Neutral Citation Number: [2009] EWHC 705 (Admin)

Case No: CO/7641/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2009

Before :

THE HONOURABLE MR JUSTICE STADLEN

- -

Between :

THE QUEEN ON THE APPLICATION OF J	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

MS LAURA DUBINSKY (instructed by **Birnberg Peirce**) for the **CLAIMANT**
MR JAMES STRACHAN (instructed by **Treasury Solicitors**) for the **DEFENDANT**

Hearing dates: 17, 18, 23 and 24 June 2008

Judgment

The Honourable Mr Justice Stadlen:

1. This is an application for judicial review of a decision made by the Secretary of State for the Home Department on 15 June 2006 to certify the Claimant's asylum and human rights claims under Section 96 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") on the grounds that they relied on matters which could have been raised in the Claimant's appeal against an earlier decision to refuse entry and should have been raised in a statement made in response to an earlier one stop notice and that in the opinion of the Secretary of State there was no satisfactory reason for those matters not having been raised in the earlier appeal or in response to the one stop notice.

2. The effect of the decision to certify the Claimant's claims under Section 96 of the 2002 Act in the form in which it was in force at the time the decision was made was to preclude the right which the Claimant would otherwise have had by virtue of Section 82 to appeal against the Secretary of State's decision, also made on 15 June 2006, to reject the Claimant's application for permission to remain in the United Kingdom on asylum and human rights grounds. Central to the issues arising on this application is the fact that at the same time as and notwithstanding certifying the

Claimant's claims under Section 96, the Secretary of State also accepted that they amounted to fresh claims pursuant to Paragraph 353 of the Immigration Rules.

3. The application raises important general questions on the relationship between section 96 of the 2002 Act and paragraph 353 of the Immigration Rules as amended which defines a fresh claim as submissions whose content had not already been considered and, taken together with the previously considered material, created a realistic prospect of success notwithstanding its rejection by the decision maker. In particular in what circumstances if any is it lawful for a claim to be certified and for the right of appeal to be precluded in respect of submissions which the Secretary of State has determined amount to a fresh claim and thus created a realistic prospect of success?

The Facts

4. The claimant is a Sri Lankan national who was born on 18 May 1980 and is thus now 28 years old. He arrived in the UK on 30 June 2001 and claimed asylum immediately at the airport. He was served with a one stop notice pursuant to section 74 of the Immigration and Asylum act 1999,("The 1999 Act"), the precursor of section 120 of the 2002 Act. The notice required the Claimant to state any additional grounds which he might have for wishing to enter or remain in the United Kingdom. In particular it stated that he should then put forward any human rights arguments he might have and warned him that if he raised additional grounds after the period allowed he might lose the chance to have any decision on them reviewed by an independent adjudicator, and that it might be concluded that they were put forward late to delay his removal from the United Kingdom.

5. On 7 July 2001 the Claimant was requested to complete and return within ten working days a Statement of Evidence Form in support of his application for asylum. By a letter dated 24 July 2001 the Claimant's then solicitor sent a statement of additional grounds together with a Statement of Evidence Form. However this was not received until 6 August 2001.

6. On 31 July 2001 the Secretary of State refused the Claimant's application for asylum. The Statement of Evidence Form not having been received in time the Secretary of State found that the Claimant had failed to establish his claim and concluded in the light of all the evidence available to him (of which there did not appear to be any) that he had not established a well-founded fear of persecution and did not qualify for asylum. His application was refused under paragraphs 336 and 340 of the Immigration Rules (as amended) and was recorded as determined on 31 July 2001. The Secretary of State also indicated that he was not satisfied on the information available that the Claimant qualified under any of the articles of the European Convention on Human Rights ("ECHR").

7. The Claimant was served with a further one stop notice and required to state any additional reasons for staying in the United Kingdom not previously disclosed in a statement of additional grounds which was attached to a Notice of Appeal form served on him. On 12 August 2001 the Secretary of State formally refused the Claimant leave to enter the United Kingdom and notified him of his right to appeal on the ground that his removal would be contrary to the United Kingdom's obligations under the 1951 United Nations Convention Relating to the Status of Refugees ("The

Geneva Convention"), notice of which appeal had to be received by 1 September 2001.

8. On 6 August 2001 the Secretary of State received a completed one stop notice and Statement of Evidence Form. The former submitted that in addition to seeking leave to enter as a Geneva Convention refugee the Claimant had been tortured by the state authorities in Sri Lanka which was evident from photographs filed with the Statement of Evidence Form and that removal directions would breach Article 3 of the ECHR. The latter contained declarations both by the Claimant and by his then solicitors, Ratna and Co. The Claimant declared that the information he gave was complete and true to the best of his knowledge. His solicitor declared that she had assisted the Claimant in completing the form, that the responses provided were all based on information provided to her by the Claimant and that the completed form had been read to the Claimant in his native language for verification before he signed his declaration in her presence.

9. In the Statement of Evidence form the Claimant applied for asylum on the basis that he feared persecution if returned to Sri Lanka by reason of his race ethnic origin or nationality and political opinions. This was supported by the account he gave in his signed statement of his alleged involvement in the LTTE (Liberation Tigers of Tamil Eelam ("the Tamil Tigers")).

10. In his statement the Claimant alleged that he and his elder brother had been forced by the Tamil Tigers through the use of continued harassment and pressure to work for them. In May 1995 he stated that his elder brother had been pressurised by the Tamil Tigers to work for them. The Claimant and his parents tried unsuccessfully to locate his elder brother to persuade him to return home but were unsuccessful. In January 1998 during a Tamil Tiger attack on a government camp in Puliamkulam the Claimant's brother was killed. The Claimant and his parents were informed of this via the Voice of Tigers, a radio operated by the Tamil Tigers. The Claimant and his parents were requested to contact and leave their address with the National Heroes Office which they later did. They were then visited by some Tamil Tigers who said that the elder brother's body had been taken by the Sri Lankan authorities. A remembrance stone for his brother was planted at the National Heroes Resting House, a large space allocated for planting remembrance stones for those who died in the war with the Sri Lankan authorities.

11. On 30 December 1999 the Claimant stated that he was arrested in a night-time raid on his parents' house by the Sri Lankan army. The arresting soldiers said they had confirmed information that the Claimant's father was sheltering sons who had close links with the Tamil Tigers and asked for details of the Claimant's elder brother. They disbelieved his father's claim that he had died six months earlier and that the family had no contacts with him. They asserted that the elder brother was still alive and working for the Tamil Tigers. As soon as they arrived at the house and spotted the Claimant they shouted "Koddiya", a Sinhalease word for Tiger. While doing so they pointed their guns at the Claimant and an officer said "Shoot! Shoot!".

12. Having kicked the Claimant's father with their boots the soldiers dragged the Claimant into a van and took him to a Sri Lankan army base where he saw a human skull as he was led in. At the camp the Claimant said that he was interrogated to reveal his brother's whereabouts and tortured. He said that he was held upside down

and beaten on his feet with heavy boots and sharp weapons. He was also beaten on the forehead with sharp weapons. Later they tied a shopping bag soaked with petrol over his head and beat him again. In the course of interrogation he was asked to identify Tamil Tigers who attended his brother's funeral but did not do so. He was also taken to a sentry point and asked to identify Tamil Tigers who passed it. When he failed to do so the interrogator said he must be a Tamil Tiger himself.

13. After being held in the army camp for many days the Claimant said that it was overrun by Tamil Tigers whom he told that he was being held by the Sri Lankan army as a Tamil Tiger. He claimed that he was dragged by the Tamil Tigers out of the camp and driven to a Tamil Tiger camp and thence to Vanni where he was investigated by the Tamil Tigers. He claimed that they told him to join the Tamil Tigers but that he refused, citing the death of his brother after he had joined them. They then told him to work for the Tamil Tigers in their camp and since he had no way of going back to Jaffma and knew no-one in Vanni he agreed to do so, doing all the odd jobs in the camp starting with cleaning and cooking.

14. In March 2000 the Claimant said that the Tamil Tigers told him to join their spying wing, which he initially refused to do. However, because they said that provided he agreed to spy for them he would not be forced to participate in their fight against the authorities, the Claimant stated that eventually he agreed, fearing that otherwise he would be forced to participate in the military struggle. He then attended classes where he met other members of the spying wing and was sent to the Vanni border to spy for the Tamil Tigers. On 6 June 2000 he said that he was one of five spies who were taken to a different base where they were ordered to go to Puttalam to spy for the Tamil Tigers and to pass a message to Tamil Tigers who would introduce themselves in Puttalam. They were shown camps, police stations and CID offices in the Puttalam area and given two addresses of Tamil Tiger supporters there, one of whom was a very prominent Muslim businessman. They were told that he would employ them in his business and that they would live at his house.

15. The Claimant then stated that around 5 June 2001 (sic) he and five other Tamil Tigers arrived at Puttalam having been escorted there by 18 Tamil Tiger militants in a four-day journey through the jungle. They were met by a Muslim and stayed at his house, spying for the Tamil Tigers. On 20 June 2001 the Claimant said that whilst spying at a place near the Sri Lankan authority's base he was arrested by CID officers. Soon after his arrest the Muslim businessman contacted the CID officials and paid a bribe to secure his release in order, so the Claimant understood, as to avoid the Claimant informing the authorities about his help for the Tamil Tigers. The Muslim businessman arranged for the Claimant to stay in the house of a relative from where he was taken in a lorry to Colombo. In Colombo he stayed at the house of an agent who assisted him to leave the country on 30 June. The agent escorted him through checkpoints where he spoke with the police and army personnel.

16. The Claimant appealed against the Secretary of State's decision by letter dated 22 August 2001, also enclosing a further completed one-stop notice setting out a Statement of Additional Grounds. In the Notice of Appeal the Claimant explained why his original Statement of Evidence Form was served out of time. The Claimant stated that he filed the Statement of Evidence Form by Recorded Delivery on 25 July 2001. Prior to that, he tried soon after seeking asylum on 7 July 2001 to contact various solicitors who could speak the Tamil language and provide free legal advice

and assistance. He was only able to see Ratna & Co on 14 July 2001. They had then assisted him to draft a statement which was finalised in less than ten working days. He said that he had great difficulties in finding lawyers who could converse in the Tamil language and see him at short notice to assist in complying with the strict deadline given by the Secretary of State. Accordingly he contended that the Secretary of State's decision to refuse him asylum on the ground that he did not receive the Statement of Evidence form in time was a contravention of the UK's obligations under the Geneva Convention. In addition the Claimant referred to evidence which he enclosed by way of photographs and "paper cuttings" as confirmation of his torture at the hands of the State authorities and appealed also against the Secretary of State's refusal to consider human rights issues in his claim.

17. By letter dated 20 September 2002 the Claimant was informed that even though the Statement of Evidence form had been received only on 6 August 2001 the Secretary of State had carefully considered the basis of his asylum claim as contained in that form but was not satisfied that he had a valid claim for asylum. Furthermore, in the absence of a reasonable explanation for failing to return the form within the stipulated period the Secretary of State was not persuaded that he should reverse his previous decision to refuse the Claimant's claim for asylum on non-compliance grounds under paragraph 340 of the Immigration Rules which was thus maintained.

18. The letter set out the reasons for maintaining the refusal in the light of the Claimant's Statement of Evidence form. First, it was considered that the authorities would not have released the Claimant if they had any reason to believe that he was of continuing interest to them. Second, and of critical importance to this application, the Secretary of State did not think it was likely that someone unwilling to fight for the Tamil Tigers would be given the job of spying and that he would be introduced to high-level members whose identities he could reveal if caught by the authorities.

19. In addition it was considered that members of the civilian population, whatever their religion or ethnic origins, have nothing to fear from routine actions and enquiries made by the authorities in Sri Lanka in pursuance of their efforts to combat terrorism and to maintain law and order. Reference was made to a press release of 29 June 2002 in which Amnesty International recognised that the ceasefire agreement had made a significant impact in reducing human rights abuses in Sri Lanka. In the light of those changes in Sri Lanka it was considered that even if the Claimant's account were true the Tamil Tigers and the authorities in Sri Lanka would have no further interest in him. The Secretary of State considered that the Claimant did not qualify for recognition as a refugee because there was a part of Sri Lanka in which he did not have a well-founded fear of persecution to which it would be reasonable to expect him to go irrespective of the Secretary of State's other comments regarding the merits of his claim. Finally it was stated that the Claimant had supplied no new evidence regarding his asylum application in his grounds of appeal which would cause the Secretary of State to alter his original decision to refuse the claim for asylum.

20. The Claimant pursued his appeal and was represented by Counsel (who was not the same Counsel who appeared on the application before me) and gave evidence before an Adjudicator on 29 November 2002. The Adjudicator rejected the appeal on both asylum and human rights grounds. He found that there was no serious possibility of a risk of the Claimant facing treatment in breach of his rights under Articles 2 and 3 of

the ECHR and was not satisfied that the Claimant currently had a well-founded fear of persecution for a Geneva Convention reason in the event of his return to Sri Lanka.

