remains of the principle of finality, is open to question. It may soon be time for Parliament and/or the Courts to take a more comprehensive and principled look at both forensic processes with a view to reshaping their structures and jurisdiction so that the form and substance of what the courts are doing bear some resemblance to each other."

As that passage recognises, there is an underlying tension in these cases between the "anxious scrutiny" appropriate to asylum cases (*Bugdaycay v Secretary of State* [1987] AC 514, 531E) and the important, but sometimes conflicting, principle of finality. Given the number of recent Court of Appeal cases raising this point, we agree with Auld LJ that the apparent difference of approach requires early resolution.

4. In the present case, Mr Kovats for the Secretary of State submits that the strict line is to be preferred. As we understand it, his main object of attack is *A v Secretary of State*, which, he says, was *per incuriam*, because it was decided without reference to *Kibiti*, and based on a misinterpretation of *Turgut* and *Haile*. The later cases (except *AE and FE*) wrongly treated the issue as settled by *A v Secretary of State*, although they may be defensible on their facts or on the basis of concessions made in them.

5. We will first summarise the facts of the two cases before us, and the statutory framework. It will then be necessary to consider the relevant principles of general administrative law, before analysing in more detail the relevant asylum cases, and drawing conclusions.

Factual background

6. We will refer to the two appellants respectively as "E" and "R".

7. E is an Egyptian national who has lived outside Egypt all his life. He came to this country from Bangladesh in April 2001 and claimed asylum. His case is that he is a sympathiser of the Muslim Brotherhood, and that his family, particularly his father, had been strongly involved in Muslim Brotherhood activities. He said that he had left Bangladesh because the Egyptian authorities were looking for him and that he could not renew his passport without going to Egypt. He claimed that if he were required to return to Egypt he would be subject to risk of detention and torture. His application for asylum was refused by the Home Secretary, and that refusal was confirmed on appeal by the Adjudicator and by the IAT.

8. The IAT hearing took place on 22nd October 2002, but for reasons which have not been explained the decision was not issued until 4th April 2003. The Tribunal accepted (contrary to the finding of the Adjudicator) that there was evidence that Muslim Brotherhood members were detained and arrested in Egypt. However it concluded that the arrests in the year 2000 were related to the elections in that year, and that most of those arrested were released after a short period (para 58). It recorded that the Adjudicator had properly rejected the appellant's evidence on a number of points. It concluded:

> "As the Adjudicator rightly found the appellant's claimed membership of the Muslim Brotherhood is not such as to render him liable to persecution and his activities if any have been at a very low level and have resulted in very little difficulty for him either in Pakistan or Bangladesh.
>
> There is no evidence before the Tribunal or before the Adjudicator that the appellant had become involved in assisting those engaged in international conflict. She agreed (that) the core of the appellant's story had been consistent but in relation to other matters it was so lacking in credibility and the central core of his case lacking in any facts which led her to dismiss the appeal and find that he did not have a well-founded fear of persecution if returned to Egypt. There is no error of law in that finding. The Tribunal has regard to the guidelines in *Borissov* [1996] Imm AR 526 and finds there is no reason to set aside the findings of the Adjudicator after taking into account the objective evidence in relation to the treatment of the Muslim Brotherhood in between the year 2000 and 2002 by the Egyptian authorities" (para 66-7).
>
> (*Borissov* explained the principles applicable to appeals to the IAT on issues of fact; the approach was recently confirmed by this Court in *Indrakhumar v Secretary of State* [2003] EWCA Civ 1677.)

9. On receipt of that decision, E applied to the IAT for permission to appeal to the Court of Appeal. He challenged the finding that the arrests were solely related to the year 2000. He sought to rely on "subsequent objective evidence", in the form of two reports, which had come into being since the hearing but before the promulgation of the decision.

10. The first was the Human Rights Watch Report 2003, published in January 2003. It referred to the Government intensifying its "crackdown on real or suspected political opponents"; and to "hundreds of arrests during 2002 of suspected Government opponents", the "vast majority" of those targeted being alleged members of the banned Muslim Brotherhood. It also said that police and security personnel "continued to routinely torture or mistreat detainees in some cases leading to death in custody." It noted as a "positive development" that the authorities had referred a number of police personnel accused of torturing suspects to trial; but said that the authorities did not investigate the vast majority of allegations of torture. The other report was that of the World Organisation Against Torture, dated 27th January 2003, which referred to arbitrary pre-trial detention of 15 members of the Muslim Brotherhood.

11. Permission to appeal was refused by the IAT. Of the two reports, it said:

> "The Tribunal can only determine an appeal on the objective evidence before it at the time of the hearing and those reports were not before the Tribunal."

Generally the IAT considered that the grounds of appeal amounted to no more than a disagreement with its findings on the objective evidence before it.

12. R is an Afghan national who came to this country in August 2001 and immediately claimed asylum. The grounds were that he was a convert from Islam to Christianity, and that he feared persecution on that ground if sent back to Afghanistan. The Adjudicator generally accepted R's evidence, but rejected the claim. He considered that, at the time of R's departure from Afghanistan, he had had a well-founded fear of persecution; but that, since the Taliban were no longer in power, his fear was not now justified. This decision was upheld by the IAT. Its hearing was held on 23rd April 2003, but its decision was not promulgated until 19th August 2003.

13. The principal reason for rejecting the claim was that there was no credible evidence of a risk to apostates following the removal of the Taliban. The IAT noted that the appellant's case was unsupported by any recent evidence of conditions in Afghanistan. It commented:

> "The appellant's objective evidence consisted of the US State Department Report on International Freedom for Afghanistan and Iraq, for the year 1999 (published in 2000). These documents are published every year, but the appellant chose to rely on documents, which predated the removal of the Taliban and the new era of religious freedom in Afghanistan. We are unable to place any weight on either of these reports today.

> Mr Blundell for the respondent said that he had not filed the CIPU Country Report for October 2002 on Afghanistan, as it now does not mention apostasy at all. Neither party produced any current US State Department Report or material other than that mentioned."

14. On 1st September R applied for permission to appeal, relying on a new CIPU report dated April 2003. This included the following statement:

> "6.44. In a report dated July 2002 UNCHR Geneva reported that a serious risk of persecution continues to exist for Afghans suspected, or accused, of having converted from Islam to Christianity, or Judaism. Conversion is punishable by death throughout Afghanistan, however at the time the report was written no such harsh punishment was reported."

R also relied on an expert report by a Dr Gopal, dated 3rd September 2003, supporting R's case as to the risk to converts in Afghanistan.

15. Permission was refused by the IAT. It said:

> "The grounds of appeal contend that the Tribunal should have taken into account the April 2003 CIPU country report which the Home Office presenting officer did not present at the hearing (nor did the appellant), despite the Tribunal having signed its determination on the day of the hearing. There was a delay of almost four months in administrative promulgation of the determination, during which time it is alleged that the Tribunal should have reviewed the determination of its own motion. That is not a proper ground of appeal especially as the April 2003 CIPU country report was not available for tribunals in April but in May 2003…
>
> It is not in the interests of certainty that where there are administrative delays after the Court or Tribunal has signed its decision for promulgation, it should be expected to record all pending decisions on the issue of new Home Office evidence such as a CIPU country report. The Tribunal decides the appeal on the evidence of submissions and other documents actually before it at the hearing (or after, if leave is given for post-hearing service of additional relevant documents)."

16. Permission to appeal in both cases was granted by Buxton LJ, who directed that they should be heard together. In the light of the apparent conflict between recent Court of Appeal decisions (he referred in particular to *AE and FE* and *Khan*; see above), he considered that the court should have the opportunity to consider –

> "the jurisprudential basis of its power to overturn appeal decisions of the IAT on the basis of material not before the IAT".

Statutory Provisions

17. As is well known, the legislation in this field has been subject to frequent amendment. Care is therefore required in identifying the provisions in force at any relevant time. For present purposes it is sufficient to refer to the statutory provisions governing the rights of appeal to the Tribunal and this Court. They are found in the Immigration and Asylum Act 1999 ("the 1999 Act"), the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and the Immigration and Asylum Appeals (Procedure) Rules 2003 ("the 2003 Rules"). Although, as we will explain, the 2002 Act applies for certain purposes, the appeals to the IAT were governed by the 1999 Act, under which the grounds of appeal were not confined to points of law (cf 2002 Act s 101(1) which now confines appeals to the IAT to points of law). What follows is intended as a summary of the law at the relevant time, not a definitive exposition.

