Case No: C4/2006/2500

**Neutral Citation Number: [2007] EWCA Civ 1220**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**(MR JUSTICE STANLEY BURNTON)**

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Monday, 29th October 2007

**Before:**

**LORD JUSTICE WALL**
**LORD JUSTICE RICHARDS**
and
**LORD JUSTICE LAWRENCE COLLINS**

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**Between:**

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| **THE QUEEN ON THE APPLICATION OF FD (ZIMBABWE)** | **Appellant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

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**Mr D Bazini** (instructed by Immigration Advisory Service) appeared on behalf of the **Appellant**.

**Ms L Giovanetti** (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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# Judgment

**(As Approved by the Court)**

**Lord Justice Richards:**

1. The appellant is a citizen of Zimbabwe who claimed asylum in the United Kingdom in April 2004. His claim was refused by the Secretary of State, but succeeded on appeal to an adjudicator in September 2004. The Secretary of State then appealed the adjudicator's decision, and in March 2005 the Immigration Appeal Tribunal (the IAT), as it then was, allowed the Secretary of State's appeal and remitted the matter for rehearing by a different adjudicator.

2. The appellant challenged the IAT's decision by an application for judicial review, which was heard by Stanley Burnton J in November 2006. The judge dismissed that application. The appellant now appeals against a part of the judge's decision.

3. The appellant claims to have left Zimbabwe in January 2003 as a result of severe ill treatment suffered by him and his wife because of their membership of the MDC. He said that his wife was abducted, but he escaped with his son to South Africa, where he was assisted by an MDC member in obtaining a false South African passport. In November 2003 he took a flight with his son to Manchester, but was refused entry and was put on a return flight to South Africa. On that occasion, he did not claim asylum in the United Kingdom. On his return to South Africa, he contacted the man who had helped him before, and was assisted in obtaining further false documentation. Then in April 2004 he and his son flew once more to the United Kingdom, this time to Heathrow, where he did on this occasion claim asylum.

4. The adjudicator found the appellant to be a credible witness, who had given a truthful account of the circumstances in which he left Zimbabwe and of what he feared on return. The adjudicator concluded that he was at risk of adverse treatment amounting to persecution and in breach of his human rights if he were returned.

5. The Secretary of State's appeal to the IAT succeeded on two main grounds. The first was that the adjudicator had erred in law in failing to consider the possibility of internal relocation. The second was that the adjudicator had erred in relation to his assessment of credibility. The tribunal held that in the circumstances, the matter had to be remitted for a rehearing by a different adjudicator. Under the arrangements that have existed since the IAT was replaced by the Asylum and Immigration Tribunal (the AIT), the matter would now fall to be dealt with as a reconsideration by the AIT.

6. Both aspects of the IAT's decision were challenged without success before Stanley Burnton J, but only the credibility issue is pursued before us. As to internal relocation, Mr Bazini for the appellant accepts that the IAT's finding, as upheld by the judge, means that the case must go back for reconsideration by the AIT, but his submission is that the IAT was wrong to find a legal error in the adjudicator's approach to credibility, and that the judge erred in upholding that aspect of the IAT's decision. If that submission succeeds, the

case will go back to the AIT for reconsideration solely on the issue of internal relocation, with the adjudicator's positive credibility findings remaining intact. Accordingly, the appeal on the credibility issue has potentially important consequences for the appellant, even though the case must be remitted to the AIT in any event.

7. There were two limbs to the AIT's finding that the adjudicator had erred in his approach to credibility. The first concerned an alleged failure by the appellant while in South Africa to make sufficient efforts to find out through the Red Cross what had happened to his wife in Zimbabwe, and his explanation of what he had done to try to locate her. The second concerned a particular point on the appellant's immigration history: namely, his failure to claim asylum in the United Kingdom when he and his son flew to Manchester in November 2003 and were returned to South Africa. We have been told that counsel for the Secretary of State conceded before the judge that he could not defend the IAT's decision on the first point if it was found that the IAT's approach to the second point was flawed. In the circumstances, the judge considered only the second point, and the argument before us has likewise concentrated on that point.