21. The Adjudicator allowed the appeal in so far as it related to paragraph 340 of the Immigration Rules on the basis that the Secretary of State was not entitled to rely on non-compliance with the deadline for submitting the Statement of Evidence Form. He was satisfied that the form sent by Recorded Delivery letter dated 24 July 2001 must have been received at the Home Office some time before a 6 August 2001 date stamp was affixed to it and concluded that it was probably received about ten days out of time. Of some significance in the context of the principal issues on this application the Adjudicator accepted the Claimant's explanation as to the delay which he was satisfied constituted a reasonable explanation. Part of that explanation was the Claimant's assertion that, between 7 July 2001, when he was issued with a Statement of Evidence Form and 14 July 2001 when he first met Ratna & Co, he had tried unsuccessfully various solicitors who might be able to provide him with free legal advice and assistance and who could also converse with him in Tamil.

22. On the substantive grounds of appeal, the Adjudicator accepted part but not all of the Claimant's account in his Statement of Evidence Form as elaborated in oral testimony. On the credit side, he accepted that the Claimant had been taken by the army, detained for a period of about two months, interrogated and subjected to treatment which was sufficiently severe to amount to torture. He recorded that the Claimant's claim to have been beaten on his feet was borne out by the evidence of scarring on his feet and supported by a short report from a doctor. He thus accepted that the Claimant was tortured during this period of detention and that his detention having been prompted by his suspected Tamil Tiger membership or association, the detention and torture amounted to persecution for a Geneva Convention reason. He further accepted that the Claimant had been released from army detention when the Tamil Tigers attacked the army base. He accepted that after the Tamil Tigers released him the Claimant made his way to the premises of the Muslim businessman who was a known sympathiser of the Tamil Tigers. He also accepted that the Claimant had been arrested on 20 June 2001 and that thereafter the Muslim businessman paid a bribe to secure his release. His conclusion was that the Claimant had suffered persecution as a result of his arrest, detention and torture between December 1999 and February 2000 which was as a result of his perceived sympathies for the Tamil Tigers.

23. On the debit side the Adjudicator had great reservations as to the plausibility and credibility of the Claimant's claim. Thus he said that if the Claimant's brother's body had been taken by the army, as he claimed to have been told by the Tamil Tigers, he could not believe that the army would not have taken steps to identify it. Nor could he believe that the army would not have listened to the Tamil Tiger broadcasts and thereby obtained every piece of information which had been obtained by the Claimant's family. Thus the Adjudicator did not believe that nearly four years later the army would have called at the family home investigating the whereabouts of the Claimant's missing brother. He thus concluded that the raid by the army on 30 December 1999, which he accepted took place, had been a routine security investigation and that the Claimant exaggerated his account of what took place that evening. In particular he did not accept that the family had been targeted specifically as a result of the Claimant's brother's membership of the Tamil Tigers and his death in combat.

24. Of central importance to this application the Adjudicator recorded that he was unable to accept that if the Claimant did no more than menial tasks for the Tamil Tigers and had refused to be an active participant he would have been considered with sufficient confidence to have been trained for spying activities. He thus rejected that aspect of the Claimant's claim. He therefore concluded that when the Claimant left the Tamil Tiger camp it was merely because the Tamil Tigers considered that he was of no further use to them and simply released him. He found the Claimant's account of the events on 5 June 2001 when he suggested that he and a few other Tamil Tiger members had had an escort of 18 Tamil Tiger militants when making their way to the Muslim businessman in Puttalam to be totally lacking in credibility. He concluded that when, as he accepted happened, the Claimant was arrested in Colombo, he was merely waiting at a bus stop and that the arrest was initially as part of a general security check and then because his identity documents were not in order. That finding coupled with the Claimant's almost immediate release on payment of a bribe did not indicate to the Adjudicator persecution nor that the Claimant was of any continuing serious interest to the authorities.

25. Based on these findings the Adjudicator was not satisfied to the necessary standard that the Claimant currently had a well-founded fear of persecution for a Geneva Convention reason in the event of his return to Sri Lanka. The one period of persecution in the past to which he found that the Claimant had been exposed was of relatively short duration and nearly three years earlier. He rejected the Claimant's claim that it was due to association with his brother, finding that it was as a result solely of suspected Tamil Tiger involvement on his part or as a result of routine security checks. He could not believe that the fact of the Claimant's brother having been killed in fighting between the Tamil Tigers and the army nearly seven years earlier would result in any continuing attribution by the authorities to the Claimant of close Tamil Tiger associations. He was satisfied that the Claimant's more recent arrest in June 2001 was as a result of routine security checks and not as a result of any perceived affiliation.

26. In addition the Adjudicator referred to a dramatic change in the country situation in Sri Lanka in the 18 months since the Claimant left Sri Lanka. Because the Claimant's scarring was in an area where it would not normally be noted on casual inspection he considered that it was not of such a nature as itself to give rise to a risk of adverse interest or attention. In view of the circumstances of the Claimant's release from his last brief period of detention he was satisfied that he would not be on record. If he had been on record as a result of his earlier period of detention that would no doubt have come to light when he was arrested for the second time. He therefore concluded that the Claimant was not on record and would not be of adverse interest to the authorities upon return to Sri Lanka.

27. For the same reasons as led him to reject the appeal on asylum grounds the Adjudicator found that there was nothing to engage Articles 2 or 3 of the ECHR.

28. On 31 January 2003 the Claimant's application for permission to appeal to the Immigration Appeal Tribunal (IAT) against the Adjudicator's determination was refused by a vice president of the IAT on the ground that in his view. none of the grounds of appeal had any real prospect of success

29. By letter dated 19 February 2004 new solicitors instructed by the Claimant, Messrs Lawrence Lupin, wrote to the Secretary of State purporting to make a fresh asylum and human rights claim. The letter asserted that the Claimant had been given very bad and misleading advice by his previous solicitors, Ratna and Co. In particular it was asserted that the draft statement prepared by his previous solicitors had never been read back to the Claimant until the day before the hearing of his appeal, at which point he had found that it was full of errors which were never corrected, with the result that the adjudicator had serious problems reconciling the information in the statement with the information that the Claimant gave in oral testimony.

30. In addition and critically it was asserted that the Claimant had been advised by his previous solicitors to suppress a lot of crucial information, such as his very serious and deep involvement with the Tamil Tigers Intelligence Unit. The letter enclosed a new 23 page unsigned statement which was said to outline the Claimant's very deep involvement as an Intelligence Operative for the Tamil Tigers, to establish that he had access to internal files of the Tamil Tigers and that, having escaped from them, if he were to return to Sri Lanka the Tamil Tigers would most certainly apprehend him and severely punish him since they were extremely tough with Intelligence Operatives and paranoid about information leaking. Even though it was accepted that this information had been available to the Claimant before, it was asserted that he had concealed the very sensitive and controversial position that he was in as an escaped Intelligence Operative from the Tamil Tigers. It was asserted that when he had begun to tell his former solicitors about his involvement they had advised him that since the Tamil Tigers were a proscribed organisation he should not divulge too much information about his involvement with them as he would be considered a terrorist. It was submitted that the new statement showed that the Claimant had been involved in "unsavoury practices" such as detaining people targeted by the Tamil Tigers for punishment and interrogation.

31. It was further submitted in the letter from his second firm of solicitors that the Claimant's surviving brother had been sought by the Sri Lankan Intelligence and called in for questioning about his brothers including the Claimant even though he had never shown any kind of link with the Tamil Tigers. He had been detained on 15 November 2001 and kept at Mount Lavinia Police Station confirmation of which was said to be shown by a receipt that had been emailed to the Claimant. The solicitors' letter enclosed a letter from a doctor said to have been caring for the Claimant's mother who was said to be seriously traumatised by the death of her son and the position of the Claimant. The letter further enclosed a report by Dr. Anthony Good, a copy of which was not before the Court but which was said to be a generic country situation report.

32. In the enclosed new statement the Claimant stated that he had been wrongly advised by people he knew and in particular by Ratna and Co who told him that he should not in anyway say that he worked for the Tamil Tigers of his own volition. They had advised him that the Tamil Tigers were proscribed in the UK and that any support for them would be seen as support for a terrorist organisation. They had also advised the Claimant that he should say that the army became interested in him because he was supporting the Tamil Tigers unwillingly. He regretted following their advice because what they had advised him to say was not true.

33. In the new statement the Claimant gave an account which was in many respects similar to the original account but in material respects different. Thus for example he now said that his whole family had been heavily involved with the Tamil Tigers which was known by the whole of the village where they lived. The date of his elder brother's death in a battle with the Sri Lankan army was said to have been January 1996. (In the earlier statement it had been given as January 1998, although that had been corrected in oral testimony). From 1996 the Claimant said that he continued to help individual members of the Tamil Tigers buying them food and finding safe houses to hide in. He also helped individual Tamil Tiger cadres by reporting to them on army movements and helping them to find the whereabouts of other cadres.

34. In relation to his involvement with the Intelligence Unit of the Tamil Tigers after they overran the army camp where the Claimant had been detained, the Claimant now gave a different account from that in his earlier statement. So far from being reluctant, he said that he had been very moved by reading books about the history of the Tamil Tiger heroes and when he started working in the offices of the Intelligence Unit he was very enthusiastic about everything he did. He had suffered at the hands of the army and wanted to pay them back.

35. Part of his work involved sorting out all the Tamil Tigers' intelligence files, which gave him access to a great deal of information about individual Tamil Tigers. He also said that he interrogated many people in connection with his intelligence work. He had been punished by the Tamil Tigers for interrogating people roughly and for not spying properly. He said that when he first joined the Tamil Tigers after his detention he joined in the beatings of informants who had been treacherous enthusiastically because he was angry and bitter and hated all Sinhalese people. He said that he interrogated two to three people a week. He said that he carried out these duties loyally and with a sense of duty. He fully believed in the Tamil Tigers and felt that the mission of the Intelligence Unit in identifying and weeding out traitors and bad elements was a correct one. The Claimant asserted that if he went back he would face severe punishment at the hands of the Tamil Tigers who are very suspicious of any Tamil Tiger member who has been detained by the armed forces because they had experience of detainees returning and spying on the Tamil Tigers for the army. He said that having been released in Puttalam he was terrified to return because those who had been punished by him before would be waiting to interrogate and torture him fiercely. He even feared for his life.

36. The Claimant stated that the reason why the army had come to his family house in December 1999 was not because his brother had died four years earlier but rather because it was known locally that his family had been long term supporters of the Tamil Tigers. The Claimant reiterated that his previous solicitors had advised him not to say that he had willingly joined the Tamil Tigers. He said that the reason the Muslim businessman had secured his release from detention was that he was afraid that he would divulge information which he had obtained while working in the Tamil Tiger Central Intelligence Office in Vanni. For example he knew which cadres had been ordered to carry out the murders of many prominent people and how girl suicide bombers operated in Colombo.

37. In answer to the Adjudicator's finding that the army would not have a record of his detention because of the manner of his escape the Claimant stated that the army had come to arrest him identifying his home specifically because they had records about

him and his brother. He also said that the authorities who detained his other brother who was later questioned by the CID in Colombo had specifically come to his dwelling place which was a lodge owned by a distant relative and not as part of a mass raid. During the course of his questioning it became apparent that the police had connected the Claimant's detention in June 2001 to his earlier detention in December 1999. In response to a finding by the adjudicator that there were inconsistencies between the Claimant's evidence and that contained in an affidavit of his father, the Claimant stated that his father's affidavit was not truthful, the reason being that his father had been reluctant to state that the Claimant had been involved in a terrorist organisation and that the JP had been frightened to record that the Claimant had been detained by the army.

38. In a letter dated 15 June 2006 to the Claimant's third set of solicitors, Birnberg Peirce and Partners, the Secretary of State refused the Claimant's application for leave to enter on the basis of asylum which was recorded as being determined on that day. In addition the Secretary of State certified under Section 96(1) of the 2002 Act (as amended) that the Claimant's application relied on a matter that could have been raised in an appeal against the old decision and that in his opinion there was no satisfactory reason for that matter not having been so raised. The Secretary of State further certified in accordance with Section 96 (2) of 2002 Act (as amended) that the Claimant's application relied on a matter which should have been but had not been raised in a statement made in response to a one Stop notice served under part IV of the 1999 Act and that in the opinion of the Secretary of State there was no satisfactory reason for that matter not having been so raised. The effect of both certificates was stated to be that an appeal under Section 82(1) of the 2002 Act might not be brought.

39. The Secretary of State's letter did not expressly state that he was treating the Claimant's new representations as a fresh asylum or Article 3 ECHR claim. Given the importance to this application of his having so treated them that is a curious and potentially important lacuna. In oral argument Mr Strachan, counsel for the Secretary of State, told me that for the purposes of these proceedings the Secretary of State was treating the decision letter of 15 June 2006 as indicating an acceptance that the representations made in the letter dated 19 February 2004 were a fresh claim with a real prospect of success. That he said was implicit in the Summary Grounds of Defence in the Acknowledgement of Service which did not deny the assertion in paragraph 12 of the Statement of Facts in the Claimant's judicial review Claim Form that the Secretary of State "has accepted that the Claimant has a fresh asylum and Article 3 ECHR claim and that that is clear from the fresh immigration decision issued to the Claimant on 15 June 2006." (Confusingly and inconsistently with the assertion in paragraph 12, the Claimant in paragraph 1 of the Statement of Facts asserted that the Secretary of State had refused to treat his representations as fresh asylum or Article 3 ECHR claims.) In this regard Mr Strachan further pointed out that a certificate under Section 96 of the 2002 Act would only arise in a case where the Secretary of State was treating submissions as a fresh claim.