18. It is relevant to some of the arguments of the appellants that the 1999 Act introduced what was called a "one-stop" regime for appeals. This is explained in Macdonald's *Immigration Law and Practice* 5th Ed para 18.108:

> "One of the aims of the Immigration and Asylum Act 1999 is to put an end to the possibilities of sequential appeals under the Immigration Act 1971 and Asylum and Immigration Appeals Act 1993. Under those Acts it was possible for an applicant to enjoy an appeal under the rules (eg a student appeal), then a deportation appeal for overstaying, and finally an appeal against a refusal to revoke a deportation order, on asylum grounds… The one-stop procedure is the main mechanism by which the Government seeks to ensure that all possible grounds of appeal, including asylum and human rights or discrimination grounds, by the principal applicant, and all members of the family, are dealt with together. …."

19. The determination of appeals in the present case is governed by Part IV of Schedule 4 to the 1999 Act. (Following the enactment of the 2002 Act, the 1999 provisions continue to apply in relation to "events which took place before 1st April 2003": see 2002 Act (Commencement No 4) Order art 3-4.) An appeal could be made to the adjudicator on the grounds (among others) that a decision was in breach of human rights (s 65), or that removal would be contrary to the Refugee Convention (s 69). On appeals on those grounds, the adjudicator and the IAT could take account of any evidence relevant to the appeal, including evidence about matters after the date of the decision appealed against (s 77(3)). This reflects the approach established as correct by this court in *Ravichandran v Home Secretary* [1996] Imm AR 97, 112-3 per Simon Brown LJ. Paragraph 22 of Schedule 4 provided for appeals to the IAT from the Adjudicator, which is not confined to issues of law; the IAT could "affirm the determination or make any other determination which the Adjudicator could have made".

20. Paragraph 23 provides for appeal from the IAT to the Court of Appeal, with leave of either the IAT or the Court of Appeal. The right of appeal is limited to "a question of law material to (the Tribunal's) determination." It is common ground that the Court of Appeal is confined to considering the circumstances as at the date of the IAT's determination. (The

difference is as to the extent to which new evidence may be adduced to establish the true position at that date.)

21. The 2003 Rules were applied to appeals to the IAT pending on 1st April 2003. Their "overriding objective" is:

> "to secure the just, timely and effective disposal of appeals and applications in the interests of the parties to the proceedings and in the wider public interest." (rule 4)

Part 4 governs the procedure for applications for permission to appeal from the IAT. Rule 26, headed "Scope of this Part", provides:

> "This Part applies to applications to the Tribunal for permission to appeal on a point of law to the Court of Appeal …. from a determination of an appeal by the Tribunal."

Rules 27 to 29 deal with the making of the application for permission. Rule 30 is headed "Determining the Application". It provides that the application must be determined by a legally qualified member of the Tribunal without a hearing, and (by paragraph (2)) that the Tribunal may (a) grant permission to appeal; (b) refuse permission to appeal; or (c) subject to paragraph (3), "set aside the Tribunal's determination and direct that the appeal to the Tribunal be re-heard." Paragraph (3) provides that an order under (c) may only be made by the President or Deputy President of the Tribunal, and after giving every party an opportunity to make representations. There is an issue, to which we shall return, as to the limits if any on the scope of the power to direct a re-hearing.

22. Account must also be taken of the general rules governing appeals to the Court of Appeal. For the purposes of an appeal, the Court of Appeal generally has "all the authority and jurisdiction" of the tribunal appealed against (Supreme Court Act 1981, s 15(3)). Procedure in the Court of Appeal itself is subject to CPR Part 52. Rule 52.11(1) provides that the appeal will be limited to a "review" of the decision of the lower court, unless the court considers that "in the circumstances of an individual appeal, it would be just to order a re-hearing". Rule 52(2) provides that, unless otherwise ordered, the court will not receive (a) oral evidence; or (b) evidence which was not before the lower Court.

23. Although that rule gives the Court a discretion to admit new evidence, it is not unlimited:

i) The discretion is subject to any statutory limitations in the scope of the appeal (see CPR 52.1(4)). Thus, where the appeal is limited to questions of law, the power to admit new evidence cannot be used to turn it into an appeal on issues of pure fact (cp *Green v Minster of Housing* [1967] 2 QB 606, 615, under the old rules).

ii) New evidence will normally be admitted only in accordance with "*Ladd v Marshall* principles" (see *Ladd v Marshall* [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR

> 2318, 2325; White Book para 52.11.2). The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876.

We will need to consider below to what extent those principles are further relaxed in asylum cases.

24. Mention should also be made of the position following the final dismissal of an asylum claim by the IAT or this court. If circumstances change, a fresh claim can be made in accordance with the principles explained in *R v Home ex p Oniboyo* [1996] QB 768. It was accepted in that case that a "fresh" claim implied a "significant change" from the claim as previously advanced, and that any new evidence had to satisfy "tests analogous to *Ladd v Marshall* ... of previous unavailability, significance and credibility" (p 783).

25. The current procedure is explained in paragraph 346 of the Statement of Changes in Immigration Rules (HC 395). This provides that, where an asylum applicant has been refused asylum during his stay in the United Kingdom, the Secretary of State will determine whether any further representations should be treated as a fresh application for asylum. They will be treated as a fresh application if the claim advanced is -

> "…sufficiently different from the earlier claim that there is a realistic prospect that the conditions (for grant of asylum) will be satisfied."

In reaching that decision:

> "the Secretary of State will disregard any material which "(i) is not significant; or (ii) is not credible; or (iii) was available to the applicant at the time when the previous application was refused or when any appeal was determined."

(To make sense, the reference in that passage to "any appeal" must, we think, be to an appeal in which the new material would have been admissible.)

Although the decision on a new application is potentially subject to the ordinary appeal machinery, that right is excluded if the Secretary of State certifies that the ground of appeal was or would have been available in relation to a previous decision: 2002 Act s 96(2).

Issues

26. The appellants' cases rest on the contention that the new evidence was available before the date of the promulgation of the Tribunal's decisions, and would have had a material effect on the determinations. The questions which accordingly arise are:

i) Can the Tribunal take account of material which becomes available between the date of the hearing and the date of the promulgation of its decision ("the decision date")?

ii) Where such material was in existence before the decision date but is first drawn to the attention of the Tribunal on the making of an application for permission to appeal, does the Tribunal have power to re-open its decision in order to take it into account?

iii) What is the relevance of such evidence to an appeal limited to questions of law?

iv) If it is relevant, what principles should the Court of Appeal apply in exercising its discretion to admit it?

27. The first question is strictly academic, because the new evidence was not made available to the IAT before the decision date. We have noted that in refusing leave in R's case, the IAT recorded that its determination had been "signed" at the end of the hearing, although it was not "promulgated" until some months later. The IAT's decision in fact bears the Vice-President's signature dated 23rd April 2003, but there is no indication that it was communicated to the parties at the time; the "date determination notified" is given as 19th August 2003. The precise status of the appeal in the intervening period was not the subject of detailed argument before us (see Macdonald Immigration Law and Practice 5th Ed. para 18.167, for discussion of the possible consequences of delay in promulgation.) As we understand it, the argument on both sides has proceeded on the basis that, up until the date of promulgation, the IAT would have been at liberty to admit further evidence (whether or not it was under any duty to do so). That seems correct. In accordance with ordinary principles, the IAT remained seized of the matter until the decision was formally communicated to the parties.

Tribunal's power to direct a re-hearing

28. We turn therefore to issue (ii): that is, the power of the IAT itself, on receipt of new material as part of the application for permission to appeal, to direct a re-hearing. We have already set out the terms of rule 30 (2)(c) of the 2003 Rules.

29. The general purpose of the power to direct a re-hearing is not in doubt. Where the IAT sees force in the proposed grounds of appeal, it can obviously be sensible for it to short-circuit the process of appeal. However, there is an issue as to the limits, if any, on the scope of this power. Mr Kovats says that Part 4 of the 2003 Rules (in which this rule appears) is concerned solely with "applications to appeal… on a point of law…" (rule 26). The essential starting-point, therefore, is a finding by the Tribunal of an arguable error of law in their original decision.