8. The appellant's case, in short, is that the IAT fell into error in allowing the Secretary of State's appeal against the adjudicator's positive credibility finding on the ground that the adjudicator had failed to give proper consideration to the immigration history point or to give adequate reasons in respect of it. The appeal to the IAT under Section 101 of the Nationality Immigration and Asylum Act 2002 lay only on a point of law, so the tribunal was entitled to interfere only if there was a material error of law in the adjudicator's decision. It is submitted that there was no such error.

9. Before I consider the submissions further, it is important to set out the way the immigration history point developed over time. Paragraphs 15 to 19 of the Secretary of State's decision letter, refusing the appellant's claim, made various adverse credibility points in respect of the appellant's account of his escape to South Africa, the time he spent there, and what he did on his arrival in the United Kingdom in April 2004. In paragraph 15, it was considered highly unlikely that a man called Nkosi, the MDC member who the appellant said had assisted him, would have agreed to arrange his journey to the United Kingdom, particularly as the appellant admitted to being only a low-level supporter of the MDC. In paragraph 16, it was not accepted that Nkosi would have agreed to support the appellant as a low-level supporter of the NDC for a whole year. It was also noted that if Nkosi agreed to help by fraudulently obtaining South African passports, he could also have obtained the correct documentation for the appellant to live in South Africa and legally obtain employment to support himself and his son. Paragraph 17 referred to a claim by the appellant at interview to have been imprisoned in South Africa in November 2003 after being arrested for not being a South African national, and to have been released after Nkosi had paid a fine. Significance was attached to the appellant's failure to make any reference to this in his previous

accounts, and various other points were made about it. It was not accepted that the appellant had been detained in South Africa, as he claimed.

10. Paragraph 18 is of some significance. It reads:

> "Your version of events after you were returned to South Africa at the end of 2003 also raises serious doubts. You claim that on return to Johannesburg, you spoke to Nkosi who was angry that you had failed to claim asylum on arrival in the United Kingdom and that he then arranged for the issue of further fraudulent documents… Once again, it is not accepted that Nkosi would go to the trouble of arranging more documents for you, particularly as you had obviously failed to follow his original instructions".

Paragraph 19 related to what happened following the appellant's arrival in the United Kingdom in April 2004 and his claim to asylum. Reference was made to medical treatment that he had obtained for his son and to the failure to seek such treatment for the son prior to their arrival in this country. The letter expressed the belief that the appellant's motivation for claiming asylum was based solely on seeking medical treatment for his son.

11. It is to be noted that, on its face, the Secretary of State's letter says nothing about what happened at Manchester on the occasion of the appellant's unsuccessful attempt to enter the United Kingdom in November 2003, and in particular makes no adverse comment about the appellant's failure to claim asylum on that occasion. The return to South Africa after he had been refused entry on that occasion forms the starting point for paragraph 18, which I have quoted, but the letter is silent about what happened in the United Kingdom. That is to be contrasted with the detailed adverse comments about various aspects of the appellant's account of events in South Africa, and about what happened following his entry into the United Kingdom in April 2004.

12. I move to the adjudicator's decision. The adjudicator made a brief reference in the narrative part of his decision to the fact that the appellant had travelled to Manchester but had been returned to South Africa because he was travelling on false documents. There was no reference to this in the adjudicator's summary of the cross examination of the appellant by Mr Wardle, the Home Office Presenting Officer, or in the summary of Mr Wardle's submissions which relied on the Secretary of State's refusal letter and were recorded as making a few additional points. In his reasons for a positive credibility finding, one of the matters covered by the adjudicator was this:

> "Although the Respondent in his refusal letter suggests that the Appellant's evidence is not credible and that contention has been repeated by the Home Office Presenting Officer in his submissions, the evidence of the appellant has been consistent

> throughout. The Home Office Presenting Officer, Mr Wardle, cross-examined briefly and on matters that did not go to the heart of his claim for asylum. The result of that cross-examination was that the appellant's credibility was not reduced in any way. Even if I had accepted the limited submissions made by Mr Wardle on the Appellant's credibility that would not have led me to conclude, taking into account all the Appellant's evidence and applying the lower standard of proof to it, that he was not a credible witness".

13. The same paragraph (paragraph 32) went on to deal with specific points made in Mr Wardle's submissions, and ended with a rejection of the contention that the appellant's motivation in coming to the United Kingdom was economic. The adjudicator went on to find in later paragraphs that the appellant's account was also in line with the objective evidence.