40. The lack of an express determination that the Claimant's submissions constituted a fresh claim complicates an already difficult issue in a number of ways. First it leaves open the question of which was the aspect of the Claimant's representations that the Secretary of State determined had a realistic prospect of success. In particular was it the Claimant's new factual account in his second Statement of Evidence Form or was

it the new country report by Dr. Good or a mixture of the two? Second it means that there is no indication in the letter dated 15 June 2006 ("the Decision Letter") as to whether the Secretary of State took into account in exercising his discretion on whether to certify under Section 96 the fact of his determination that there was a fresh claim with a realistic prospect of success and/or the reasons which led to that determination and if so what weight, if any, he gave to those matters. I refer to this in more detail below.

41. The Decision Letter set out the reasons for the Secretary of State's conclusion that the Claimant did not qualify for asylum or Humanitarian Protection, which latter question had also been considered because the Claimant had raised issues under Article 3 of the ECHR.

42. Having drawn attention to the marked differences between the Claimant's factual account contained in the Statement of Evidence Form submitted on 23 July 2001 and the unsigned statement enclosed with the letter dated 19 February 2004, the Decision Letter stated that the Home Office was not prepared to accept the claim in the latter document that the Claimant had been working enthusiastically in the Intelligence Unit of the Tamil Tigers, that he had had access to their files and that he had been involved in interrogations.

43. The reasons given were as follows. First reference was made to the fact that although the Adjudicator had accepted some of the Claimant's claim as likely to be true he was said to have been scathing as to its central pillar. Second if the Home office were to accept the Claimant's new statement as the unvarnished truth it would mean that he had knowingly lied to the Home office and the Adjudicator. Third in light of his behaviour the Home Office was not prepared to place any weight at all on further uncorroborated claims. Fourth the enclosures with the letter dated 19 February 2004 did not in any way support the Claimant's latest claims. In relation to the report on a fact finding visit to Sri Lanka by Doctor Anthony Good of the University of Edinburgh, it was not specific to the Claimant and did not establish that either of the accounts he had given was true.

44. On 27 June 2006 Birnberg Pierce submitted further materials. First there was a detailed report from Dr. Chris Smith, an expert on Sri Lanka. Doctor Smith is a visiting fellow of the Department of Politics at Bristol University and formerly deputy director of the International Policy Institute at King's College London. He advises the Foreign and Commonwealth Office, the Ministry of Defence and the Department of International Development on Sri Lanka and advises the Sri Lankan government on weapon smuggling and decommissioning.

45. Dr. Smith's report commented on the Claimant's claim and on certain of the Adjudicator's findings. A number of those comments were to a greater or lesser extent supportive of the Claimant's case. Thus in paragraph 156 of his determination, the Adjudicator noted that the Claimant was never charged with any offence during his period in detention. In paragraph 55 of his report Dr Smith commented: "The fact that he was released without charge does not mean that the Appellant was not of further interest to the authorities when he was released on payment of a bribe or that the appellant's details were not recorded and placed on a national data base." Acknowledging that the Claimant's overall credibility is a matter for the Court and not for him, Dr Smith said that nothing in the Claimant's account of events was

intrinsically implausible to him or inconsistent with objective evidence of which he was aware.

46. Dr Smith commented on the Adjudicator's finding that the Claimant's account of events on 5 June 2001 when he suggested that he and a few other Tamil Tiger members had an escort of 18 Tamil Tiger militants when they were making their way to the Muslim businessman in Puttalam was totally lacking credibility. Dr. Smith commented that the Claimant's activities for the intelligence wing of the Tamil Tigers were very detailed. He found the Claimant's training and activities for the Tamil Tiger intelligence wing and the details relating to his team's mission to government controlled Puttalam to be entirely consistent with the background evidence of which he was aware.

47. The Adjudicator drew attention to inconsistencies between assertions in the Claimant's evidence and the contents of his father's affidavit and found that the absence of any reference, in a letter from the Muslim businessman which was before him, to the Claimant's alleged Tamil Tiger activities further undermined his credibility as to the circumstances in which he came to be released. Dr. Smith expressed the opinion that it is reasonably likely that the Claimant's father and the Muslim businessman who secured his release from detention in Puttalam would not have been able to make a full and frank disclosure about the information they had about the Claimant in their statements. He pointed out that they were living in government controlled areas and said that due to a climate of fear Tamil civilians and Tamil government officials were reluctant to detail incidents involving the security forces and police. He concluded that it is perfectly plausible that the Claimant's father and the businessman who secured his release could have failed to provide details involving the security forces and police in their statements due to fear.

48. The Adjudicator stated that the fact that the Claimant was released after a very short period of detention and on payment of a bribe indicated to him that he was not of any serious interest to the authorities. Dr Smith commented that he has prepared expert witness reports on other Sri Lankans who have secured release from detention who are of approximately equal and in some cases of greater interest to the authorities. He referred to the case of a named asylum seeker for whom he had written an expert report on his successful appeal against refusal of asylum and whose evidence was found entirely credible by the immigration judge. The appellant in that case worked for the Tamil Tigers in an auxiliary junior role. He was detained by the Sri Lankan army and tortured in 1997 which left him with scars on his arms and legs. He was released through payment of a bribe despite which the authorities continued to maintain his records and retained an adverse interest in him. The Sri Lankan authorities had continued to seek information about him and members of his family had been detained and tortured 5 years later. Despite the appellant's release in that case through payment of a bribe the Tribunal found that he would be of continuing interest to the Sri Lankan authorities.

49. The Adjudicator found that in view of the circumstances of the Claimant's release from his last brief period of detention he was satisfied that he would not be on record. If he had been on record as a result of his earlier periods of detention that would no doubt have come to light when he was arrested for the second time. Those factors drove him to conclude that the Claimant is not on record and would not be of adverse interest to the authorities upon return to Sri Lanka. He was able to leave without

encountering problems and there was nothing about his case which persuaded the Adjudicator that there is anything so exceptional about his claim as to put him at a real risk of adverse attention, detention and ill treatment upon return.

50. Dr. Smith commented that in light of the fact that the Claimant's brother was questioned about him after his second release he considered that the Claimant's release through payment of a bribe in June 2001 was reasonably likely to have been recorded as an escape. He further expressed the opinion that, irrespective of the manner of release, the facts that the Claimant was detained twice, once by the army and the second time by the CID, that during the first detention he was tortured and interrogated about his suspected involvement in Tamil Tiger activities and that his brother was subsequently detained in Colombo and questioned about him would have required records to be drawn up.

51. Thereafter he concluded that it is reasonably likely that the Claimant's details would have been entered onto the central database where they will remain "for the duration" and that it is reasonably likely that the Claimant is recorded as an escapee. Again in this context he referred to the case of the asylum seeker who was found by the immigration judge to be someone who would be of continuing interest to the Sri Lankan authorities. Dr. Smith concluded that the Claimant's previous status as a recorded and detained Tamil Tiger suspect means that he is almost certain to be of interest to the authorities and as such will automatically have been placed on one of the two lists that are provided to the immigration services at the airport by the security services. The first is a stop list which the National Intelligence Bureau provides to ensure that those in whom the authorities have an interest are detained upon arrival. The second is a watch list which alerts the authorities to the return of a person in whom there is an interest and is used to trigger covert surveillance.

52. The Adjudicator referred to the Claimant's scarring but found that it was in an area where it would not normally be noted on casual inspection and was not in his view of such a nature as of itself to give rise to a risk of adverse interest or attention. Dr. Smith expressed a contrary view. Referring to a CIPU country report which asserted that many of the NGOs and the police in Sri Lanka do not regard scarring as a reason for arrest or suspicion, Dr Smith said that that was in direct contradiction to his own information gained directly from a senior police officer in Colombo in May 2004 when he was consultant to the Metropolitan Police Service. He said that he was advised that scarring had long been considered by the police in Sri Lanka to be a significant indicator and expressed the view that the Sri Lankan authorities would use scarring as an indicator and that the Secretary of State would appear to have been provided with inaccurate information on scarring. He said that he was prepared to ask the police officer in question to corroborate his evidence. He added that it appeared to be routine that when people are detained for other reasons they are stripped to their underwear during interrogation and torture and said that he had encountered this in the accounts given by many asylum seekers. He referred to a 2002 report by the Medical Foundation which said that "some clients reported that when they were arrested the security forces examined their bodies specifically for scars...lawyers in Sri Lanka….agreed that any sort of scar can lead to suspicion, surgical scars being also regarded by the security forces as evidence of injury sustained fighting for the Tamil Tigers".

53. In relation to the Claimant's expressed fear of torture or worse at the hands of the Tamil Tigers, Dr Smith commented that as a Tamil Tiger intelligence officer and former interrogator the Claimant was almost certain to be on the Tamil Tiger wanted list. If he were to be detained by the Tamil Tigers he would be extremely vulnerable to ill treatment and torture. If he were returned to Colombo the Tamil Tigers would be reasonably likely to make an attempt to kill him. I interpolate that this comment of course assumes the truth of the Claimant's claim in his second unsigned statement that he had been an intelligence officer and interrogator for the Tamil Tigers.

54. Dr Smith's report also contained detailed reference to the unravelling ceasefire and deteriorating security situation in Sri Lanka and their implications for the Claimant were he to be returned. He concluded that it is reasonably likely that the Claimant's whereabouts would quickly become known to the security forces if he is returned to Colombo and on balance he found it extremely likely that he would come to the attention of the security forces if he based himself in Colombo.

55. The Birnberg Peirce letter dated 27 June 2006 also enclosed a statement from a former Tamil Tiger who stated that his own asylum claim had been refused by the Home Office but allowed on appeal by an immigration judge who he stated had found him a credible witness. He stated that he escaped from Sri Lanka with the help of an agent and came to the UK on 23 March 2003, from which it follows that if that is correct his statement would not have been available to the claimant at the time of his original Statement of Evidence Form in July 2001 or the appeal hearing in November 2002.

56. The asylum seeker stated that he knew the Claimant when he worked in the intelligence section of the Tamil Tigers. He spoke to him to get briefings on the background of businessmen in government controlled areas from whom he was sent by the Tamil Tigers to collect taxes. He claimed to have met the Claimant on two or three occasions, each meeting lasting between one and two hours. At these briefing meetings he said that the Claimant was able to give him full details on the background of the businessmen from whom he was going to collect taxes.

57. The letter from Birnberg Peirce also enclosed a statement from a Sri Lankan who stated that his asylum claim had been refused by the Home Office in January 2001 mainly he stated because he did not set out the true basis of his asylum claim in his statements to the Home Office in particular by not referring to his involvement with the Tami Tigers. He stated that he had not mentioned the fact that he was once the deputy leader of the Tamil Tigers Sea Tigers Section because he had been advised by his previous solicitors that he should not reveal his membership of the Tamil Tigers and the activities he carried out for them because the Tamil Tigers was considered a terrorist organisation by the UK government and many other governments. When he changed solicitors for the appeal hearing his new solicitors advised him to give a true account including the details regarding his true involvement with the Tamil Tigers at a senior level and the actual activities he carried out for them. Accordingly he stated that in his statement to the adjudicator he set out the true account of his actual involvement with the Tamil Tigers and explained that he had failed to file a true account to the Home Office because of the bad advice he had received from his previous solicitors. He stated that the immigration judge hearing his appeal in January 2005 found him a credible witness and accepted the true account he claims to have

provided to her in his evidence and allowed his appeal against the Home Office decision to refuse his asylum and human rights claim.

58. The Birnberg Peirce letter also enclosed background material on the changed security and human rights situation in Sri Lanka in 2006.

59. The Birnberg Peirce letter was also a letter before action which requested the Secretary of State to reconsider the decision to doubt the Claimant's account as provided in his second statement and the decision to refuse the Claimant's fresh claim and to certify his claim as clearly unfounded.

60. On 6 September 2006 Birnberg Pearce sent the Secretary of State a report from the Claimant's treating consultant physiatrist, Dr Fisher which stated that the Claimant was suffering from post traumatic stress disorder and reported a series of then recent inpatient admissions.

61. In the absence of any response from the Secretary of State to the representations and letters dated 27 June 2006 and 6 September 2006 the claim for judicial review was lodged on 14 September 2006. The claim for judicial review challenged the Secretary of State's decision of 15 June 2006 to certify the Claimant's asylum and ECHR claims under Section 96 of the 2002 Act and the Secretary of State's failure to make a decision on or respond to the further representations and fresh evidence submitted to him on 27 June 2006 and 6 September 2006.