30. On the other side, the appellants draw attention to the general and unqualified nature of the power to direct a re-hearing under paragraph (c), as compared to its predecessor. Asylum Appeals Procedure Rules 2000 rule 27(5) provided that "where the Tribunal intends to grant

leave to appeal", it could instead (after giving all parties an opportunity to make representations) set aside the determination and direct a re-hearing of the appeal. The limitation to cases where the Tribunal "intends to grant leave to appeal" is omitted in the 2003 Rules.

31. The new wording, it is said, is consistent with the "one-stop" approach, and reflects the unqualified terms of the enabling provision. Rule 30 of the 2003 rules is made under section 106 of the 2002 Act, which empowered the Lord Chancellor to make rules prescribing the procedure to be followed in connection with various forms of proceedings, including appeals from the Tribunal on a point of law. Section 106(2)(l) provides (simply and without qualification) that the rules "may enable the Tribunal to set aside a decision of the Tribunal".

32. The appellants draw support from a concession made on behalf of the Secretary of State, and accepted by the Court, in *Polat*, relating to the predecessor rule 27(5) of the 2000 Rules. The applicant in that case was a Turkish citizen of Kurdish origin. The Tribunal rejected his appeal on the grounds that he would not be regarded as sufficiently closely involved with separatist organisations, to be at risk of persecution. His application for permission to appeal against the Tribunal's decision was supported among other things by evidence from an acknowledged expert on Kurdish affairs (Mr MacDowall), which challenged the Tribunal's assumption about the level of involvement likely to give rise to risk. By the time the matter reached this Court, subsequent decisions of the IAT had resulted in modified guidelines for dealing with such cases. On behalf of the Secretary of State, it was submitted that the Court's jurisdiction was limited to the material before the Tribunal, and that the new evidence should be left for consideration by the Secretary of State in support of any fresh claim for asylum. May LJ observed that this submission was difficult to reconcile with the more flexible approach taken in other recent cases (para 28). However, in the event the appeal was allowed, by concession, on a narrower ground, which May LJ explained as follows:

> "Mr McDowall's report was submitted to the Tribunal in the present case at the time when it was considering the application for permission to appeal to this court. The decision refusing leave to appeal did not allude to the report. Rule 27(5) of the (2000 Rules), in operation at the material time, gave the Tribunal power, instead of granting leave to appeal, to set aside the determination appealed against and direct that the appeal to the Tribunal be re-heard. Mr Saini accepts that, in the exceptional circumstances of this case, it was an error of law not to take account of Mr McDowall's report with a view to directing a re-hearing. Upon this concession, I conclude that the court has jurisdiction to take the obviously sensible course." (para 29)

33. In this Court, Mr Kovats does not accept the correctness of the concession made on behalf of the Secretary of State in that case. With respect to Mr Saini, and his understandable desire to achieve a sensible result in that case, we see the force of Mr Kovats' objection, in the context of rule 27(5) of the 2000 Rules. The concession seems to overlook the initial requirement, under that rule, that the Tribunal should "intend" to give leave to appeal. This seems to imply a need for it to have found at least an arguable error of law in their original decision, not merely some new evidence meriting reconsideration.

34. However, the same objection is more difficult to make in the context of the 2003 Rules, where the power to direct a re-hearing is not so qualified. Certainly, the facts of *Polat* show the desirability of such a power in suitable cases, for example where (as in that case) there is evidence calling for reconsideration of the Tribunal's general practice in relation to appeals from a particular category of claimants. It is in the interest of all parties that decisions should be made on the best available information. As Sedley LJ said in *Batayav* (where the matter was remitted to the IAT, on the basis of new evidence submitted by the Secretary of State about conditions in Russian prisons):

> "It is to nobody's advantage to find an ostensibly comprehensive background appraisal on which decision-makers then rely in judging individual claims has been arrived at in ignorance of material information and has to be undone." ([2003] EWCA Civ 1489 para 40)

35. We see nothing in rule 30 (2)(c), in its present form, which should prevent the IAT from directing a re-hearing in such cases, whether or not it accepts that there was an arguable error of law in its original decision. The starting-point, no doubt, must be an application to appeal from the IAT on a point of law (see rule 26). But such an application having come before the IAT, there is nothing in the wording of the rule (or the enabling statute) to restrict its discretion to direct a rehearing, as one of the three possible ways of dealing with the application. On the other hand, it is clear that the IAT is under no duty to direct a re-hearing in any particular circumstances. Regard must be had to the context, which is providing for limited review of an otherwise final decision. The principle of finality is therefore an important consideration. To justify reopening the case, in the absence of an apparent error of law, the IAT would need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked. Furthermore, where it is asked to consider new evidence, we see no reason why it should not apply the same principles as a court of appeal to the admission of new evidence in a similar context. We discuss below the application of those principles in the context of asylum cases.

Error of fact in administrative law.

36. So far as concerns the powers of this Court, we have identified two issues: (iii) (relevance) and (iv) (admissibility). In some of the cases they seem to have been conflated. However, it is important in our view to maintain the distinction. The first, and most difficult, question is as to the relevance of new evidence of *fact* on an appeal confined to issues of *law*. Even if that question is answered in the appellants' favour, there is a separate question whether the evidence should be admitted, as an exception to the ordinary rule that the court proceeds on the basis of the material before the Tribunal; or whether consideration of any new evidence should be a matter for the Secretary of State on a fresh claim.

37. We will consider first the question of error of fact as a ground for review in administrative law. The appellants' case is that the new evidence shows that the basis of the IAT's decision in each case was mistaken, and that such a mistake can provide grounds for an appeal even where it is limited to questions of law.

38. It is convenient to start from a summary in a recent case in this Court of the principles applicable to an appeal on a point of law from a specialist tribunal, in that case the Lands Tribunal (*Railtrack plc v Guinness Ltd* [2003] RVR 280, [2003] EWCA Civ 188). Having referred to another Lands Tribunal case, in which an appeal had been allowed because the Tribunal had failed to take account of the "whole of the evidence" on a particular point (*Aslam v South Bedfordshire DC* [2001] RVR 65, [2001] EWCA Civ 514), Carnwath LJ (with whom the other members of the Court agreed) said (para 51):

> "This case is no more than an illustration of the point that issues of 'law' in this context are not narrowly understood. The Court can correct 'all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings' (*R v IRC ex p Preston* [1985] 1 AC 835, 862 per Lord Templeman; see also De Smith, Woolf and Jowell, Judicial Review 5th Ed para 15-076). Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached 'upon an incorrect basis of fact', due to misunderstanding or ignorance (see *R (Alconbury Ltd) v Secretary of State* [2001] 2 WLR 1389, 2001 UKHL 23, para 53, per Lord Slynn). A failure of reasoning may not in itself establish an error of law, but it may 'indicate that the tribunal had never properly considered the matter…and that the proper thought processes have not been gone through' (*Crake v Supplementary Benefits Commission* [1982] 1 All ER 498. 508)."

In the *Guinness* case the issue was whether the Tribunal had misunderstood some of the complicated expert evidence in front of it, resulting in a "double counting" in the valuation. The Court accepted that that was a proper ground of challenge on an appeal limited to questions of law, but held that it was not made out on the facts.

39. Two aspects of that summary require elaboration in the context of the present case: first, the relationship of this form of appeal with judicial review; and secondly the availability of appeal "upon an incorrect basis of fact".

Appeal on law, and judicial review

40. There was some discussion in the present case as to whether the grounds upon which the Court may question a decision of the IAT differ materially, depending on whether the case comes before the Court as an application for judicial review, or as an appeal on a point of law. It would certainly be surprising if the grounds for judicial review were more generous than those for an appeal. In practice, such cases only come by way of judicial review because the IAT has refused leave to appeal, and its refusal can only be challenged in that way. There is certainly no logical reason why the grounds of challenge should be wider in such cases.

41. More generally, the history of remedies in administrative law has seen the gradual assimilation of the various forms of review, common law and statutory. The history was discussed by the Law Commission in its Consultation Paper *Administrative Law: Judicial*

*Review and Statutory Appeals* CP 126, Parts 17 to 18. The appeal "on a point of law" became a standard model (supplanting in many contexts the appeal by "case stated") following the Franks Committee report on *Administrative Tribunals and Inquiries* (1957 Cmnd 218), which was given effect in the Tribunals and Inquiries Act 1958 (now Tribunals and Inquiries Act 1992 s11). In other statutory contexts (notably, planning, housing and the like), a typical model was the statutory application to quash on the grounds that the decision was "not within the powers of the Act" (see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320). Meanwhile the prerogative writ procedures were remodelled into the modern judicial review procedure. In *R v Hull University Visitor ex p Page* [1993] AC 682, the House of Lords acknowledged the evolution of a common set of principles "to ensure that the powers of public decision-making bodies are exercised lawfully" (p 701, per Lord Browne-Wilkinson).