14. One of the grounds of the Secretary of State's appeal to the IAT was that the adjudicator had not made any findings as to why the appellant failed to claim asylum when he was turned away by Immigration Officers at Manchester Airport in November 2003. It was submitted that this point went to the heart of the appellant's credibility, in that one would expect a person in genuine need of protection to apply for asylum at the first opportunity, and that the adjudicator's failure to make a credibility finding on it called into question his overall assessment of credibility.

15. That was the first reference in the documentation to any suggestion that the failure to claim asylum in the United Kingdom in November 2003 was being relied on by the Secretary of State as a reason for rejecting the appellant's credibility.

16. The point was evidently pursued with some vigour before the IAT. Paragraphs 4 to 5 of the IAT's decision refer to the grounds of appeal. Paragraph 4 deals with internal relocation, paragraph 5 with credibility. On credibility, paragraph 5 refers first to the issue of the appellant's explanation of what he had done to locate his wife. It goes on:

> "A matter prayed in aid strongly by the Secretary of State in the hearing of the appeal was the fact that the claimant had not claimed asylum in the United Kingdom when first arriving in November 2003. It was submitted that the matters were of considerable importance in the overall assessment of the claim. The adjudicator had erred in law in failing to give reasons why he did not consider them to have the significance which was contended".

17. The claim for judicial review and Mr Bazini's submissions before Stanley Burnton J and his written submission before this court proceeded on the basis that in that passage the IAT was saying that the immigration history point had been prayed in aid strongly by the Secretary of State before the adjudicator. I do not read the passage in that way. I think it clear that the passage is referring to the arguments canvassed on behalf of the Secretary of State before the IAT itself not before the adjudicator. It was before the IAT that the Secretary of State was praying the immigration history point strongly in aid. The IAT is not saying anything in that passage about the extent to which the point had been canvassed previously.

18. The IAT's actual reasoning on the credibility issue is to be found at paragraphs 20 to 28 of the decision. The first matter dealt with was the efforts made by the appellant to locate his wife. The issue before us is then dealt with in this way, at paragraphs 23 to 25:

> "23. Perhaps of more significance is the immigration history of the claimant. He stayed in South Africa and made detailed arrangements to come to the United Kingdom. Passports were obtained for himself and his son and other documents also were obtained. He and his son flew to the United Kingdom in December 2004. When he arrived the claimant said that he had come on a visit. That was not accepted by the Immigration Officer, who indicated that they were to be returned and indeed they were returned on a flight to South Africa the evening of that day. Notwithstanding the likelihood of return, the claimant made no application for asylum at that time, despite the efforts which had been made to get him to the United Kingdom. He then returned to South Africa, and the process is then repeated with many more false documents having to be obtained. The point made on behalf of the respondent in some detail in the reasons for the refusal at paragraphs 15 to 19 is that the failure to claim asylum, either in the United Kingdom or elsewhere, is a material matter undermining credibility".
>
> "24. We readily recognise that every case must turn upon its own particular facts. There are often many ingredients which are placed before an adjudicator potentially relevant to the issue of credibility. It would not be reasonable to expect adjudicators to deal with each and every point. However, on these two matters they are of considerable substance, going to the overall credibility of the claim. Once again, the adjudicator has considered that matter in passing at paragraph 32, saying as follows: 'I do not

> accept that the evidence indicates that his motivation in coming to the United Kingdom was for economic reasons.' The adjudicator did not deal with concerns in any detail or give reasons why he found that those concerns are not in fact material to the overall assessment of credibility'".
>
> "25. It seems to us that those matters ought to have been dealt with by the adjudicator in more detail and clear reasons given, considering their respective importance to the issue of credibility".

19. The claim for judicial review contended that the IAT was in error in thinking that the immigration history point had been raised as a concern before the adjudicator. It was submitted that the point had not been raised in the Secretary of State's refusal letter or at the hearing before the adjudicator. This led to an exchange of evidence in the judicial review proceedings. Natalie Tonge, the member of the Immigration Advisory Service who had represented the appellant before the adjudicator, produced her written record of the hearing, which she said was recorded as accurately as possible and to the best of her ability. That record included a note of the cross-examination of the appellant by Mr Wardle, with the questions numbered sequentially. There was no reference in the note to any cross-examination on the immigration history point. There was also a note of Mr Wardle's closing submissions, again making no reference to the point. Miss Tonge's written record ties in closely with the adjudicator's own summary of cross-examination and the submissions.