62. The following relief was sought: first a mandatory order requiring the Secretary of State to consider and make a decision within 28 days on the fresh representation and fresh evidence submitted to him on the Claimant's behalf; second and alternatively an order quashing the Secretary of State's decision of 15 June 2006 to certify the Claimant's asylum and ECHR claims under Section 96 of the 2002 Act and a declaration that the decision was unlawful.

63. On 12 March 2007 Fulford J granted permission to apply for judicial review on ground two but refused permission on ground one observing as follow;

> "Ground One
>
> It is not for the Claimant to dictate the date by which the defendant must consider any further representations (so long as the timetable adapted by the defendant is reasonable). The defendant had undertaken to consider the representations that were made on 27 June and 6 September 2006 and in due course the Claimant will no doubt be informed of the defendant's conclusions. However, given my decision on ground two, it would be helpful if the defendant were able to consider these further representations in advance of the hearing of the application for judicial review as regards ground two. Accordingly I decline to grant permission as regards the first ground.
>
> Ground Two

> I consider there is a tension between the decision of the defendant that the Claimant had a fresh asylum claim and Article 3 ECHR claim (that meant he considered on the basis of significantly different material there was a realistic prospect of success) on the one hand and the decision that there is no satisfactory reason for that matter not having been raised in an appeal against the old decision (thereby justifying certification under section 96) on the other. I consider it right to give leave so that the court can consider whether those decisions are inconsistent and whether the decision to certify is unreasonable."

64. On 19 May 2008 the Claimant sought the Secretary of State's agreement to an adjournment of the hearing of the application which was scheduled to be heard on 17 June 2008 to enable to Secretary of State to consider the representations and evidence submitted on the Claimant's behalf in June and September 2006 ,which appeared still not to have been done. This was on the basis that whatever the outcome of the judicial review on Ground Two the Secretary of State would still need to give consideration to those representations and that evidence and the Claimant's solicitors were concerned whether it was a proper use of court time to consider this case before those representation had been considered by the Secretary of State. The Claimant's solicitors proposed a draft consent order for a 75 day stay and indicated that they were amenable to the Secretary of State's suggestions on timetable. The letter indicated that absent agreement the Claimant would seek permission to amend his grounds so as to restore the issue of whether the Secretary of State has acted reasonably in failing to consider the 2006 representations and evidence.

65. By letter dated 2 June 2008 the Secretary of State declined to agree to a stay on the basis that it would be unfair to other applicants to prioritise those applications in which judicial review proceedings have been initiated over those applications where they have not and that the Claimant should not be permitted to "jump the queue". Accordingly in her skeleton argument Ms Dubinsky on behalf of the Claimant sought permission to amend his grounds to include the contention that the Secretary of State's failure to review the Section 96 certificate in the light of the additional evidence submitted by the Claimant in 2006 is unreasonable.

Ground Two: The challenge to the decision to certify

66. The lion's share of both oral and written submissions was directed to this ground and it is convenient to address it first. Before doing so, however, I would make the following introductory observations. When considering the lawfulness of the Secretary of State's decision taken on 15 June 2006 to certify the Claimant's new claim, it is not legitimate to take into account the evidence and submissions which were subsequently advanced by the Claimant on 27 June 2006 and 6 September 2006. Nor is it permissible to take into account the subsequent change in the general country conditions in Sri Lanka and in particular the deterioration in the security situation and its impact on the assessment of risk faced by those associated with the Tamil Tigers who return to Sri Lanka.

67. In particular on 8 August 2007, as is well known, the Asylum Immigration Tribunal ("the AIT") issued new country guidance on Sri Lanka in *LP (Sri Lanka) [2007]*

00076. This noted that a state of emergency was declared in Sri Lanka in August 2005 and that the parties to the ceasefire had repeatedly engaged in open conflict. The AIT considered a list of 12 factors which might make a person's return to Sri Lanka a matter which would cause the United Kingdom to be in breach of the Geneva Convention or the ECHR. The AIT stated that these factors should be considered both individually and cumulatively. The factors are:

(i) Tamil ethnicity.

(ii) Previous record as a suspected or actual LTTE member or supporter.

(iii) Previous criminal record and/or outstanding arrest warrant.

(iv) Bail jumping and/or escaping from custody.

(v) Having signed a confession or similar document.

(vi) Having been asked by the security forces to become an informer.

(vii) The presence of scarring.

(viii) Returned from London or other centre of LTTE activity or fund-raising.

(ix) Illegal departure from Sri Lanka.

(x) Lack of ID card or other documentation.

(xi) Having made an asylum claim abroad.

(xii) Having relatives in the LTTE.

68. Ms Dubinsky submitted that factors (i) (ii) (iv) (vii) (viii) (ix) (x) (xi) and (xii) apply to the Claimant even on the account accepted by the Adjudicator in his case. Without in anyway prejudging the issues which the Secretary of State will have to consider in her re-determination in the light of the 2006 representations and evidence, I observe that there appears to be considerable force in that submission in relation to most if not all of those factors. Similarly, while it is a matter for the Secretary of State, the statement of the asylum seeker who states that he knew the Claimant when he worked in the intelligence section of the Tamil Tigers, at any rate taken at face value, appears to corroborate the Claimant's revised account of his true role in the Tamil Tigers intelligence unit which was rejected by the Secretary of State as untruthful in the Decision Letter. There are also other aspects of the Claimant's account which the Adjudicator found implausible or rejected which appear to derive some support from Dr Smith's report, again at least taken at face value.

69. In these circumstances I wholeheartedly endorse Fulford J's prescient comment that it would have been helpful if the Secretary of State had been able to consider the Claimant's further representations in advance of the hearing of the application for judicial review as regards Ground Two. It is hard to avoid the feeling that there is an air of unreality about deciding Ground Two and the legality or otherwise of the Decision Letter in the knowledge that whatever the outcome the Decision Letter has been overtaken by subsequent events which may render any decision on Ground Two

of academic interest only. Whatever may be the merits of the Secretary of State's general submissions on queue jumping, on the particular facts of this case it is a matter of regret that the Secretary of State chose not to respond to Fulford J's invitation.

The legislative framework

70. In order to consider the central issue in this case, it is necessary to have in mind the legislative framework as it relates to the interaction between the power of the Secretary of State to certify and the principles by reference to which (s)he determines whether any further submissions amount to a fresh claim. Some of the relevant statutory provisions and Immigration Rules have been considered by the courts and in order to understand the relevant decisions and dicta it is necessary to trace the history of the statutory framework which has evolved.

71. The provisions by reference to which the Secretary of State's decision of 15 June 2006 falls to be considered are those which were in force on that date. They are to be found in the relevant sections of the 2002 Act in the form in which they were in operation on that date (they had been amended before that date) and Rule 353 of the Immigration Rules in the form in which it was in operation on that date (it has subsequently been amended). Similar but materially different provisions are to be found in the precursors to the 2002 Act and Rule 353, that is to say the 1999 Act and the former rule 346 of The Immigration Rules.

The Statutory Provisions in force at the time of the Decision Letter on 15 June 2006

72. Immigration decisions made by the Secretary of State may be subject to rights of appeal. Provision for rights of appeal was made in Part V of the 2002 Act.

73. Sections 82 (1), (2) and (4) of the 2002 Act set out a right of appeal for a person in respect of whom an immigration decision has been made, subject to the exceptions and limitations set out in Part V.

74. Section 82(1) provides:

> " Where an immigration decision is made in respect of a person he may appeal to the Tribunal.

75. Section 82(2) defines what constitutes an immigration decision for the purposes of section 82(1). It includes the following :

> "In this Part "immigration decision" means –
>
> (a) refusal of leave to enter the United Kingdom,…
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,…..
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b) (ba) or (c) of the Immigration and Asylum Act 1999 (c.33) (removal of person unlawfully in the United Kingdom)"

76. Section 82(4) provides that the right of appeal conferred by Section 82(1) is subject to the exceptions and limitations contained within the remainder of Part V of the 2002 Act. Thus:

> "(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part."

77. The present case concerns the operation of one of those exceptions and limitations which is set out in Section 96 of the 2002 Act which is also in Part V of the Act.

78. Where a right of appeal does exist, Section 84 sets out the grounds on which such an appeal may be brought, which include grounds relating to the Geneva Convention and the Human Rights Act 1998. It includes the following:

> "(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds –
>
> (a) that the decision is not in accordance with the immigration rules;…
>
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;…..
>
> (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
>
> (e) that the decision is otherwise not in accordance with the law;
>
> (f) that the person taking the decision should have exercised differently a discretion conferred by the immigration rules;
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

79. Section 85 sets out matters to be considered on an appeal made under Section 82. These include any matter raised in a statement made by a person under Section 120 in response to what is commonly known as a one stop notice which constitutes a ground of appeal of a kind listed in section 84(1). Section 85 includes the following:

> "(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
>
> (2)If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3)Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced."

80. Section 120 makes provision for service of a "one-stop notice" upon a person who has applied to enter or remain in the United Kingdom, or in respect of whom an immigration decision has been taken or may be taken. It provides as follows:

"120 Requirement to state additional grounds for application

(1) This section applies to a person if –

a) he has made an application to enter or remain in the United Kingdom, or

b) an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him.

(2) The Secretary of State or an immigration officer may by notice in writing require the person to state –

(a) his reasons for wishing to enter or remain in the United Kingdom, and

(b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which he should not be removed from or required to leave the United Kingdom.

(3) A statement under subsection (2) need not repeat reasons or grounds set out in-

(a) the application mentioned in subsection (1)(a), or

(b) an application to which the immigration decision mentioned in subsection (1)(b) relates."

81. Pursuant to the transitional provisions in Schedule 6 to the 2002 Act, notices served pursuant to sections 74 and 75 of the 1999 Act are to be treated as notices served under section 120 of the 2002 Act for the purposes of section 96 of the 2002 Act. Paragraph 4 of Schedule 6 to the 2002 Act provides:

"*Earlier Appeal*

In the application of section 96 -

(a) a reference to an appeal or right of appeal under a provision of this Act includes a reference to an appeal or right of appeal under the Immigration and Asylum Act 1999,

(b) a reference to a requirement imposed under this Act includes a reference to a requirement of a similar nature imposed under that Act,

(c) a reference to a statement made in pursuance of a requirement imposed under a provision of this Act includes a reference to anything done in compliance with a requirement of a similar nature under that Act, and

(d) a reference to notification by virtue of this Act includes a reference to notification by virtue of any other enactment.

82. Section 96 of the 2002 Act (as amended by Section 30 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act")) sets out a certification procedure which in the circumstances therein specified precludes any right of appeal under Section 82 against certain new immigration decisions. Section 96 as amended (which was applied by the Secretary of State in certifying the Claimant's February 2004 claim and is still in force) provides:

"Earlier Right of Appeal

(1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies –

a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),

b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision,

(2) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration officer certifies –

(a) that the person received a notice under section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision,

(b) that the new decision relates to an application or claim which relies on a matter that should have been, but has not been, raised in a statement made in response to that notice, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in response to that notice."

(5) Subsections (1) and (2) apply to prevent a person's right of appeal whether or not he has been outside the United Kingdom since an earlier

right of appeal arose or since a requirement under Section 120 was imposed.

The precursors to Section 96 of the 2002 Act and Immigration Rule 353

83. The 1999 Act contained provisions for certification albeit in different terms to those set out in section 96 of the 2002 Act. Section 74 provided for service of a one-stop notice and section 73 gave the Secretary of State a discretion to certify (a) that an appellant's claim could reasonably have been included in a statement required from him under section 74 but was not so included and/or (b)that it could reasonably have been made in the original appeal but was not so made and in either case (c) that one purpose of such a claim would be to delay the removal from the United Kingdom of the appellant or any member of his family and (d) that the appellant had no other legitimate purpose for making the claim. Section 73 further provided that on the issuing of such a certificate the appeal so far as relating to that claim was to be treated as finally determined.

84. Thus Section 73 of the 1999 Act provided:

> "(1)This section applies where a person ("the appellant") has appealed under the Special Immigration Appeals Commission Act 1997 or this Act and that appeal ("the original appeal") has been finally determined.
>
> (2) If the appellant serves a notice of appeal making a claim that a decision of the decision-maker was in breach of the appellant's human rights, the Secretary of State may certify that in his opinion –
>
> a) the appellant's claim -
>
> (i) could reasonably have been included in a statement required from him under section 74 but was not so included, or
>
> (ii) could reasonably have been made in the original appeal but was not so made;
>
> (b) one purpose of such a claim would be to delay the removal from the United Kingdom of the appellant or any member of his family; and
>
> (c) the appellant had no other legitimate purpose for making the claim.
>
> (3)On the issuing of a certificate by the Secretary of State under subsection (2), the appeal so far as relating to that claim, is to be treated as finally determined.
>
> (4) Subsection (5) applies if a notice under section 74 was served on the appellant before the determination of his original appeal and the appellant has served a further notice of appeal.
>
> (5) The Secretary of State may certify that grounds contained in the notice of appeal were considered in the original appeal.

(6) On the issuing of a certificate by the Secretary of State under subsection (5), the appeal, so far as relating to those grounds, is to be treated as finally determined.