42. Thus, in spite of the differences in history and wording, the various procedures have evolved to the point where it has become a generally safe working rule that the substantive grounds for intervention are identical. (The conceptual justifications are another matter; see, for example, the illuminating discussion in Craig *Administrative Law* 5th Ed pp 476ff). The main practical dividing line is between appeals (or review procedures) on both fact and law, and those confined to law. The latter are treated as encompassing the traditional judicial review grounds of excess of power, irrationality, and procedural irregularity. This position was confirmed in *R v IRC ex p Preston* [1985] AC 835, 862E-F (a tax case), where Lord Templeman said:

> "Appeals from the General Commissioners or the Special Commissioners lie, but only on questions of law, to the High Court by means of a case stated and the High Court can then correct all kinds of errors of law including error which might otherwise be the subject of judicial review proceedings…"

43. Of course the application of these principles will vary according to the power or duty under review; and, in particular, according to whether it is a duty to decide a finite dispute (such as that of a tribunal), or a continuing responsibility (such as that of a minister or local authority). As will be seen, this distinction is important in analysing some of the cases cited in this appeal. Furthermore, some decisions reflect the relative procedural flexibility of judicial review. While a statutory appeal is normally confined by the terms of the statute to consideration of the decision appealed against, judicial review is not so confined. An application for a judicial review of a particular decision may, subject to the Court's discretion, be expanded by amendment to include review of subsequent decisions of the same agency (see e.g. *Turgut* below), or even related decisions of other agencies.

Incorrect basis of fact

44. Can a decision reached on an incorrect basis of fact be challenged on an appeal limited to points of law? This apparently paradoxical question has a long history in academic discussion, but has never received a decisive answer from the courts. The answer is not made easier by the notorious difficulty of drawing a clear distinction between issues of law and fact (see, Craig *op cit* p488; *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 para 22 ff, per Lord Hoffmann).

45. The debate received new life following the affirmative answer given by Lord Slynn in *R v Criminal Injuries Compensation Board ex parte A* [1999] 2AC 330. In that case the claimant had claimed compensation on the basis that in the course of a burglary she had been the victim of rape and buggery. She was examined five days after the burglary by a police doctor who reported that her findings were consistent with the allegation of buggery. However, at the hearing of her claim that report was not included in the evidence, and the Board was given the impression by the police witnesses that there was nothing in the medical evidence to support her case. The claimant did not ask for the report, but, in Lord Slynn's words:

> "…having been told that she should not ask for police statements as they would be produced by the police, it would not be surprising that she assumed that if there was a report from the police doctor, it would be made available with the police report" (p 343F).

46. One of the issues discussed in detail in argument was whether the decision could be quashed on the basis of a mistake, in relation to material which was or ought to have been within the knowledge of the decision maker (see p 333-336). Lord Slynn thought it could. He said:

> "Your Lordships have been asked to say that there is jurisdiction to quash the Board's decision because that decision was reached on a material error of fact. Reference has been made to "*Administrative Law*" (*Wade and Forsyth* (7th edition)) in which it is said at pp. 316-318 that:
>
> > 'Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact,' [*Secretary of State for Education v Tameside MBC* [1977] AC 1014, 1030] 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.'
>
> De Smith, Woolf and Jowell "*Judicial Review of Administrative Action*" 5th ed., at p. 288
>
> > 'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.'

> For my part, I would accept that there is jurisdiction to quash on that ground in this case…" (p 344G-345E).

47. However, Lord Slynn "preferred" to decide the instant case on the alternative basis that there had been a breach of the rules of natural justice amounting to "unfairness." As to that he said:

> "It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness. Thus I would accept that it is in the ordinary way for the applicant to produce the necessary evidence. There is no onus on the Board to go out to look for evidence, nor does the Board have a duty to adjourn the case for further enquiries if the applicant does not ask for one…. Nor is it necessarily the duty of the police to go out to look for evidence on a particular matter."

Nonetheless, he considered that the police "do have a special position in these cases", and he noted the evidence that the Board is "very dependent on the assistance of and the co-operation of the police who have investigated these alleged crimes of violence". He said:

> "In the present case, the police and the Board knew that A had been taken by the police to see a Police Doctor. It was not sufficient for the police officer simply to give her oral statement without further inquiry when it was obvious that the doctor was likely to have made notes and probably a written report." (p 345F- 346B).

He concluded:

> "I consider therefore, on the special facts of this case and in the light of the importance of the role of the police in co-operating with the Board in the obtaining of the evidence, that there was unfairness in the failure to put the doctor's evidence before the board and if necessary to grant an adjournment for that purpose. I do not think it possible to say here that justice was done or seen to be done." (p347B).

48. The other members of the House agreed with Lord Slynn's reasoning, thereby (as I read the speeches) endorsing his "preferred" basis of unfairness. Only Lord Hobhouse made any direct reference to the question of review for "error of fact", specifically reserving that issue for consideration in the future (p348E).

49. The same statement on that question was repeated by Lord Slynn, in another context, in *R v Secretary of State for the Environment ex p Alconbury* [2003] 2AC 295, [2001] UKHL 23 para 53. He referred to the jurisdiction to quash for "misunderstanding or ignorance of an established and relevant fact", as part of his reasons for holding that the court's powers of review (under a statutory procedure to quash for excess of power) met the requirements of the European Convention on Human Rights. This part of his reasoning was not in terms

adopted by the other members of the House of Lords. The point was mentioned by Lord Nolan and Lord Clyde. Lord Nolan put it in somewhat narrower terms; he said:

> "But a review of the merits of the decision-making process is fundamental to the Court's jurisdiction. The power of review may even extend to a decision on a question of fact. As long ago as 1955 your Lordships' House, in *Edwards v Bairstow* [1956] AC 14, a case in which an appeal (from General Commissioners of Income Tax) could only be brought on a question of law, upheld the right and duty of the appellate court to reverse a finding of fact which had no justifiable basis". (para 61).

He saw *Edwards v Bairstow* as an illustration of "the generosity" with which the Courts have interpreted the power to review questions of law, corresponding to "a similarly broad and generous approach" in the development of judicial review (para 62). Lord Clyde referred to Lord Slynn's statement on this issue in *CICB*, commenting that it was:

> "… sufficient to note… the extent to which the factual areas of a decision may be penetrated by a review of the account taken by a decision-maker of facts which are irrelevant or even mistaken." (para 169)

50. In the present case the appellants rely on Lord Slynn's statement as representing the law. Mr Kovats, for the Secretary of State, contents himself with the observation that the *CICB* case is "not in point" because it was a judicial review case, and Lord Slynn's statement was *obiter*. For the reasons already given, we do not think the fact that *CICB* was a judicial review case is an adequate ground of distinction. Indeed, Lord Slynn himself (and Lord Clyde) treated it as no less relevant to a statutory review procedure in *Alconbury*. The fact that the statement was *obiter* means of course that it is not binding on us, but does not detract from its persuasive force, bearing in mind also the authority of the textbooks cited by him.

51. Although none of the parties found it necessary to examine in any detail the authorities referred to in argument in the *CICB* case or in the textbooks, it seems to us difficult to avoid such examination, if we are to address properly the issue in these appeals. Fortunately the ground is very well-covered, not only in the textbooks, but also in two excellent articles: by Timothy Jones, "Mistake of fact in Administrative Law" [1990] PL 507; and by Michael Kent QC (no doubt stimulated by his unsuccessful advocacy in *CICB* itself) "Widening the scope of review for error of fact" [1999] JR 239. The authorities are helpfully summarised in Michael Fordham's invaluable *Judicial Review Handbook* 3rd Ed pp 730-2 (see also Demetriou and Houseman *Review for Error of fact – a brief guide* [1997] JR 27). Michael Kent includes a useful comparison with the concept of "manifest error" as applied by the European Court of Justice. He concludes:

> "A cautious extension of the power of the court on judicial review to reopen the facts might now be appropriate. This would need to be limited to cases where the error is manifest (not requiring a prolonged or heavily contested inquiry), is decisive (on which the decision

turned) and not susceptible of correction by alternative means…" (*op cit* p 243).