20. On the other hand, Mr Wardle made a witness statement in which he stated that his best recollection of the hearing before the adjudicator was that he did cross-examine the appellant as to why he had failed to claim asylum when he came to the United Kingdom in November 2003 (Mr Wardle, like the IAT, referred to December 2003, but I believe that the correct date was November). Mr Wardle could not recall the exact words of the question or response, but believed that the appellant's answer was that he did not claim asylum because he had been instructed not to, because he would be sent back to Zimbabwe if he did. Mr Wardle said he had checked his notes of the hearing and they had not specifically recorded the appellant's answer, but he recalled the appellant giving that explanation. He also confirmed that the fact that the appellant had not claimed asylum on that occasion formed part of his prepared submissions to the adjudicator (a copy of which he exhibited), and he recalled that he did in fact make the point in his submissions to the adjudicator. It is perhaps remarkable that Mr Wardle, whose work as a Home Office Presenting Officer must involve him in many cases, was able to recall so clearly the detail of a hearing that took place some fifteen months before he made his witness statement. It is also striking that the matters to which he refers do not feature in Miss Tonge's detailed note of the hearing, or in the adjudicator's own summary. We are also told that Mr Wardle's own contemporaneous notes of the hearing have not been produced to the court.

21. Nevertheless, Stanley Burnton J understandably considered it unnecessary to resolve the factual conflict that arose on that evidence. He said this at paragraph 11 of his decision :

> "On one view the first question is whether the issue was in fact raised before the adjudicator. In my judgment, however, in cases where the challenge is to a decision of the tribunal, cases will be rare where the court will investigate what took place before the adjudicator. What is in issue is the regularity of the tribunal decision. The decision of the tribunal is liable to be set aside if it was based on a material factual error; but a factual error in this context must be an error going to material fact 'which could be established by objective and uncontentious evidence'. (See the judgment of Brooke LJ in R (Iran) and Ors v Secretary of State for the Home Department [2005] EWCA Civ 982 at 9.) In general, the court will not set aside the decision of a tribunal public authority which is alleged to be based on error of fact unless that fact can be uncontroversially established. In the present case, there is evidence both ways as to what occurred before the adjudicator…It is sufficient for me to say that there is controversy as to whether or not it was raised".

22. If it was being contended, as I think it was, that the IAT proceeded on the basis of a material mistake of fact as to what happened before the adjudicator, and that this mistake amounted to an error of law, then in my view the judge was plainly right to reject the contention in the way in which it was advanced. The circumstances in which a decision can be quashed on the ground that the tribunal proceeded on a misunderstanding of, or in ignorance of, a relevant fact are narrowly confined (see E and R v Secretary of State [2004] EWCA Civ 49 and the exposition of that case in R (Iran) at paragraphs 28 to 33). In particular, the relevant fact must be an established one in the sense of being uncontentious and objectively verifiable. The evident controversy about the factual position in the present case takes it outside the scope of the principle.

23. Mr Bazini submits that in suggesting that the type of evidence adduced on behalf of the Secretary of State made the issue controversial, the judge "lowered the bar to such an extent that almost any allegation from an aggrieved party no matter how lacking in force and devoid of evidential support could be said to make an issue controversial". I cannot accept that way of putting it. This was not just a matter of assertion. There was specific evidence on the point from the Presenting Officer. Whatever reservations one may have about that evidence (and I have indicated the basis of my own reservations), it clearly gave rise to a genuine evidential dispute and rendered the matter controversial.

24. But that still leaves the question whether the IAT was entitled to reach the conclusion to which it came on the material before it. I stress "on the material before it" because, as I have said, the evidential controversy about what happened before the adjudicator arose only in the course of the subsequent judicial review proceedings. All the IAT had to go on was the Secretary of State's refusal letter, the adjudicator's decision and the notice of appeal. No reference is made in its decision to any other material, and neither of the legal representatives who appeared before it had appeared before the adjudicator, so there would appear to have been no scope for oral elaboration of what happened before the adjudicator.