(7) Subsection (8) applies if, on the application of the appellant, an immigration officer or the Secretary of State makes a decision in relation to the appellant.

(8) The immigration officer or, as the case may be, the Secretary of State may certify that in his opinion-

(a) one purpose of making an the application was to delay the removal from the United Kingdom of the appellant or any member of his family; and

(b) the appellant had no other legitimate purpose for making the application.

(9) No appeal may be brought under the Special Immigration Appeals Commission At 1997 or this Act against a decision on an application in respect of which a certificate has been issued under subsection (8)."

85. Section 74 of the 1999 act provided, so far as material:

(1)This section applies if -

(a) the decision on an application for leave to enter or remain in the United Kingdom is that the application be refused; and

(b) the applicant, while he is in the United Kingdom, is entitled to appeal against the refusal under the Special Immigration Appeals Commission Act 1997 or this Act……

(4) The decision-maker must serve on the applicant and on any relevant member of his family a notice requiring the recipient of the notice to state any additional ground which he has or may have for wishing to enter or remain in the United Kingdom.

(5) "Decision-maker" means the Secretary of State or (as the case may be) an immigration officer.

(6) The statement must be –

(a) in writing; and

(b) served on the Secretary of State before the end of such period as may be prescribed.

(7) A statement required under this section must –

(a) if the person making it wishes to claim asylum, include a claim for asylum;…

(b) if he claims that an act breached his human rights, include notice of that claim…

86. In its original un-amended form, Section 96 of the 2002 Act contained provisions which in some respects were more akin to those in section 73 of the 1999 Act than to those of the 1996 Act in its subsequently amended form. Thus section 96 of the 2002 Act in its original form provided:-

(1) An appeal under section 82 (1) against an immigration decision ("the new decision") in respect of a person may not be brought or continued if the Secretary of State or an immigration officer certifies –

(a) that the person was notified of a right to appeal under that section against another immigration decision (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b) that in the opinion of the Secretary of State or the immigration officer the new decision responds to a claim or application which the person made in order to delay his removal from the United Kingdom or the removal of a member of his family, and

(c) that in the opinion of the Secretary of State or the immigration officer the person had no other legitimate purpose for making the claim or application.

(2) An appeal under section 82 (1) against an immigration decision in respect of a person may not be brought or continued if the Secretary of State or an immigration officer certifies that the immigration decision relates to an application or claim which relies on a ground which the person –

(a) raised on an appeal under that section against another immigration decision,

(b) should have included in a statement which he was required to make under section 120 in relation to another immigration decision or application,

(c) would have been permitted or required to raise on an appeal against another immigration decision in respect of which he choose not to exercise a right of appeal…

(3) A person may not rely on any ground in an appeal under Section 82(1) if the Secretary of State or an immigration officer certifies that the ground was considered in another appeal under that section brought by that person. "

87. In its original form Section 96 of the 2002 Act came into force on 1 April 2003. In its amended form, which was in force at the time of the 15 June 2006 decision, Section 96 came into force on 1 October 2004 by virtue of Section 30 of the 2004 Act 2004.

88. On 18 October 2004 paragraph 346 of the Immigration Rules was replaced by paragraph 353 which was in force on 15 June 2006 when the Secretary of State made his decision. Paragraph 353 is in these terms:

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

89. Paragraph 346 of the Immigration Rules which was replaced by paragraph 353 was in these terms:

> "Where an asylum applicant has previously been refused asylum during his stay in the United Kingdom, the Secretary of State will determine whether any further representation should be treated as a fresh application for asylum. The Secretary of State will treat representations as a fresh application for asylum if the claim advanced in the representations is sufficiently different from the earlier claim that there is a realistic prospect that the conditions set out in paragraph 334 [that is to say the criteria for grant of an asylum] will be satisfied. In considering whether to treat representations as a fresh claim, 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."

90. Paragraph 346 was introduced on 1 September 1996. Paragraph 334, which is referred to in paragraph 346, was in these terms:

> "An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and

(ii) he is a refugee, as defined by the Convention and Protocol; and

(iii) refusing his application would result in his being required to go (whether immediately or after the time limited by any existing leave to entry or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

91. This application raises issues as to the relationship between on the one hand principles contained in Section 96 of the 2002 Act which are arguably analogous to those set out in *Ladd v Marshall* 1954 1WLR 1489 and on the other hand the extent of the rights and obligations respectively of applicants and the Secretary of State in asylum and/or human rights claims which, by virtue of being held to constitute fresh claims under Rule 353, are deemed to have a realistic prospect of success on appeal.

92. As a preliminary observation before considering the parties' submissions and the authorities, I would draw attention to points arising from the legislative chronology.

93. First the matters to be certified have evolved. Under Section 73 (2) (b) and (c) of the 1999 Act the focus was on the purpose of the new claim: was one purpose to delay the removal from the United Kingdom of the appellant or of any member of his family; and if so did the appellant have any other purpose for making the claim which was legitimate? That was also the focus under section 96 (1) (b) and (c) of the 2002 Act as originally enacted. Under section 96 (1) (c) and (2) (c) of the 2002 Act as amended the focus is not on the purpose of bring the claim. Rather it is on whether there is a satisfactory reason for a matter relied on in the new claim not having been raised in an appeal against the old decision and/or in a statement made in response to a section 120 one-stop notice.

94. Second until October 2004 the provision which on its face involved a test analogous to *Ladd v Marshall* principles was paragraph 346 of the Immigration Rules. That test, as discussed below, reflected the test as to what constituted a fresh claim laid down by the Court of Appeal in *R v Secretary of State for the Home Department ex parte Onibiyo* [1996] QB 768. There was no *Ladd v Marshall* type test either in section 73 (2) of the 1999 Act or in section 96 (1) of the 2002 Act in its original form. Section 96 (2) (b) of the 2002 Act in its original form did focus on whether a ground was relied on in a new application or claim which should have been included in a statement required to be made under section 120 in relation to another immigration decision or application but there was no equivalent provision in relation to a ground which could or should have been raised in an earlier appeal and there was no provision for the Secretary of State to certify that in his opinion there was no satisfactory explanation for the ground not having been included in the response to the section 120 one-stop notice.

95. In the statutory regime which was in force on 15 June 2006 there was no *Ladd v Marshall* type test at the stage where the Secretary of State was determining whether

there was a fresh claim. That had been removed when Rule 353 of the Immigration Rules replaced Rule 346 on 18 October 2004. The new Rule reflected (whether or not it was created as a result of) criticism by Collins J in *R (Gungor) v SSHD* [2004] EWCH 2117 (Admin) of the *Ladd v Marshall* type requirement in Rule 346 on the Secretary of State to disregard any material which was available to the applicant at the time when the previous application was refused or when any earlier appeal was determined. However under section 96 of the 2002 Act as amended on 1 October 2004 a *Ladd v Marshall* type test was introduced into the statutory mechanism whereby in certain circumstances an appeal even against a fresh claim with a realistic prospect of success was by statute excluded. Thus under section 96 (1) and (2) an appeal under section 82 (1) against an immigration decision might not be brought if the Secretary of State or an immigration officer certified that in the opinion of the Secretary of State or the immigration officer there was no satisfactory reason for a matter on which the application to which the new decision related relied not having been raised in an appeal against the old decision and/or in a statement made in response to a notice under section 120.

96. This is a point of some potential importance. The Claimant relied on a number of authorities to support his submission that *Ladd v Marshall* principles have been held either not to apply or to apply only in a watered down form in the context of asylum and human right cases. In considering that submission it is necessary to bear in mind the context in which those dicta and decisions were made. The context was usually the construction of a rule or regulation or a common law principle as to the admissibility of evidence as distinct from the construction of a statute. While there is or may be scope to construe a statutory provision by reference to an assumption that in the absence of express contrary intention Parliament may be assumed to have intended not to apply *Ladd v Marshall* principles with full rigour where the consequence of doing so might be to expose an applicant or claimant to a breach of his asylum and/or Article 3 rights, it does not follow that if there is an irreconcilable conflict between on the one hand the clear intention of Parliament on a proper construction of a statutory provision and on the other hand a principle that *Ladd v Marshall* type principles should not apply with full rigour in an asylum or human rights context that the latter should prevail.

The Claimant's case

97. On behalf of the Claimant Ms Dubinsky advanced a number of alternative submissions. In the judicial review Claim Form the second ground relied on was that the Secretary of State's certification of the Claimant's asylum and Article 3 ECHR claims under section 96(1) and (2) of the 2002 Act was unreasonable. On its face this ground was confined to a challenge to the exercise by the Secretary of State of his discretion under section 96 (1) and (2) by reference to *Wednesbury* principles. However, the submissions advanced in support of that ground in the Statement of Grounds went further. It was submitted that:

> "There being a realistic prospect of success on appeal in the Claimant's Refugee Convention and Article 3 ECHR claims, the Defendant's decision to certify the Claimant's claims and deny the Claimant a right of appeal to an immigration judge is irrational. The common law principle that provisions which restrict right of access to a court must be narrowly construed

> (see for example *SSHD v Saleem* [2000] Imm AR 529) applies with particular force where the claim engages Article 3 ECHR. It is submitted that the exclusion of a right of appeal by certification where there is a valid Article 3 ECHR claim is incompatible with the procedural safeguards inherent in Article 3 ECHR. Pursuant to section 3 Human Rights Act 1998, section 96 of the 2002 Act can be read and given effect in a way which is compatible with Convention rights by precluding certification and the consequent loss of appeal rights where there is a valid Article 3 ECHR claim."

98. The practical effect of those two submissions if correct would be the same. They would both have the effect that there could be no circumstance in which there could ever be a lawful certification by the Secretary of State under section 96 of the 2002 Act in any claim based on an Article 3 ECHR claim where the Secretary of State has determined that there is a realistic prospect of success on appeal and thus determined that there is a fresh claim.

99. Under the first submission it would always be irrational for the Secretary of State to exercise her discretion to certify in such a case. In effect there would thus, in such cases, be no discretion at all. That is despite the fact that Section 96 does not impose a duty on the Secretary of State to certify where the relevant conditions are satisfied and thus on its face contemplates a discretionary power rather than a duty.

100. As a matter of analysis the second submission, based as it is on the requirement under Section 3 of the Human Rights Act that so far as it is possible to do so legislation must be read and given effect in a way which is compatible with Convention rights, appeared to constitute a submission that as a matter of statutory construction the prohibition on appeals in Section 96(1) and (2) was not intended by Parliament to apply in a case based on an Article 3 claim where the Secretary of State has determined that there is a fresh claim and thus a realistic prospect of success on appeal.

101. However in her opening written submissions Ms Dubinsky advanced the second submission in a different way, namely that in the postulated circumstances it is incompatible with the Secretary of State's own duties under section 6 of the Human Rights Act to certify and thereby deprive the claimant of access to a court or tribunal. It thus appeared that what Ms Dubinsky meant in her Statement of Grounds by reading and giving effect to section 96 in a way which is compatible with Convention rights by precluding certification and the consequent loss of appeal rights where there is a valid Article 3 claim was not that, even where there has been a lawful certification by the Secretary of State, Section 96 (1) and (2) do not have effect to exclude an appeal because section 96 (1) and (2) do not apply in such a case. The focus of the submission appeared not to be on the preclusion of an appeal by the words "an appeal… may not be brought if the Secretary of State… certifies…" as being inapplicable in an Article 3 fresh claim case. Rather the focus appeared to be on the Secretary of State's act of certification. As it was formulated in a subsequent note, the submission was that in certifying the Claimant's fresh asylum and Article 3 ECHR claim the Defendant acted contrary to her obligations under Section 6. However elsewhere, as appears below, Ms Dubinsky reverted to the original formulation of the second submission and contended that Section 3 of the Human Rights Act requires

Section 96(1) and (2) to be construed in such a way as not to apply to an Article 3 claim. In the course of argument Ms Dubinsky in response to a question from the court expressly disavowed any alternative submission that if her submissions were wrong then Section 96 of the 2002 Act is incompatible with the ECHR and should be declared to be so by the court.

102. In her opening written submissions Ms Dubinsky advanced three alternative submissions:-

(a) Having found that an asylum applicant has made a fresh claim, the Secretary of State has made a finding that the claim is "significantly different" from the earlier claim and has "realistic prospects of success" on appeal to the AIT. It is incompatible with the Secretary of State's own duties under section 6 of the Human Rights Act and/or unreasonable to then deprive that person of access to a court or tribunal. ("Submission(a)")

(b) The Secretary of State has discretion over whether to certify a claim under section 96 of the 2002 Act. The Secretary of State has failed to have regard to that discretion in the Claimant's case but has erroneously treated the question of whether the Claimant relied on a "matter" which "could have been raised" earlier as determinative of the question of whether to certify.("Submission (b)")

(c) The test of whether there is a satisfactory reason under section 96(1)(c) or section 96(2)(c) requires the decision maker to consider whether the underlying claim has merit or conversely is a spurious claim brought solely to delay removal. The Secretary of State failed to have regard to underlying merit when determining that the Claimant had no satisfactory reason. ("Submission (c)")

103. In the note to which I have referred, Ms Dubinsky confirmed that the challenge under (a) above has the effect that, if correct, the Secretary of State can never lawfully certify under section 96 (1) or (2) a fresh asylum or Article 3 ECHR claim.