52. That is not dissimilar to the formulation approved by Lord Slynn, although he required that the error should be "material", rather than "decisive". Before reaching a conclusion that mistake of fact is now a ground for judicial review in its own right, it is necessary to review briefly the authorities mentioned in those articles. Two main points emerge: first, that widely differing views have been expressed as to the existence or scope of this ground of review; but, secondly, that, in practice, this uncertainty has not deterred administrative court judges from setting aside decisions on the grounds of mistake of fact, when justice required it.

Differing views

53. First, there have been several judicial statements by eminent judges on both sides of the debate. The narrower view is exemplified by a recent statement of Buxton LJ, under the heading "Error of fact as a ground for judicial review?" (*Wandsworth LBC v A* [2000] 1 WLR 1246):

> "The heading of this section of this judgment is, deliberately, the same as that of an important section, paragraphs 5-091 and following, in the 5th edition of De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*. That section shows the difficult and elusive nature of this question, viewed as a general issue. However, if our present case is properly analysed the dilemma does not arise. While there may, possibly, be special considerations that apply in the more formalised area of planning enquiries, as suggested by De Smith, paragraph 5-092 at fn75; and while the duty of "anxious scrutiny" imposed in asylum cases by *R v SSHD ex p Bugdaycay* [1987] AC 514 renders those cases an uncertain guide for other areas of public law; nonetheless De Smith's analysis shows that there is still no general right to challenge the decision of a public body on an issue of fact alone. The law in this connexion continues, in our respectful view, to be as stated for a unanimous House of Lords by Lord Brightman in *Pulhofer v Hillingdon LBC* [1986] AC 484 at p518E:
>
> > 59. It is the duty of the court to leave the decision [as to the existence of a fact] to the public body to whom Parliament has entrusted the decision-making power, save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

He adopted the observations of Watkins LJ (sitting with Mann LJ) in *R v London Residuary Body* (24 July 1987, unreported, but quoted in the *Judicial Review Handbook* p 730):

> "Of course, a mistake of fact can vitiate a decision as where the fact is a condition precedent to an exercise of jurisdiction, or where the fact is the only evidential basis for a decision or where the fact was as to a matter which expressly or impliedly had to be taken into account. Outside those categories we do not accept that a decision can be

> flawed in this court, which is not an appellate tribunal, upon the ground of a mistake of fact."

54. The clearest articulation of the alternative view (before *CICB*) was that of Scarman LJ in the Court of Appeal, in *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030. (This can be taken as having been implicitly endorsed by Lord Slynn, since it was cited by *Wade and Forsyth* in the extract quoted by him: see above.) The question in *Tameside* was whether the Secretary of State was entitled to hold that the Council reacted "unreasonably" in reversing plans of the previous administration to make all the schools in their area "comprehensive". One issue was the practicability of carrying out the necessary selection process within the available time. On the material available to the Court of Appeal, it appeared that the Secretary of State had "either misunderstood or was not informed" as to the professional advice available to the authority on this issue; and that he had wrongly "jumped to the conclusion" that the proposals were unworkable (see p 1031C, 1032H). Scarman LJ did not accept that the scope of judicial review was as limited as suggested by counsel for the Secretary of State:

> "…I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact may be either physical, something which existed or occurred or did not, or it may be mental, an opinion. Suppose that, contrary to the minister's belief, it was the fact that there was in the area of the local education authority adequate school accommodation for the pupils to be educated, and the minister acted under the section believing that there was not. If it were plainly established that the minister was mistaken, I do not think that he could substantiate the lawfulness of his direction under this section. Now, more closely to the facts of this case, take a matter of expert professional opinion. Suppose that, contrary to the understanding of the minister, there does in fact exist a respectable body of professional or expert opinion to the effect that the selection procedures for school entry proposed are adequate and acceptable. If that body of opinion be proved to exist, and if that body of opinion proves to be available both to the local education authority and to the minister, then again I would have thought it quite impossible for the minister to invoke his powers under section 68." (p 1030E-G)

55. In the House of Lords, Lord Wilberforce referred to the need for "proper self direction" as to the facts ([1977] AC at p 1047D- E). But he made no direct reference to the observations of Scarman LJ, and it may be (as was the view of Buxton LJ: see the *Wandsworth* case at [2000] 1 WLR at 1256D) that he was thinking only of the limited forms of factual review later summarised by Watkins LJ in the *ILEA* case. The House of Lords held that the Secretary of State had acted unlawfully, principally on the ground that the Secretary of State had set the criterion of unreasonableness too low.

56. More recently, in *R v ITC ex p Virgin Television Ltd* (25.1.96 unreported, cited in Demetriou and Houseman, *op cit* para 28), Henry LJ distinguished between mistakes of fact "not grave enough to undermine the basis of a multi-faceted decision", and "misapprehension of the

facts which form the foundation of the Commissioner's decision"; only the latter would justify intervention by the court on judicial review.

57. Timothy Jones notes that another leading proponent of the wider approach, Sir Robin Cooke, in the New Zealand Court of Appeal, adopted Scarman LJ's formulation, saying:

> "To jeopardise validity on the ground of mistake of fact the fact must be an established one or an established and recognised opinion; and… it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may be reasonably held." (*New Zealand Fishing Industry Association Inc v Minister of Agriculture* [1988] 1NZLR 544, 552)

There was however no majority on this issue in the New Zealand Court of Appeal (see Jones *op cit* p 514-5.)

Mistake of law in practice

58. Timothy Jones cites a number of cases, particularly in the context of town and country planning, where decisions have been set aside because of errors of fact (albeit without detailed discussion of the principle). Examples are:

i) An inspector's mistaken understanding that land had never been part of the Green Belt: *Hollis v Secretary of State* (1984) 47 P&CR 351 (Glidewell J).

ii) An inspector's mistaken view that a building extension would not obstruct a particular aspect: *Jagendorf v Secretary of State* [1985] JPL 771 (David Widdicombe QC).

iii) The minister's misinterpretation of the inspector's conclusions on evidence relating to viability of restoration of a building: *Barnet Meeting Room Trust v Secretary of State* 13.12.89 unreported (Sir Graham Eyre QC).

59. More significant, because it was a fully reasoned decision of the Court of Appeal, was another planning case, *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1989) 57 P&CR 306. The Secretary of State in rejecting the planning appeal had mistakenly thought that the council had carried out a study relevant to the inclusion of the site in the Green Belt, whereas the study related only to what uses should be made within the Green Belt designation. The decision was challenged on the basis that "as a result of the error of fact" the Minister had "taken into account matters which he was not entitled to consider" (p 322). The Court of Appeal accepted that formulation, holding that the error was "undeniably significant in the decision-making process" (p 327, per Purchas LJ), or was one which "was or may have been material" (p 329, per Staughton LJ). The decision was therefore quashed.

60. As will be seen, the cases of *Haile* (mistake as to the name of a political party) and *Khan* (ignorance of a conviction in Bangladesh) are best explained as further examples in this Court of the same approach to plain errors of fact, as applied in the field of asylum law.

Underlying principle

61. As the passage cited by Lord Slynn shows, the editors of the current edition of De Smith (unlike Wade and Forsyth) are somewhat tentative as to whether this is a separate ground of review:

> "The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration or the failure to provide reasons that are adequate or intelligible or the failure to base the decision upon any evidence." (para 5/-094).

62. We are doubtful, however, whether those traditional grounds provide an adequate explanation of the cases. We take them in turn:

i) Failure to take account of a material consideration is only a ground for setting aside a decision, if the statute expressly or impliedly requires it to be taken into account (*Re Findlay* [1985] AC 318, 333-4, per Lord Scarman). That may be an accurate way of characterising some mistakes; for example, a mistake about the development plan allocation, where there is a specific statutory requirement to take the development plan into account (as in *Hollis*). But it is difficult to give such status to other mistakes which cause unfairness; for example whether a building can be seen (*Jagendorff*), or whether the authority has carried out a particular form of study (*Simplex*).

ii) Reasons are no less "adequate and intelligible", because they reveal that the decision-maker fell into error; indeed that is one of the purposes of requiring reasons.

iii) Finally, it may impossible, or at least artificial, to say that there was a failure to base the decision on "*any* evidence", or even that it had "no justifiable basis" (in the words of Lord Nolan: see above). In most of these cases there is *some* evidential basis for the decision, even if part of the reasoning is flawed by mistake or misunderstanding.