25. The way the judge referred to this aspect of the matter appears at paragraphs 12 to 14 of his decision. He observed that the immigration history point was raised expressly in the notice of appeal, and that no objection was made to the IAT considering the point. In those circumstances, he said the tribunal was entitled to proceed on the basis that the matter was properly before it. There was no perversity in its dealing with the point. The judge went, however, a bit further (as he put it). It appeared that the Presenting Officer had relied before the adjudicator on the Secretary of State's refusal letter, and although that letter did not raise expressly any point that the visit to England in November 2003 was inconsistent with a genuine fear of persecution, it did contain the passage in paragraph 18 that I have quoted. The judge set out that passage. The letter also made the further point in paragraph 19, to which the judge referred, about the seeking of medical treatment for the appellant's son when he had finally claimed asylum in this country.

26. The judge continued at paragraph 14:

> "The flight to England in November 2003, his return to South Africa, his obtaining of a second false passport and flight ticket and the circumstances of his return to England in April 2004 were clearly significant aspects of the history of the claimant in relation to his claim for asylum. The facts that he had been here, gone back, and again persuaded Mr Nkosi to give him another false passport and air ticket to be used in exactly the same way as the first, were manifestly matters which went to the credibility of the claim in a very substantial way. In my judgment, the adjudicator, having regard to the terms of the refusal letter, was bound to deal one way or another with the episode and did not do so. I am far from saying that it was not open to the adjudicator to find that the episode did not in any way affect the credibility of the claimed persecution. The explanations put forward by [the appellant] may be genuine explanations which satisfy and should satisfy a tribunal, whatever the standard of proof that is required. But the episode was highly material and cried out for explanation. In my judgment,

therefore, the tribunal was not only entitled, but right, to allow the appeal on that ground".

27. Mr Bazini's submissions are as follows. He says that the focus here must be on the failure to claim asylum at Manchester in November 2003, since that was the only relevant ground of appeal by the Secretary of State to the IAT. That is the one specific immigration history point that was placed in issue before the IAT and is in issue before us. That immigration history point was not raised at all, even impliedly, in the Secretary of State's refusal letter. The passage to which the judge referred in his judgment was concerned only with the credibility of the appellant's account in respect of the period after his return to South Africa. Mr Bazini submits, for similar reasons, that the IAT itself was wrong to refer to paragraphs 15 to 19 of the refusal letter as making the point that the failure to claim asylum in the United Kingdom in November 2003 was a material matter undermining credibility.

28. The adjudicator's decision, submits Mr Bazini, shows that he was well aware of the relevant facts, but contained nothing to suggest that the particular immigration history point was relied on before him as telling against the appellant's credibility. Nor did the Secretary of State's grounds of appeal to the IAT assert that the point had been raised before the adjudicator. By contrast with what was said in the grounds relating to other matters, the grounds relating to the immigration history point did not refer to the point as having been the subject of submissions to the adjudicator; they simply said that the adjudicator had failed to make any finding on the point. Accordingly, it is submitted that the IAT fell into error in proceeding on the basis that the point had been raised as a concern before the adjudicator and that the adjudicator ought therefore to have dealt with the concern in more detail and have given clear reasons in relation to it. If, as was the case, the point had not been raised before the adjudicator, there was no reason why the adjudicator should deal with it in his reasons. It was not the kind of point that cried out for such treatment, despite the contrary view expressed by the judge. If one looks at the overall picture, including the appellant's account of the harrowing ill-treatment he had suffered in Zimbabwe, this particular point can be seen to have been truly peripheral. Had it been a point of real importance, one would have expected it to have been identified by the Secretary of State in the detailed refusal letter, or by the Presenting Officer in his cross-examination or submissions before the adjudicator.