The Claimant's Submissions (b) and (c):alleged errors in the decision-maker's application of the Section 96(1) and (2) procedure to the facts of his case

104. The issues raised in Submission (a) are of great complexity and even greater importance. However, in my judgment the disposal of the Claimant's challenge to the Secretary of State's decision to certify is not dependent on their resolution. That is because in my view the claim succeeds on this ground for different reasons referable to errors in the way in which the decision maker in this case approached the certification process laid down in Section 96(1) and (2).

105. In my judgment, even if Section 96 (1) and (2) of the 2002 Act applies to an asylum and/or Article 3 ECHR claim which has been determined by the Secretary of State to have a realistic prospect of success and to be a fresh claim, and even if there are circumstances in which it would not be unreasonable for the Secretary of State to exercise the power to certify and such an exercise would not be contrary to her duty under Section 6 of the Human Rights Act, the decision to certify in this particular case was legally flawed.

106. Under Section 96 (1) and (2) before the Secretary of State can lawfully decide to certify, she has to go though a four stage process. First she must be satisfied that the person was notified of a right of appeal under Section 82 against another immigration decision (Section 96(1)) or that the person received a notice under Section 120 by virtue of an application other than that to which the new decision relates or by virtue of a decision other than the new decision (Section 96(2)). Second she must conclude that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision (Section 96(1)(b)) or that the new decision relates to an application or claim which relies on a matter that should have been but has not been raised in a statement made in response to that notice (Section 96(2)(b)). Third she must form the opinion that there is no satisfactory reason for that matter not having been raised in an appeal against the old decision (Section 96 (1) (c)) or that there is no satisfactory reason for that matter not having been raised in a statement made in response to that notice (Section 96 (2)(c)). Fourth she must address her mind to whether, having regard to all relevant factors, she should exercise her discretion to certify and conclude that it is appropriate to exercise the discretion in favour of certification.

107. No complaint is made by the Claimant in respect of the first two stages of the process in this case. He was plainly notified of his right of appeal and served with a one stop notice (albeit under Section 74 of the 1979 Act rather than Section 120 of the 2002 Act). Nor is it disputed by the Claimant that the new claim submitted in February 2004 relied on matters which could have been raised in his appeal against the Secretary of State's original decision to refuse entry and which should have been but was not raised in the original statement made in response to the Section 74 one-stop notice.

108. The third stage of the process required the Secretary of State to have formed the opinion that there was no satisfactory reason for the matters now relied on not having been raised in the earlier appeal or in the statement made in response to the Section 74 notice. On its face, in my view the Decision Letter suggests that the Secretary of State did not take the steps required by the third or fourth stages of the process. (More accurately, since the letter stated that the Claimant's representations had not been considered by the Secretary of State personally but by an official acting on his behalf, it suggested that the requisite steps had not been taken by that official.)

109. Thus the letter stated:

> "Your client is seeking to rely on matters that could and should have been raised at the hearing of his appeal. **Consequently** it has been decided to apply a certificate to this claim. … Your client is seeking to rely on matters that could and should have been raised in the Statement of Additional Grounds that he was required to complete as part of the One Stop process. **Consequently** it has been decided to apply a certificate to this claim." (Emphasis added.)

110. On its face these statements are susceptible of only two interpretations. Either the official ignored the third stage of the process altogether and failed to address the question of whether in his opinion there was no satisfactory reason for the matters not having been raised on the earlier appeal or in the Section 74 statement. Or the official

formed the opinion that the mere and very facts that the matters could have been raised in the earlier appeal and should have been but were not raised in the Section 74 statement themselves led inevitably to the conclusion that there was no satisfactory reason for them not having been raised in the appeal or in the statement. Either explanation would in my judgment plainly vitiate the decision.

111. The former would demonstrate that the decision maker omitted to take one of the requisite steps without which the power to certify could not lawfully be exercised. The latter would demonstrate a fundamental misunderstanding of the process which the decision maker is required to go through before deciding to certify. In effect it would suggest that he conflated and equated the questions whether (a) the matters could and/or should have been raised in the earlier appeal and/or one stop statement with the questions whether there was in his opinion no satisfactory reason for them not having been so raised. In reality, as in my view is self-evident, these are two separate and distinct sets of questions. The answers to the first cannot themselves lawfully provide the answers to the second. Were it otherwise there would be no need for the additional requirement for the decision maker to certify that in his opinion there was no satisfactory reason for the matters not having been raised. It would in every case be sufficient to certify that they could and should have been but were not so raised.

112. In reality the matters which the decision maker could and indeed should take into account in forming his opinion as to whether there is or is not a satisfactory reason go far wider than the fact that they could and should have been raised earlier. Indeed at the third stage of the process that fact is a given in every case. If the matter could not and/ or should not have been raised earlier one of the necessary conditions precedent for the exercise of the power to certify will be absent and the power to certify cannot be exercised in any event. No question of whether there was or was not a satisfactory reason arises.

113. This is not, in my view, a technical or arid shortcoming in the decision making process. In my judgment it goes to the very heart of it. The point is best illustrated by reference to Section 96(1). Under section 96(1) (b) it is not necessary in order for the certification power to be exercisable that the matter **should** have been raised in the earlier appeal but merely that it **could** have been. Thus in an extreme case the Claimant might be relying on a matter of whose existence he was unaware but which had he been aware of it could have been raised on an earlier appeal. It could not in my judgment possibly be lawful for the decision maker to certify that in his opinion there was no satisfactory reason for the matter not having been raised in the earlier appeal without separately addressing the question whether in his opinion having regard to all the circumstances of the case the explanation as to why the matter was not raised was or was not satisfactory.

114. The premise on which this question falls to be considered is a new asylum or Article 3 claim which the decision maker has determined has a realistic prospect of success and is thus a fresh claim. In other words there is a realistic prospect that the Claimant would succeed if allowed to proceed to appeal in persuading the AIT that, on the low test applicable in such cases, there is a real risk of the Claimant being persecuted or facing death or torture on return The proposition that in those circumstances it would be lawful for the decision maker to certify that in his opinion there was no satisfactory explanation for the matters not having been raised earlier with the consequence that

the Claimant would be deprived of a right he would otherwise have to appeal without addressing his mind to the reasons why the matters were not raised earlier and evaluating those reasons would in my view be wholly unsustainable.

115. In a well known passage in the case of *WM (DRC)* [2006] EWCA Civ 1495, Buxton LJ emphasised the importance in an asylum case of the consideration of all the decision makers being informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution:

> "The rule [Rule 353 of the Immigration Rules] only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue, the consideration of all the decision-makers, the Secretary of State, the Adjudicator and the Court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay v SSHD* [1987] AC 514 at p. 531F "(paragraph 7).

116. Although the context of Buxton LJ's dicta was the prior stage of the Secretary of State making a determination under rule 353 as to whether representations constitute a fresh claim, they are in my judgment of equal application to the approach to be adopted in the first instance by the decision-maker when considering whether to certify under Section 96 and then by the Court in considering an application for judicial review challenging the lawfulness of the decision. Both decisions share with those involved at the fresh claim stage the characteristic that if made incorrectly they may lead to the claimant's exposure to persecution. A fortiori in a case such as this where there is in addition an Article 3 claim that they may lead to the death or torture of the Claimant.

117. In his written submissions on behalf of the Secretary of State, Mr Strachan submitted that the Secretary of State's decision contains a detailed analysis and anxious scrutiny of the Claimant's new representations and why she (sic- the decision was in fact made by her predecessor) rejected the claims made in light of the material, as well as why she was certifying the decision pursuant to Section 96 of the 2002 Act. The Secretary of State, he submitted, was entitled to find that the explanation advanced for the previous untruthful account and the failures by the Claimant to have previously advanced the matters now relied on were not satisfactory and therefore such as to give rise to the power to certify under Section 96 of the 2002 Act. As to the first of those submissions, I do not accept it in so far as it relates to the reasons why the Secretary of State was certifying the decision. In my view, the second submission begs the critical question of what were the reasons why the Secretary of State found that the explanations were not satisfactory.

118. In my view, so far from containing a detailed analysis and anxious scrutiny of why the decision to certify was taken, the Decision Letter not only failed to provide a satisfactory account of the third stage of the requisite process but also contained on its

face no indication that the fourth stage which was required to be gone through was addressed at all. On the contrary, the two passages set out above on their face suggest that the decision-maker did not address the fourth stage at all either. That is to say, he did not consider whether or not to exercise the discretion to certify. He appears to have proceeded on the assumption that, having concluded that the matters could and should have been raised earlier, he was entitled without more to decide to certify. Alternatively, even if I am wrong in relation to the third stage and the decision-maker did after anxious scrutiny of all relevant matters and on reasonable grounds reach the conclusion that there were no satisfactory reasons for the matters now relied on not having been relied on earlier, he appears to have proceeded on the basis that that conclusion entitled him without more to decide to certify. In so proceeding, in my view he erred in treating as automatic what is in reality a discretionary decision. I return to the issue of discretion below.

119. Returning to stage three of the process, it is right to point out that, contained within the section of the Decision Letter which set out the reasons why the Home Office rejected the claim on its merits and concluded that the Claimant did not qualify for asylum or humanitarian protection, was a statement that the Home Office was not prepared to accept the unsigned Statement of Evidence Form enclosed with the letter of 19 February 2004 as the truth. In particular attention was drawn to the Claimant's new assertion that he had been working enthusiastically in the Intelligence Unit of the Tamil Tigers, that he had access to their files and that he had been involved in interrogations.

120. The Decision Letter referred to the fact that the Adjudicator had been scathing as to the central pillar of the Claimant's original version of events and continued as follows:

> "Your client seeks to lay the blame for misleading the Immigration Service and the Adjudicator at the door of his previous representatives, Ratna & Co. The Home Office cannot intrude into the dealings between an applicant and his legal adviser beyond pointing out that, if he feels that he has been badly advised, he should make a complaint to the Law Society. Your client states that his original statement was not read back to him until the day before his appeal hearing at which time he found it to be full of errors. Your client attended the appeal hearing and had a full opportunity to make any further statements, amendments or clarifications he wished. You are referred to paragraph 7 of the Adjudicator's Determination:
>
> > "With the assistance of an interpreter, the appellant gave evidence to me. He dealt with the preparation of his statement and corrected some dates in that statement as noted on the copy on file. Subject to those amendments, he adopted the statement as his own evidence-in-chief".
>
> If we were to accept your client's new statement as the unvarnished truth it would mean that he had knowingly lied to the Home Office and the Adjudicator. Your client was

> represented at appeal by Counsel who could have warned him of the serious consequences of this. The Home Office takes the view that your client is responsible for his choice of legal adviser and for ensuring that the claim he advances is the truth. Your client admits at paragraph 5 of his statement that he had not told the truth during the processing of his asylum application or subsequently at appeal. In light of his behaviour the Home Office is not prepared to place any weight at all on further uncorroborated claims. The enclosures with your letter of 19 February 2004 have been examined but they in no way support your client's latest claims ….".

121. The comments and conclusions in that passage were all said to be part of the reasons why the new claim was rejected on its merits. There was no suggestion that they also were the reasons or part of the reasons for the decision-maker reaching the conclusion that there were no satisfactory reasons for these matters not having been raised earlier. A decision letter is not, of course, a statute and should not be construed as if it were. The Court may be entitled to infer that matters referred to in the context of assessing the merits of the claim were still in the mind of the decision-maker at the stage of considering the satisfactory or unsatisfactory nature of the reasons for matters relied on not having been raised earlier.

122. However, it is also necessary to remind oneself that the effect of the Decision Letter is that, subject to this challenge for judicial review, and subject to any further consideration of the later submitted materials, it will lead without further appeal to the return to Sri Lanka of an asylum seeker whose claim that if returned he faces a real risk of persecution, death and/or torture has been determined in the same Decision Letter to have a realistic prospect of success on appeal. It is thus also necessary to remind oneself of the duties of anxious scrutiny imposed both on the decision-maker and on the Court. Finally it is pertinent to draw attention to the dictum of Kennedy LJ in *Balamurali and Sandhu and The Secretary of State for the Home Department* [2003]EWCA Civ 1806 in the context of a discussion of the statutory power to certify claims in the 1999 Act: "As with all decisions which affect the rights of individuals, it is important that the reasons for issuing a certificate are properly explained." (paragraph 39).

123. Applying that approach, I do not consider that the passage which I have set out displaces the conclusion that the decision-maker did not properly discharge the duty imposed on him in the third or fourth stages of the process.

124. First, the two extracts first cited contain no reference at all to any of the comments or conclusions which appear as part of the reasons for rejecting the claim on the merits. Second, those passages explicitly state that the decision to certify was consequent upon and only upon the fact that the Claimant was seeking to rely on matters that could and/or should have been raised earlier. Third and in any event, even if one were to assume in the decision-maker's favour not only that he did go through the third stage of the process but that in doing so he had in mind the matters set out in the later passage, that would not in my judgment demonstrate that he had addressed with anxious scrutiny the question whether the reasons were satisfactory and had, by reference to a consideration of all relevant matters, formed the opinion that they were not. Still less that he addressed with anxious scrutiny the issue of discretion.