63. In our view, the *CICB* case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;

iii) The claimant could not fairly be held responsible for the error;

iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;

v) The mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. Similarly, in *Tameside,* the Council and the Secretary of State, notwithstanding their policy differences, had a shared interest in decisions being made on correct information as to practicalities. The same thinking can be applied to asylum cases. Although the Secretary of State has no general duty to assist the appellant by providing information about conditions in other countries (see *Abdi and Gawe v Secretary of State* [1996] 1 WLR 298, he has a shared interest with the appellant and the Tribunal in ensuring that decisions are reached on the best information. It is in the interest of all parties that decisions should be made on the best available information (see the comments of Sedley LJ in *Batayav,* quoted above).

(We have also taken account of the judgment of Maurice Kay J in *R (Cindo*) *v Secretary of State* [2002] EWHC 246 para 8-11, drawn to our attention since the hearing by Mr Gill, in which some of these issues were discussed.)

65. The apparent unfairness in *CICB* was accentuated because the police had in their possession the relevant information and failed to produce it. But, as we read the speeches, "fault" on their part was not essential to the reasoning of the House. What mattered was that, because of their failure, and through no fault of her own, the claimant had not had "a fair crack of the whip". (See *Fairmount Investments v Secretary of State* [1976] 1 WLR 1255, 1266A, per Lord Russell.) If it is said that this is taking "fairness" beyond its traditional role as an aspect of procedural irregularity, it is no further than its use in cases such as *HTV Ltd v Price Commission* [1976] ICR 170, approved by the House of Lords in *R v IRC ex p Preston* [1985] AC 835, 865-6.)

66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly,

the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

67. Accordingly, we would accept the submissions of each of the present appellants, that, if the new evidence is admitted, the Court will be entitled to consider whether it gives rise to an error of law in the sense outlined above. As we have said, however, whether the evidence should be admitted raises a separate question to which we now turn.

New Evidence

68. Assuming the relevance of showing a mistake of fact in the Tribunal's decision, there may need to be evidence to prove it. As has been seen, the Court has a discretion to admit new evidence (CPR 52.11(2)), but it is normally exercised subject to *Ladd v Marshall* principles, raising in particular the issue whether the material could and should have been made available before the decision.

69. Whether this is a material issue, of course, depends on the nature of the mistake. It may not be relevant if the mistake arises purely from the Tribunal's consideration of the evidence (for example, the misinterpretation of the planning study in *Simplex*). However, it may be material, where (as in the present cases) the complaint is of ignorance of evidence which was available before the decision was made. In such cases, it inevitably overlaps with the question of "unfairness". A claimant who had the opportunity to produce evidence and failed to take it may not be able to say that he has not had "a fair crack of the whip".

70. *Kibiti v Home Secretary* [2000] Imm AR 594 shows the strict application of these principles even in an asylum case. The appellant was a citizen of the Congo who had been refused asylum and failed in his appeal to the Tribunal. The Tribunal had concluded that there was a state of civil war in the Congo, a view which was challenged by the appellant by reference to a report written after the Tribunal hearing. The leading judgment (with which the other members of the Court agreed) was given by Buxton LJ. He rejected the appeal after a detailed review of the Tribunal's conclusions on the material available to it. Peter Gibson LJ added certain comments on the question of new evidence. He said that the appellant had sought to rely on a report by a Dr Manley, which had not been before the Tribunal at the time of its hearing but was provided to it when permission was asked to appeal to the Court of Appeal. Counsel for the Secretary of State objected to the material being received by the Court, on the grounds that the Court could only consider "any question of law material to the determination":

> "This Court… is confined to looking to see whether the Tribunal erred in some manner in relation to the facts and material which were before the Tribunal. It is obvious that material not put to the Tribunal could not be used to identify an error of law on the part of the Tribunal."

Peter Gibson LJ agreed with that approach:

> "In my judgment (Counsel's) objection was entirely right. It is inappropriate for new material to be presented to this Court which could not in any way have affected the decision of the Tribunal below. It is of course open to an applicant to present such new material to the Secretary of State once the appellate process relating to the earlier decision has been exhausted; and I do not doubt that the Secretary of State would take into account material such as that from Dr Manley, as an expert in the relevant field." (para 43- 44).

Although the other members of the Court did not in terms adopt this reasoning, we think they must be taken as having done so, since the leading judgment of Buxton LJ was based entirely on material available to the IAT, and Dr Manley's report played no part in it. (As we have said, the same approach was very recently taken by this Court, albeit without discussion of the authorities, in *AE and FE v Secretary of State* [2003] EWCA Civ 1032 para 9.)

71. Mr Kovats, for the Secretary of State, accepted that there are established exceptions to this principle. He adopted the summary in *R v Secretary of State for the Environment ex p Powis* [1981] 1 WLR 584, which, although given in a judicial review case, he accepts as equally applicable to an appeal on law. Dunn LJ referred to three permissible categories of new evidence: (1) evidence to show what material was before the tribunal; (2) where the jurisdiction of the tribunal depended "on a question of fact or whether essential procedural requirements were observed", evidence to establish the "jurisdictional fact or procedural error"; (3) evidence to show misconduct (such as bias or fraud) by the tribunal or parties before it. Mr Kovats submits that those categories are exclusive.

72. The appellants submit that this is too strict an approach in asylum cases, at least where the new evidence relates to facts which were "established" at the time of the IAT's decision, and is in support of a "mistake of fact" ground of appeal. This submission was based principally on four decisions to which we have already referred: *Turgut*, *Haile*, *A*, and *Khan.* Also relied on were two decisions of the House of Lords in different areas of public law: *R v Home Secretary ex p Launder* [1997] 1 WLR 839, and *R v Home Secretary, ex Simms* [2000] 2 AC 115.

73. It is convenient to deal first with the two House of Lords cases. It is true that in both cases new evidence was admitted by the House. However, neither concerned the decision of a tribunal, such as the IAT. In *Launder* the issue was the legality of the Home Secretary's decision to extradite the applicant to Hong Kong, notwithstanding alleged doubts over the likely fairness of any trial in Hong Kong following its transfer to China in July 1997. Although the judicial review proceedings were in terms directed at two particular decisions, in letters written in July and December 1995 (see p 842D), the Home Secretary was under a continuing duty to keep the matter under review (see p 852H). It was against that background, and in the unusual circumstances of the case, that the House considered it relevant to have regard to up-to-date information about the position in Hong Kong. Lord Hope said:

> "The situation has changed since 1995 when the decisions were taken. So it is necessary first to mention the situation at that time and then to

> examine the situation at the present stage. Although we are concerned primarily with the reasonableness of the decisions at the time when they were taken we cannot ignore these developments. We are dealing in this case with concerns which have been expressed about human rights and the risks to the respondent's life and liberty. If the expectations which the Secretary of State had when he took his decisions have not been borne out by events or are at risk of not being satisfied by the date of the respondent's proposed return to Hong Kong, it would be your Lordships' duty to set aside the decisions so that the matter may be reconsidered in the light of the changed circumstances." (p 860-1)

74. As will be seen, that passage was relied on by Schiemann LJ in *Turgut*. However, the context was important. The decision to admit the evidence had nothing to do with the application of *Ladd v Marshall* principles, which were not referred to in argument or in the judgment. This no doubt was, not only because by definition the up-to-date information was not available when the Home Secretary made his decisions, but also because the case inevitably raised issues relevant to his continuing responsibility in the matter (as contrasted with a decision of a body with finite jurisdiction, such as a tribunal).

75. *Simms* also concerned the judicial review of a decision of the Home Secretary, this time in the context of exchanges between prisoners and journalists. New evidence was admitted in the House of Lords to show the contribution made by journalists in past cases identifying miscarriages of justice ([2000] 2 AC at p 127). There is no indication of any objection to the House receiving this evidence. Again, in view of the Home Secretary's continuing responsibility in the matter, it was understandable that the House wished to reach its judgment on the fullest available information. The case throws no light on the present issue.