29. Mr Bazini also points out that even if the matter had been referred to in the Secretary of State's refusal letter, it was not incumbent on the adjudicator to trawl through that letter and deal with the point even though it had not been actively pursued before him by the Presenting Officer. In support of that, Mr Bazini has referred us to JK (Democratic Republic of Congo) v Secretary of State for the Home Department [2007] EWCA Civ 831 at paragraph 35. In his written submissions, Mr Bazini has also pointed to the fact that the appellant did give an explanation in his witness statement as to why he had not claimed asylum in the United Kingdom on the first visit there. In the judicial review proceedings, it was contended on behalf of the

Secretary of State that the appellant had in fact given two inconsistent explanations. Mr Bazini submits that the two statements were not necessarily inconsistent, and since there was nothing to show that the matter was raised before the adjudicator, the adjudicator cannot be said to have erred in law in failing to deal with the possible inconsistency. Indeed, it is to be noted that the adjudicator found expressly that the appellant's evidence had been consistent throughout, and there was no appeal against that finding. Mr Bazini observes that the existence of an explanation by the appellant made it all the less necessary for the adjudicator to deal expressly with the immigration point when it had not been raised before him; or, to put it another way, it is a factor telling further against any suggestion that it was perverse of the adjudicator not to deal with the point.

30. In short, submits Mr Bazini, it was not open to the IAT to find that the adjudicator had erred in law in relation to credibility in the circumstances of this case, where the adjudicator had made a clear-cut finding as to credibility reached in the light of the appellant's full history, including the objective evidence, and had dealt in his reasons with the specific matters raised by the Presenting Officer. This was not a perverse decision, and it was a sufficiently reasoned decision.

31. For the Secretary of State, Miss Giovanetti has accepted that it is not incumbent upon an adjudicator to go through every point in the Secretary of State's refusal letter, but she points out that in this case the IAT did not proceed on the basis that it was so incumbent on the adjudicator. On the contrary, it accepted at paragraph 24 that it would not be reasonable to have to deal with each and every point, but the IAT considered the particular issue to be of sufficient substance that the adjudicator ought to have dealt with it, and that, she submits, was a reasonable conclusion for the IAT to reach.

32. She has also made the submission in her skeleton argument that the Secretary of State's grounds of appeal to the IAT, by arguing that the adjudicator had failed to address the immigration history point, implicitly asserted that the point was live before the adjudicator and required to be addressed. She says that the grounds did not need to state that in terms. When an appellant raises such an argument, there are a number of possible responses: that the point was indeed raised; that it was not raised so there was no error in failing to address it; or that the decision maker does not need to address every point that was raised, but only the issues of real substance, and the point now relied on by the appellant was not of sufficient importance to require a mention. In the present case, it is said that the argument of the current appellant before the IAT was not that the point had not been raised before the adjudicator, but that the point was not of sufficient importance to require a mention; that matters of credibility did not go to the crux of the claim. The argument that the point had not been raised at all before the adjudicator was advanced for the first time in the judicial review proceedings. Accordingly, submits Miss Giovanetti, the IAT was entitled to proceed on the basis that the point had been raised before the adjudicator, and its conclusion that the adjudicator ought to have dealt with the point in more detail with clear reasons was properly open to it.

33. Miss Giovanetti has also advanced an argument by reference to the terms of the Secretary of State's refusal letter (paragraphs 15 to 18) that the Secretary of State was making the point, in that letter, that the appellant had failed to claim asylum on his first visit to the United Kingdom. She says that if one reads paragraphs 15 to 18 as a whole, they can be seen to be directed to it having been quite extraordinary that the appellant did not claim asylum on that occasion. She says that the IAT itself plainly went wider than the particular immigration history point in its decision, and that Stanley Burnton J had pointed to the whole episode of the appellant's two journeys to the United Kingdom, and what happened in between in South Africa, as matters going to the credibility of the claim in a very substantial way. She submits that when one looks at the matter in that way, it can be seen that the IAT was entitled to conclude that the adjudicator had failed to deal with an important point, and had erred in law by reason of that failure.

34. Dealing first with the last of those submissions, it seems to me that the way in which Miss Giovanetti seeks to deploy the Secretary of State's refusal letter is unsustainable. One cannot read the relevant passage in that letter as making a point in respect of the failure to claim asylum on the first occasion in the United Kingdom. What it does is make a whole series of individual points by reference to various matters. The failure to make the point in issue in this case is quite striking. Moreover, the Secretary of State's grounds of appeal to the IAT did not seek to put the matter on the broader basis that Miss Giovanetti seeks to derive from the refusal letter, but focused specifically on the failure to claim asylum in the United Kingdom on the first occasion. In my judgment, one cannot (even approaching the matter with an appropriate degree of benevolence) read the ground of appeal as going wider than that, nor indeed was the case put wider than that on behalf of the Secretary of State before the IAT. I have already quoted the passage in paragraph 5 of the IAT's decision, which, in my view, makes it clear that the matter was being argued by reference to the specific point of a failure to claim asylum in the United Kingdom on the November 2003 occasion.