125. In the first place, there is no explanation in the Decision Letter of the reasons why the decision-maker reached the conclusion that there was a realistic prospect of success on the asylum and Article 3 claims and thus that they constituted a fresh claim. Indeed, as already mentioned, there was not even in the Decision Letter an explicit statement that the decision-maker had determined that there **was** a realistic prospect of success and that there **was** a fresh claim. As already mentioned, the Defendant in the Acknowledgement of Service admitted those facts and, as Mr Strachan accepted, they are implicit in the fact that the Decision Letter found it necessary to go on to address the question of certification. Had there been no determination that there was a fresh claim, there would have been no immigration decision and thus no prima facie right of appeal under Section 82 subject to certification under Section 96.

126. The lack of any statement of the reasons for the determination that there was a fresh claim makes it all the more difficult for the Secretary of State to argue that when it came to the third stage of the process the proper anxious scrutiny was deployed. In oral argument there was discussion as to whether the reason for the determination was a conclusion by the decision-maker that the Claimant's new version of events had a realistic prospect of being believed by the IAT or whether it was because of the contents of the report of Dr Good. Mr Strachan suggested it was unlikely to have been the latter because the Decision Letter referred to it and said that, as it was not specific to the Claimant, it was of interest only as background information and did not establish that either of the accounts he had given were the truth. There is some force in that submission. However, since the Good report was not available to the Court, it is not possible to express a definitive view one way or the other. If it was the Good report and only the Good report which led the decision-maker to conclude that there was a real prospect of success, it is hard to see how the decision-maker could reasonably have decided to certify the claim. On that basis, even assuming that he considered on reasonable grounds that there was no satisfactory explanation for the Claimant's second version of events not having been raised earlier, it is hard to see how that could justify excluding a right of appeal whose realistic prospects of success the decision-maker concluded depended on a report as to which there was no finding that it could or should have been raised earlier or that there were no satisfactory explanations for it not having been so raised. Indeed, that is an example of a matter which, on that hypothesis of the facts, ought in my view to have been taken into account at the fourth stage of considering whether to exercise the discretion.

127. If one assumes that the reason why the decision-maker concluded that there was a realistic prospect of success was not the Good report or not exclusively the Good report but rather the decision-maker's view that there was a real prospect of the IAT believing that the Claimant's second version of events was truthful, there is nothing in the Decision Letter to suggest that he took that into account when assessing whether or not the Claimant's explanation for not having raised it at the first appeal or in the one-stop statement were satisfactory. If and to the extent that the second passage from the decision Letter set out above constitutes the reasoning process by which the decision-maker reached the opinion that there were no satisfactory reasons for the new version of events not having been raised earlier, there are in my view a number of unsatisfactory aspects to it.

128. First, the chain of reasoning appears to have been that if the new version of events was true, it followed that the original version must have been a lie. Since, on that

basis, the original version was a lie, the Home Office was not prepared to place any weight at all on the uncorroborated new version. In my view this somewhat simplistic approach failed to ask, let alone answer, the obvious question whether there might be a plausible reason for the Claimant having given a false account in his first statement and not withdrawn it on the appeal other than that it as well as the new version of events were both false attempts to pursue a bad claim. If the Claimant's second version of events was true and he was indeed an enthusiastic and senior member of the Tamil Tigers Intelligence Unit who had been involved in brutal interrogation of suspected informers and had access to secret files, it is not in my view inherently implausible that he might well have been genuinely frightened that to reveal those matters would place him in jeopardy and undermine his asylum claim in the eyes of the UK authorities.

129. This aspect is in my view compounded by the apparent failure of the decision-maker to take into account the circumstances in which the original statement came to be made. (There is certainly no reference to them in the letter.) It will be recalled that the Adjudicator accepted the Claimant's explanation for the comparatively short delay in submitting the original Statement of Evidence Form, part of which was the Claimant's assertion that between 7 July 2001 when he was issued with a Statement of Evidence Form and 14 July 2001 when he first met Ratna & Co, he had tried unsuccessfully various solicitors who might be able to provide him with free legal advice and assistance and who could also converse with him in Tamil. The Statement of Evidence Form was itself sent by a letter dated 24 July 2001 shortly after his first meeting with Ratna & Co. Further, in the letter dated 19 February 2004 Messrs Lawrence Lupin, the Claimant's second solicitors, asserted that the draft statement prepared by Ratna & Co had never been read back to the Claimant until the day before the hearing of his appeal at which point he had found that it was full of errors which were never corrected. There was thus a period of no more than 10 days (commencing shortly after the Claimant arrived in the United Kingdom) between the Claimant having first met his solicitors and the first statement having been signed and submitted.

130. Next and critically the Claimant asserted through his second solicitors that he had been advised by Ratna & Co to suppress a lot of crucial information such as his very serious and deep involvement with the Tamil Tigers Intelligence Unit. The response in the Decision Letter to this latter point was to say that the Home Office could not intrude into the dealings between an applicant and his legal adviser beyond pointing out that if he feels that he has been badly advised he should make a complaint to the Law Society. If and to the extent that this was the basis or formed part of the basis of the reason why the decision-maker reached the opinion (if he separately addressed the issue) that there was no satisfactory reason for the second version of events not having been raised earlier, it is in my view deficient. If the second version of events is truthful and the Claimant was indeed advised to suppress it by his former solicitors, presumably on the basis that they advised that it would undermine his prospects of being given asylum, it is not difficult to understand why someone in the position of the Claimant might, however misguidedly, accept that advice through genuine fear of being returned to face persecution death and/or torture. If the Claimant was telling the truth in his second version of events and was precluded from a right of appeal which had a realistic prospect of that version of events being believed by the IAT, it would

be scant consolation as he faced the prospect of return to Sri Lanka to know that he could then make a complaint to the Law Society.

131. It is of course the case that the decision-maker formed the view that the Claimant's assertions in his second version of events were not corroborated by the documents which accompanied it. It is also the case that his claim to have been advised to suppress that version of events by his first solicitors was itself uncorroborated. There is a suggestion by the editors of McDonald's Immigration Law and Practice seventh edition, that a serious failure by a representative to put forward a vital issue which will have had a significant impact on the outcome of the appeal might be a satisfactory reason for the applicant's failure, provided that there is evidence to support the allegation and that the matter is serious enough to justify a formal complaint to the representative's regulatory body or to the Office of the Immigration Services Commissioner (See paragraph 18.44). I would endorse that view subject to the following qualification and observation. The observation is that even an uncorroborated statement by the applicant is evidence, the fact that it is uncorroborated going to its weight rather than its evidential status. The qualification is that while if the matter is not serious enough to justify a formal complaint that might on its face point against the failure being a satisfactory reason, it does not seem to me that the question whether it is serious enough to justify a formal complaint is itself a necessary requirement for a reason to be considered satisfactory. Rather it seems to me to be a matter going to weight.

132. In principle the fact that a statement by a claimant that a representative failed to put forward a vital issue which might have had a significant impact on the outcome of the earlier appeal or advised him to suppress such an issue is uncorroborated does not mean that that statement is incapable of supporting or demonstrating the existence of a satisfactory reason. Everything in my view depends on the facts and circumstances of the particular case. In this particular case one of the circumstances is that the decision-maker concluded, on the current assumption, that there was a realistic prospect of the IAT believing that the Claimant's second version of events was the truth. From that conclusion it might be thought it would not be a big step to conclude that there was a realistic prospect that the claimant's assertion that he was advised to suppress that version of events by his former solicitors was also the truth. That in my view would be one of the matters for the decision-maker to consider, take into account and weigh in the balance together with the other matters to which I refer later in this judgment when forming the opinion whether there was a satisfactory reason at the third stage as well as at the fourth stage of deciding whether the discretion should be exercised to certify even if he formed the opinion that there was no satisfactory reason.

133. Finally the response in the Decision Letter to the Claimant's assertion that his original statement was not read back to him until the day before his appeal, at which time he found it to be full of errors, was to point out that the Claimant attended the appeal hearing, that he had an opportunity to make any further statements, amendments or clarifications that he wished and that he did indeed correct some of the mistakes in his statement at the hearing, but subject to those amendments he adopted the original statement of evidence as his evidence.

134. The letter continued:

> "If we were to accept your client's statement as the unvarnished truth it would mean that he had knowingly lied to the Home Office and Adjudicator. Your client was represented at appeal by Counsel who could have warned him of the serious consequences of this."

I find the latter observation puzzling. It is hard to see the relevance of the fact that the Claimant's Counsel could have warned him of the serious consequences of lying. There is no evidence that the Claimant's Counsel did warn him of the serious consequences of lying or even that he had any reason to believe such a warning was necessary. It was not part of the Claimant's case as put forward through his second solicitors that his original counsel had been party to the advice allegedly given by the Claimant's first solicitors or that he had been privy to the fact that, as the Claimant now submits, the version of events in the original Statement of Evidence Form was not truthful.

135. While the decision-maker was undoubtedly entitled to take into account the fact that the Claimant corrected some errors in the original Statement of Evidence Form without taking the opportunity to admit that it contained substantial lies and omitted important parts of the truth, in my view the observation in the Decision Letter to which I have referred did not adequately address the possibility that the Claimant might still have been operating at the hearing on the basis of and in reliance on the advice he claims he had previously been given by his former solicitors to suppress the truth.

136. Finally the statement that "the Home Office takes the view that your client is responsible for his choice of legal adviser and for ensuring that the claim he advances is the truth" does not suggest in my view that the decision maker addressed his mind to the circumstances in which the Claimant came to be represented by Ratna and Co which, on his account, involved great difficulty, in a very short space of time after arriving as an asylum seeker in a country with which he was unfamiliar, in finding solicitors who could speak his language and give appropriate advice and that the deadline for returning and submitting the Statement of Evidence Form was looming.

137. A number of authorities were cited in the course of oral and written argument to the broad effect that the principles enunciated in *Ladd v Marshall* are applied, if at all, in the context of asylum and article 3 claims only in a very watered down and circumscribed way. I refer to some of them later in the context of the Claimant's Submission (a) in support of his second ground of judicial review. For present purposes what is significant is that on the assumption that the Claimant is wrong in his submission that the Secretary of State can never lawfully certify under section 96 (1) or 96 (2) a fresh asylum or human rights claim, it must in my view be right that either in the third stage of the process, that is in assessing whether there is a satisfactory reason, or at the fourth stage, that is to say in addressing whether to exercise the discretion, anxious scrutiny must be given by the decision maker to the consequences of certification.

138. It is in my view self evident that in Part V of the 2002 Act Parliament has sought to strike a balance between two important and legitimate public policy objectives which are potentially in conflict with each other. On the one hand is the principle of access to an independent tribunal for determination of asylum and human rights claims. On

the other there is the legitimate public interest in the efficient and cost effective disposal of asylum claims and the desirability of finality in such disposal. The Secretary of State submits that Parliament chose to strike the balance by providing for an unconditional right of appeal against the refusal by a Secretary of State of a first asylum or human rights claim and a conditional right of appeal against the refusal of a second fresh claim, the operative condition being that where the second appeal relies on a matter that could or should have been raised in an earlier appeal or in a one-stop notice statement there must be a satisfactory reason for it not having been raised earlier. For the reasons given below in my view the Secretary of State's submission on this is correct. However it is in my view implicit in that construction of section 96 of the 2002 Act that Parliament intended that there should be a genuine and robust safeguard against the possibility of a second refusal by the Secretary of State being erroneous. One safeguard of course is provided by the existence of the right judicially to review the refusal of the second fresh claim. There are, however, obvious and well known limitations to the extent of that right. A refusal of a second fresh claim can be challenged only on *Wednesbury* grounds and the court cannot substitute its own view of the merits for those of the Secretary of State. Nor in a case which turns on the truthfulness or credibility of the Claimant is it the practice for the court on a judicial review application to test the evidence or assertions of the Claimant.

139. There are thus obvious and potentially critical limits to the ability of the right to apply for judicial review to act as an adequate safeguard against a wrongful refusal by the Secretary of State of a second fresh claim on the basis of an erroneous view of the truthfulness or credibility of the Claimant. In those circumstances in my view it is to be assumed that Parliament intended that the process of considering whether there are satisfactory reasons for matters not having been raised earlier and deciding whether to exercise the discretion to certify an asylum or Article 3 claim which has been determined to have a realistic prospect of success should involve anxious scrutiny of all the relevant circumstances and that the ambit of the relevant circumstances to be taken into account should be generously wide.