The asylum cases

76. In *Turgut*, the *Launder* approach was applied in the context of asylum. However, again the context is important. The proceedings were not directly related to a decision of the IAT. They were for judicial review of the Home Secretary's decision, following the dismissal of the IAT appeal, not to grant the applicant exceptional leave to remain. The court was faced with "a stream of evidence and counter evidence" running to more than 1500 pages. It was in this context that Schiemann LJ gave guidance on the approach of the court (having had the assistance of Michael Fordham, as *amicus*). He said:

> "The position is as follows. The guiding principle is that the Secretary of State has undertaken not to send someone from here to a country where there are substantial grounds for believing that he would be at real risk of facing treatment proscribed by Article 3. If an applicant for permission to move for judicial review claims that the Secretary of State's decision is vitiated by some form of illegality he will file evidence to that effect. The Court will not shut out evidence which is relevant to the issues. Indeed, it may order disclosure of evidence necessary for disposing fairly of the application. The evidence is not strictly limited to evidence which was or should have been before the

> Secretary of State at the time of the decision. This was the unanimous view of the House of Lords (in *Launder*). ([2001] 1 All ER at p 735f-h)

He noted that the Secretary of State might seek to adduce evidence to explain and justify his original decision, or to show that he had considered the evidence filed by the applicant and made a new, second, decision in the light of that evidence. If the second decision were then subject to challenge, it would generally be convenient for the applicant to amend his application to substitute the second decision as that subject to challenge. Schiemann LJ went on to consider how the court should deal with new evidence in such cases (p 735-6).

77. That guidance, with respect, was readily understandable in the context in which it was given. That was a case, in which the respondent to the appeal (as in *Launder* and *Simms*) was a minister with a continuing public responsibility in the matter. It is often sensible in such cases for the matter to be looked at in the light of the Secretary of State's most recent consideration of the matter, and the judicial review procedure is flexible enough to allow that. Again, it throws no direct light on the present issue.

78. The next two cases, however, are more directly in point, since they involved challenges to decisions of the IAT itself. *Haile* was an appeal from the High Court on a challenge by judicial review to the IAT's refusal of permission to appeal. *A v Home Secretary* was an appeal with leave from the IAT.

79. In *Haile* the adjudicator had made a crucial mistake about the identity of the political party in Ethiopia, with which the claimant was connected. The error was not drawn to the attention of the IAT. The evidence necessary to prove the mistake was first produced in the Court of Appeal. The error could and should have been spotted by the claimant's advisers before the IAT decision, or at least before the judicial review hearing. It was nonetheless admitted in the Court of Appeal. Simon Brown LJ accepted that under the *Ladd v Marshall* tests it would have fallen "at the first hurdle"; but he said:

> "The fact is however that these principles never did apply strictly in public law and judicial review. As Sir John Donaldson MR said in *R v Secretary of State for the Home Department ex parte Ali* [1984] 1 WLR 663, 673:
>
> > '... the decision in *Ladd v Marshall* [1954] 1 WLR 1489 has as such no place in that context,'
>
> although he then added:
>
> > 'However, I think that the principles which underlie issue estoppel and the decision in *Ladd v Marshall*, namely that there must be finality in litigation, are applicable subject always to the discretion of the Court to depart from them if the wider interests of justice so require.'" ([2002] INLR 283, 289)

80. He did not think that this conclusion was precluded by the decision of the House of Lords in *Al-Mehdawi v Home Secretary* (see above), "not least given that this is an asylum case rather than a student leave case". He thought that "aspects" of that decision might need to be reconsidered in the light of the speeches in *CICB* (para 26).

81. We take the emphasis, in the first sentence of the passage quoted above, as being on the word "strictly". It would be wrong to say that the *Ladd v Marshall* principles have not been treated as applicable at all in judicial review (see e.g. *R v West Sussex Quarter Sessions ex p Johnson Trust Ltd* [1974] QB 24, cited with approval by the House of Lords in *Al-Medhawi v Home Secretary* [1999] 1 AC 876, 899). It is clear, however, that some flexibility has been allowed where the "interests of justice" so require. That as we understand it is the effect of Sir John Donaldson MR's comment in *Momin Ali*. Although he said that *Ladd v Marshall* principles "as such" were not applicable, he gave no direct authority for that statement. His reasons for excluding the evidence in that case appear to be have been based in effect on *Ladd v Marshall* principles. He said:

> "This fresh evidence was clearly available and should have been placed before Webster J. It is not the function of this court, as an appellate court, to retry an originating application on different and better evidence. We are concerned to decide whether the trial judge's decision was right on the materials available to him, unless the new evidence could not have been made available to him by the exercise of reasonable diligence or there is some other exceptional circumstance which justifies is admission and consideration by the court." (p 670E)

Fox LJ also accepted that there was a "wider discretion" to admit new evidence than in ordinary civil litigation, but agreed with the result (p 673G-H); Stephen Brown LJ said that *Ladd v Marshall* principles should apply (p 674A).

82. We would respectfully accept the statement of the Master of the Rolls quoted in the previous paragraph as accurately reflecting the law applicable in a case of this kind (whether it takes the form of a direct appeal from the IAT to the Court of Appeal, or comes by way of judicial review of the IAT's refusal of leave to appeal). However, we would not regard it as showing that *Ladd v Marshall* principles have "no place" in public law. Rather it shows that they remain the starting point, but there is a discretion to depart from them in exceptional circumstances.

83. *Haile* was held to be such a case, on its particular and unusual facts. We would not treat it as establishing any general proposition as to how the discretion should be exercised. Nor, with respect, do we see it as supporting any general departure, even in asylum cases, from the effect of the decision in *Al-Mehdawi*, as regards failures of the parties' advisers (although we have not heard detailed argument on this aspect). Once the evidence was admitted, then (assuming the correctness of the principles explained above) there was no difficulty in the result. It was a straightforward case of unfairness caused by a mistake of fact, on a point which was uncontroversial and material to the decision.

84. *A v Home Secretary* had a somewhat confused procedural background, but it was treated as an appeal with leave from the IAT (see judgment paras 4 – 7). The claim was based on asylum grounds and Articles 2 and 3 of the European Convention of Human Rights. Keene LJ gave the leading judgment, with which the other members of the court (including Peter Gibson LJ) agreed. The Court of Appeal admitted fresh evidence of the risks facing the appellant if returned to Jamaica, including an expert report from the executive director of Independent Jamaica Council of Human Rights, the reliability of which was accepted by counsel for the Home Secretary (para 17). It was argued for the Secretary of State that, in accordance with *Ladd v Marshall* principles, the new evidence should not be admitted. This argument was rejected. Keene LJ said:

> "On this issue, I would emphasise that it has been held a number of times that the principles enunciated in *Ladd v Marshall* [1954] 1 WLR 1489, including that which requires the fresh evidence to be evidence which could not have been obtained with reasonable diligence for use at trial, do not apply with the same strictness in public law cases. In *Turgut v Secretary of State for the Home Department* [2000] Imm.AR 306, an Article 3 case, it was emphasised by Schiemann LJ that this court will not shut out relevant evidence in such cases. The matter was dealt with fully in the unanimous decision of this court in *Haile v Immigration Appeal Tribunal* [2002] Imm.AR 170, where it was held that the proper approach was to consider the wider interests of justice. That must be right both in asylum cases and in those where Articles 2 or 3 of the ECHR are invoked. After all, one has to consider the context in which these cases are brought. As Lord Bridge of Harwich said in the oft-cited case of *Bugdaycay v Secretary of State for the Home Department* [1987] 1 AC 514 at 531 E:
>
> > 'The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'
>
> As a matter of principle it would be difficult to achieve such scrutiny whilst closing one's eyes to relevant evidence.
>
> 21. In the present case this further evidence is credible and it is potentially significant, going much further than the material which the IAT had. I for my part am quite satisfied that the wider interests of justice do require the fresh evidence to be considered by this court. I would admit it and I proceed on that basis."

At the end of the judgment, he rejected the proposal for the Secretary of State that, if the Court found the new evidence persuasive, it should remit this case to the IAT as the body with the experience to assess it. He said:

> "33…. I for my part would not do so. It seems to me that the evidence now before us admits of only one sensible interpretation and this court is fully able to arrive at a substantive conclusion on it.

> 34. I am persuaded that the removal directions given by the Secretary of State would involve a breach of the appellant's human rights. For that reason and on that specific basis, I would allow this appeal."