35. I therefore take the view that this matter must be considered by reference to the particular immigration history point, not the wider concerns expressed in the refusal letter about the appellant's account of what happened to him in South Africa, or to any wider points made by the IAT or the judge.

36. Having set out the history of the matter and the ambit of the dispute at some length, I can express my conclusions on the specific matter in issue briefly. In my judgment, the IAT had no proper basis for finding that the adjudicator had erred in law in making his positive credibility findings. On the face of it, the adjudicator dealt adequately with the matters that were raised before him. I am satisfied, for the reasons I have already given, that the Secretary of State's decision letter did not rely on the particular immigration history point and cannot be read as having impliedly raised it. I accept Mr Bazini's submissions that the IAT fell into error in relying on the Secretary of State's refusal letter as it if had raised that point. There was nothing to show that the point had been relied on before the adjudicator. It did not feature in the adjudicator's

summary of the cross-examination or of the submissions. The grounds of appeal did not contend that it had been raised before the adjudicator or make any complaint about the lack of reference to it in the summary of cross-examination of the submissions, but merely asserted that the adjudicator had failed to make any findings in the matter. In circumstances where other grounds stated in terms that the adjudicator failed to deal with matters raised in submissions, I do not accept that the ground relating to this issue can be read as implicitly arguing that the specific immigration history point had been raised before the adjudicator. Nor does it seem to me, in the circumstances, that it can be said that, by failing to take an objection before the IAT, the appellant's representative at the hearing before the IAT impliedly conceded that the point had been raised before the adjudicator.

37. Moreover, the failure to claim asylum in the United Kingdom on the first occasion was not simply a point lacking any explanation. The appellant had given an explanation of it, and so far as could be discerned from the refusal letter and the adjudicator's decision, his explanation had not been challenged. As I have said, the adjudicator found that the appellant had been consistent in his evidence throughout, and there was no challenge on appeal against that finding.

38. The position as I have described it was that by reference to which the IAT was required to assess this matter. In my view, the tribunal fell into error in approaching the matter on a very different basis: that the failure to claim asylum in the United Kingdom on the first occasion had been relied on in the refusal letter and was a concern canvassed on behalf of the Secretary of State before the adjudicator. As I have made clear, those conclusions are reached without the need to rely in any way on the evidence subsequently filed in the judicial review proceedings.

39. If the issue was not raised before the adjudicator, then in my judgment it was not in all the circumstances a matter with which the adjudicator was required to deal in any event of his own initiative. I accept Mr Bazini's submissions on that aspect of the case. I do not think that it was perverse of the adjudicator to focus on the points he did, and not to deal in terms with the failure to claim asylum on the first visit to the United Kingdom. I further take the view that the reasoning given by the adjudicator in support of his positive credibility findings dealt adequately with the points that were actually raised and was sufficient overall.

40. For those reasons, I respectfully disagree with Stanley Burnton J on this issue. I would allow the appeal in relation to it, and would quash the IAT's decision insofar as it found that the adjudicator erred in law in his credibility findings. The matter will still fall to be remitted to the AIT for reconsideration in relation to the issue of internal relocation, but on the basis that the adjudicator's positive credibility findings remain intact.

**Lord Justice Lawrence Collins:**

41. I agree.

**Lord Justice Wall:**

42. I also agree. I acknowledge that on reading the papers I was initially attracted by the judge's conclusion that the appellant's failure to claim asylum in Manchester on the first occasion was "highly material and cried out for explanation". Having listened carefully to the argument, however, I am quite satisfied (for the reasons Mr Bazini advanced and my Lord has given) that this was not, as it were, a ***Robinson*** point in reverse. The question of the failure to apply for asylum did not stick out like a sore thumb and require to be dealt with in any event. The adjudicator was entitled not to deal with it, and therefore committed no error in law in failing to do so. For that reason, amongst the others my Lord has given, I concur in the result which he has proposed.

**Order:** Appeal allowed.