85. Although this case was in form an appeal against the IAT's decision, the last paragraph suggests that Keene LJ treated it as in effect raising a distinct issue as to the legality of the Secretary of State's own actions under the human rights legislation. On the extreme evidence available to the court, one can understand the practical attractions of taking that course. However, for the reasons we have given, we do not think with respect that either *Turgut* or *Haile* provided sufficient authority for discarding the ordinary principles applicable to an appeal on law. Furthermore, in our view, the "anxious scrutiny" principle, though very relevant to consideration of the facts of any case, cannot alter the statutory limits of the procedure. The Court of Appeal does not have an all-purpose role to prevent or correct any breaches of the refugee or human rights conventions. It is not the port of last resort. The fresh claim procedure provides further protection, subject to review by the Court. But that is subject to carefully defined limits, which would be undermined if the statutory appeal were arbitrarily extended beyond its proper limits.

86. We would therefore respectfully agree with Mr Kovats that *A v Home Secretary* cannot be taken as authority for discarding, in the context of asylum law, the established approach to new evidence on an appeal limited to questions of law.

87. The same view applies with even more force to the next case, *Khan v Secretary of State* [2003] EWCA Civ 530, to which one of the members of this Court was party. The applicant was a Bangladeshi national who had come to this country in 2001. His claim centred on events in August 2000 when he had been involved in a demonstration following which fighting had broken out, and there had been warrants of arrest for a number of people including himself. He claimed asylum on the basis that, if returned, he would face a risk of arrest and lengthy pre-trial detention in inhuman or degrading conditions. In a decision issued in August 2002, the IAT accepted that the conditions of the Bangladeshi prisons in which he would be held if arrested "may be degrading treatment". However, it held that, following a change of political control in Bangladesh, there was no serious risk of his being arrested if he did return there. On the day of the hearing in the Court of Appeal, it emerged that credible evidence had very recently come to light that, far from being at no risk of prosecution, the claimant had in fact been tried and convicted in his absence in April 2002, and had been sentenced to ten years' imprisonment. In those exceptional circumstances, it seemed obvious to the Court that the matter must be looked at again. May LJ giving the leading judgment said that it was "plainly just" that this information should be considered, and that he was "personally untroubled as to the precise jurisprudential basis upon which we should do so". On the basis of the new evidence "the factual basis on which the Immigration Appeal Tribunal came to its conclusion is undermined." Agreeing with that judgment Carnwath LJ said:

> "Whatever the precise limits of this Court's power to admit new evidence in such cases as this, I have no doubt that we should do so where there is material which appears to show that the factual basis on which the Tribunal proceeded was, through no fault of its own, simply wrong."

Ward LJ agreed with both judgments.

88. One can perhaps draw three lessons from that decision:

i) Not all (or even most) Court of Appeal decisions in this area should be seen as laying down propositions of law; the decisions in this area are unusually fact-sensitive;

ii) It provides another good example of the need for a residual ground of review for unfairness arising from a simple mistake of fact;

iii) It illustrates the intrinsic difficulty in many asylum cases of obtaining reliable evidence of the facts giving rise to the fear of persecution, and the need for some flexibility in the application of *Ladd v Marshall* principles.

89. Finally we should mention briefly the case of *Tataw*, which was also relied on by the appellants, although in our view it is readily distinguishable. The appeal in that case turned on a procedural point. The IAT, on the material available to it, had reasonably concluded that the application for leave to appeal had been made outside the 10-day limit prescribed by the rules. This was on the basis that the Adjudicator's decision had been sent to her on the date on which it was delivered. It subsequently transpired that it had not been sent to her until one month later, and that on that basis the application had been in time. Not surprisingly, the Court of Appeal allowed the appeal and remitted the matter to the Tribunal. In our view, the admission of evidence relating to a procedural issue of this kind (cf the second category in *Powis*) throws no light on the principles applicable to evidence relating to the substantive issues in the case.

Conclusion

90. Finally we shall draw together the threads of this discussion, and apply the resulting principles to the facts of these cases.

91. In summary, we have concluded in relation to the powers of this Court:

i) An appeal to this Court on a question of law is confined to reviewing a particular decision of the Tribunal, and does not encompass a wider power to review the subsequent conduct of the Secretary of State;

ii) Such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" (as explained by Lord Slynn in *CICB* and *Alconbury*);

iii) The admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require.

92. In relation to the role of the IAT, we have concluded

i) The Tribunal remained seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties;

ii) Following the decision, when it was considering the applications for leave to appeal to this Court, it had a discretion to direct a re-hearing; this power was not dependent on its finding an arguable error of law in its original decision.

iii) However, in exercising such discretion, the principle of finality would be important. To justify reopening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by *Ladd v Marshall* principles, subject to any exceptional factors.

We should emphasise that this analysis is based on the regime applicable to this case, under which the right of appeal to the IAT was not confined to issues of law (before the change made by the 2002 Act, s 101: see para 17 above).

93. Applying those principles to the present cases, the actual reasons given by the IAT for refusing to consider the new evidence were erroneous in law. We understand its desire on practical grounds to confine the evidence to that produced at the hearing. However, where, as in these cases, there is substantial delay before the decision is issued, new evidence may emerge which undermines the basis of the conclusions reached at the hearing. If so, it cannot automatically be excluded, where justice requires it to be taken into account.

94. In the present case, the new evidence was not produced until after the decision was promulgated. Mr Kovats submits that in such circumstances, the IAT would have been entitled to reject it, applying *Ladd v Marshall* principles, because it could have been made available earlier. We see the theoretical force of that submission. However, it ignores the practical realities. Assuming some legal assistance is available to the asylum seeker, it is likely to be concentrated at the critical points in the process: that is, for present purposes, the hearings before the Adjudicator and IAT, and the consideration of possible appeal following receipt of their decisions. It seems unrealistic to expect continuous monitoring of potential new evidence in the intervening periods. Even if it were possible, it would be very difficult for the IAT (as their stated reasons made clear) to handle such new evidence administratively. The obvious point to review the matter, where necessary, is as part of any application for leave to appeal. If the discretion of the Tribunal is limited in the way we have suggested, the extra burden should not be unmanageable.

95. Accordingly, on the view we have taken of its powers under rule 30 (2)(c), the IAT should in principle have considered whether the new evidence justified exercising its discretion to direct a rehearing. Before remitting these cases for re-consideration by the IAT, we need to be satisfied that, if they had applied the right approach, there might have been a case for such a direction. We have already summarised the content of the new evidence. We would make the following comments:

i) *E's case* The evidence (in the form of new reports from Human Rights Watch and the World Organisation against Torture) is credible. It throws considerable doubt on the IAT's understanding that the persecution of members of the Muslim Brotherhood was solely related to the 2000 elections. On the other hand, it does little to undermine the IAT's conclusion as to the lack of risk to this particular appellant, in view of his limited connection with Egypt, and the "very low level" of his activities if any.

ii) *R's case* The 2003 CIPU report is obviously credible. It shows that, at the time of the IAT hearing, there was (in the form of the July 2002 UNCHR report) objective evidence of serious theoretical risk to apostates, although not of specific examples. That evidence is particularly significant because it directly contradicts the impression given (in good faith) by the Home Office, based on the 2002 CIPU report, that apostasy had ceased to be an issue. On the other hand, there is no indication why at the hearing the appellant himself chose to rely solely on evidence which predated the removal of the Taliban. The evidence of Dr Gopal provides some support for the risk to apostates, but again it is unsupported by specific examples. No reason is given for it not having been made available before the hearing.

96. It would be a matter for the IAT to decide whether this material meets the *Ladd v Marshall* tests, or whether there is some reason for exceptional treatment in the interests of justice. Dr Gopal's evidence appears to fail the first test. The other evidence at first sight meets that test, and is credible and material. The real issue, which is a matter for the IAT, is whether, in the context of their other findings, it would have been likely to have "an important influence on the result". Although we are far from saying that the new evidence would have been decisive in favour of the appeals, the answer is not so clear that we should deny the appellants proper consideration by the IAT, which is the tribunal best fitted to make that assessment.

97. In those circumstances, it is unnecessary for us to decide whether, in either case, the new evidence, if admitted, would demonstrate an error of law, reviewable under the more limited jurisdiction of the court. Furthermore, since the IAT will be able to look at the matter more broadly, and is better equipped to do so, we see no purpose in attempting that task.

98. Accordingly, we think it right for the appeals to be allowed on the narrow ground, that in each case the IAT wrongly failed to consider the new evidence in the context of its discretion to direct a rehearing. The matters will be remitted to the IAT to reconsider in the light of the principles set out in this judgment.

ORDER: Appeal allowed as per agreed minute of order. Permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)