140. In my view those circumstances would ordinarily include the fact that the claim is an asylum claim and/or an Article 3 claim, the risk of persecution death and/or torture if the claimant is returned on the basis of a refusal which the Secretary of State has determined would have a realistic prospect of being overturned on appeal, the fact of that determination and the reasons for it, whether the Secretary of State rejected the second claim on the merits robustly or only with difficulty and on balance. In a case such as this, where the claimant's professed reason for not raising matters earlier is integrally bound up in the version of events which is at the heart of the substantive claim, in my view the Secretary of State should consider the impact of his determination that there is a real prospect of that version of events being accepted on appeal as truthful on the question of whether the claimant's reason for withholding it earlier is satisfactory. If the reason put forward is a misguided fear that telling the truth or the whole truth might lead to the claim being rejected or to other adverse consequences, the fact that the reason involves an admission that the claimant lied in his original version of events does not in my view discharge the Secretary of State from considering whether, taken together with other circumstances, there might nonetheless be a satisfactory reason. In other words it should not be regarded as automatically dispositive of the question to be answered by the decision maker. Although Section 96 has, in my view, a legitimate purpose of creating an incentive for

claimants to be open and honest in their original claims, the power of certification is not designed to punish those who lie through misguided fear of telling the truth, by exposing them to a real risk of persecution, death or torture.

141. Parliament was faced with two potentially competing considerations of public policy: the prevention of abuse by repetition and delay and access to independent scrutiny of a rejected but arguable asylum or Article 3 claim. The structure of Part V of the 2002 Act suggests that it had well in mind both considerations: see the power to certify in Section 96(1) and (2) in relation to the former and the right of appeal in Section 82 in relation to the latter. Although I reject the Claimant's primary submission that Parliament drew the balance by excluding entirely the power to certify in asylum and Article 3 claims, I do so in part because in my view it is to be inferred that Parliament intended that the third and fourth stages of the Section 96 (1) and (2) certification process provided for in Section 96 (1) (c) and Section 96 (2) (c) should provide a control mechanism for enabling a proper balance to be struck between the two potentially competing policy considerations.

142. Thus although Section 96(1) (c) and Section 96 (2) (c) assign to the Secretary of State the assessment of whether the tendered explanation is satisfactory, that assessment was not in my judgment intended by Parliament to be undertaken without reference to the context or by reference to a narrow test of what is satisfactory. The measure of what might be considered unsatisfactory in the context of an explanation for why a student's essay has been handed in late is unlikely to be the same as in the context of why a full and truthful account of events was not originally forthcoming by a newly arrived senior member of a proscribed organization acting under pressure of time, in fear and on bad advice. As Sedley LJ remarked in *F P Iran v Secretary of State for the Home Department* [2007]EWCA Civ 13, in distinguishing dicta of Lord Bridge of Harwich in *Al Mehdawi v Home Secretary* [1990] 1 AC 876 at 898 : " For some of these [asylum seekers], the exercise of the right to be heard may literally be a matter of life and death: for all of them save the bogus (and even they have to be identified by a judicially made decision) it is in a different league from the loss of a student's right to remain here." (paragraph 43).

143. In assessing the tendered explanation in my view the Secretary of State should do so among other things by reference to the impact that the explanation has on the credibility of the fresh claim. If the explanation is on reasonable grounds considered to be so slight or non existent as to be inconsistent with a genuine fear of persecution or harm it may well be one which she is entitled to say is not satisfactory and lead to certification even if the claim is an asylum or Article 3 claim and there is some new element in it.

144. By contrast if there is a credible explanation as why some fact relevant to an asylum or Article 3 claim was not put forward, which if it were to be accepted as true might well result in a successful claim, the balance between the two considerations of public policy may shift in favour of the provision of a right of appeal and point to a conclusion that the power to certify is not exercisable either at the third stage because there is a satisfactory explanation or at the fourth stage because the discretion should be exercised against exercising the power to certify.

145. Although this latter point may be thought not to fall explicitly from the wording of the Act it is in my view one which is implicit given the background of the two strands of authorities to which I have referred, namely those which emphasise the duty of anxious scrutiny in Article 3 and asylum claims and those which emphasise both the flexible approach to be adopted to *Ladd v Marshall* principles and the need to construe narrowly provisions which purport to restrict access to courts in the context of such claims.

146. I would add this. As appears below I do not consider that the absence of an automatic right of appeal against the rejection by the Secretary of State of an asylum or Article 3 claim is incompatible with Article 3 or Article 13 of the ECHR so as to require Section 96(1) and Section 96(2) of the 2002 Act to be construed as not applying to such claims. Although that conclusion results from my analysis of the series of cases which have held that the availability of judicial review is sufficient to satisfy the requirements of Articles 3 and 13 of the ECHR, (and, as regards Article 13, from the fact that since it is not a Convention right as defined by Section 1 of the Human Rights Act even if the application of Section 96(1) and (2) was incompatible with that Article Section 3 of the Human Rights Act would not require a contrary construction), I am fortified in reaching it by my view that in stages three and four of the certification process Parliament has provided what should be an effective control mechanism to enable the Secretary of State (and ultimately the court on a judicial review of the way she applies those stages) to balance the two objectives of public policy which form the basis of part V of the Act. Alternatively if I am wrong in my view that Section 3 of the Human Rights Act and the House of Lords authorities to which I refer below (which have held that Section 3 can require even primary legislation to be read and construed in ways that strain the natural meaning of the words used if that is necessary to make the legislation compatible with Convention rights) do not compel a particular construction of Section 96(1) and (2), I would hold that the construction which I have held is the correct one satisfies the requirements of Section 3 in that the Secretary of State's obligations at stage three and four call for a sufficiently rigorous and extensive assessment to satisfy the requirements of Articles 3 and 13.

147. Mr Strachan submitted that one of the reasons why it should be inferred that Parliament intended the certification process in section 96 (1) and section 96 (2) to apply in claims based on asylum and/or Article 3 is that there would otherwise be no incentive in such cases for claimants to tell their whole story and put all their cards on the table on a first appeal and in response to a Section 120 one-stop notice and that there would be no effective sanction for non-compliance with section 120 notices. Ms Dubinsky's answer to that submission was that the incentive and sanction are provided in the risk a claimant takes of not being believed on a second appeal if he changes his story with no good reason. In my judgment there is force in Mr Strachan's submission which is not fully met by Ms Dubinsky's response.

148. Equally in the context of stages three and four of the certification process in my view the Secretary of State is entitled to take into account the importance of the finality principle and to treat with scepticism changes of story particularly where they involve express or implied admissions of having lied earlier and also uncorroborated claims to have been advised to lie on the first appeal. However in my view in the ordinary case it would be wrong for the Secretary of State to disregard a new version of events

purely on the basis that it expressly or implicitly involves an admission of having told lies earlier and it would be wrong to disregard a claim to have been advised by former legal representatives to suppress certain information purely on the basis that such a claim is uncorroborated or that a Claimant is responsible for his choice of representatives or on the basis that the advice was to lie and that a Claimant is responsible for telling the truth. Those are all matters which the Secretary of State in my view is of course entitled to take into account when forming his opinion as to whether there is a satisfactory reason and whether to certify but they are not in my view in themselves in the ordinary case determinative.

149. In *Balamurali and Sandhu and The Secretary of State for the Home Department* [2003]EWCA Civ 1806 Kennedy LJ cited with apparent approval the following dicta of Mitting J, whose decision was approved by the Court of Appeal, on the correct approach to be followed by the Secretary of State in the exercise of the discretion whether to certify created by Section 73(2) of the 1991 Act:

> "If the Secretary of State is satisfied that the appellant's claim could reasonably have been made in the original appeal but was not, and that one purpose of such a claim would be to delay removal from the UK, then, save in unusual circumstances in which the claimant had another legitimate purpose, the Secretary of State is entitled to go on to consider whether or not to issue the certificate.
>
> He has a discretion in so doing and his discretion is governed by administrative law principles. It seems to me that the Secretary of State must take into account two factors: first, the scheme of this part of the Act, which is intended to produce finality resulting from a single appeal; and secondly, by virtue of section 6 of the Human Rights Act 1988,the human rights of the claimant. Factors which it will commonly be appropriate to take into account are likely to be the strength or weakness of any new claim and the reason why such a claim was not advanced in the original appeal."(paragraph 11).

150. Although Mitting J's dicta were made in the context of a consideration of the correct approach to the exercise of the statutory discretion to certify in Section 73(2) of the 1999 Act, which involved a different test to that in Section 96(1) and 96 (2) they are in my view no less apt in the context of the correct approach to the exercise of the statutory discretion in Section 96 (1) and (2) of the 2002 Act.

151. I also consider that in a case where the reason that the Secretary of State determines that there is a realistic prospect of a new claim being successful is that there is a realistic prospect that an IAT would accept as truthful assertions which she has rejected, one of the factors to be weighed in the balance in considering how to exercise the discretion at stage four of the process is the obvious advantage to the claimant of the primary fact finding role of the IAT and his ability to submit his credibility to be tested under cross examination as compared with the more limited review function of judicial review proceedings to which he would be confined if his claim is certified. This may not be a large class of cases.

152. Experience suggests, as referred to by Collins J in *R (FH and others) v SSHD* [2007] EWCH1571 (Admin) para 25 that many allegedly fresh claims are brought when removal is at last attempted and that the majority of such claims are unarguable, being attempts to delay a justifiable removal. Hence the requirement that a repeat claim must be determined to be a fresh claim in order to qualify as an immigration decision attracting a right of appeal under Section 82 of the 2002 Act. But some, albeit a small minority, are genuine. Cases where the merits of the claim are not strong enough to persuade the Secretary of State that it is genuine but are sufficiently strong to satisfy her that there is a realistic prospect that the claimant would succeed in persuading the AIT that it is genuine if he were allowed to proceed to an appeal may be infrequent. Not all of those will be cases where credibility is of critical importance. Where it is of critical importance it will in my view require particularly anxious consideration by the Secretary of State as to whether it is appropriate to exercise her discretion in such a way as to prevent the claimant from subjecting her view of the merits to the more intrusive examination associated with an appeal and to confine him to the more limited challenge provided by judicial review. I refer in this context to my conclusions as to the rigorous and extensive nature of the assessment which is called for at stages three and four of the Section 96(1) and (2) process. In the case of *R v Ministry of Defence*
ex parte Smith [1996] QB517 at 554 Sir Thomas Bingham MR described the role of the court in assessing an application for judicial review of a rejection of an Article 3 claim as undoubtedly involving "heightened … responsibilities… in the context of so fundamental a human right as that at stake here". In my view a similar level of responsibility rests and was intended by Parliament to rest on the shoulders of the Secretary of State when approaching stages three and four of the certification process under Section 96(1) and 96 (2).

153. In my view it is clear from the terms of the Decision Letter that the decision-maker did not go through either stage three or stage four of the process required by Section 96 (1) and (2) to be gone through. . There is absolutely no reference in the letter to any exercise of discretion and the words "consequently" are in terms inconsistent with any such exercise having been undertaken. Further if I am wrong about that it is in my view in any event clear that there is no indication that the decision maker took into account and weighed in the balance in either stage three or stage four the considerations and factors which he should have taken into account and weighed in the balance. Indeed there is no indication that he applied his mind to the question of what were the relevant factors to take into account and weigh in the balance.

154. For those reasons in my view the decision to certify under Section 96 (1) and Section 96 (2) was legally flawed and should be set aside.

155. That raises the question of what should be the consequence of an order setting aside the decision to certify. If I concluded that the decision was unlawful either because no reasonable decision taker could have failed to conclude that there were satisfactory reasons or because no reasonable decision taker could have exercised the discretion in favour of certifying it is not clear to me that I would have any power to direct the Secretary of State to take any consequential step. As I understand the statutory scheme the effect of the Secretary of State having determined that the Claimant has made a fresh claim is that in the absence of a valid certification under Section 96 (1)

and/or Section 96 (2) the Claimant has a right of appeal under Section 82 which he would then be entitled to exercise.

156. I have given anxious consideration to whether I can legitimately on the material before me reach either of those conclusions. In my view I cannot. The forming of an opinion as to whether there are any satisfactory reasons and the exercise of the power to certify and the decision whether to exercise that power are all matters entrusted by Parliament to the Secretary of State and not to the Court. In circumstances where, in my judgment, the Secretary of State has not yet gone through the necessary stages of the process which is required under Section 96, it follows in my view that the question whether the decisions on those two matters are decisions that no reasonable decision maker could take does not yet arise.

157. In my judgment the correct course is for the Secretary of State now to reconsider the matter in the light of this judgment. It may be that she will decide that, in the light of the unusual circumstances of this case, there is no need to go through the Section 96 process again. There is no obligation on her under Section 96 to consider certification in the case of every rejected fresh claim.

158. It may be that she will decide that the appropriate course, before embarking on a consideration of whether her Section 96 powers are exercisable and if so whether they should be exercised, is to consider the new materials and representations submitted in June and September 2006 on the basis that they may either persuade her that the Claimant has a well founded fear of persecution and/or breach of his Article 3 rights and should thus be granted permission to remain in the United Kingdom or alternatively that, having regard to the time at which they became available to the Claimant and the fact that her predecessor determined that the July 2004 claim had a realistic prospect of success, there is no prospect of certifying them, in which case a re-consideration of whether the July 2004 claim is certifiable would serve no useful purpose.

159. Alternatively it may be that she will decide that the appropriate course is to go through the process again. If so, she must do so mindful of the need to avoid repeating the defects in the steps taken and more particularly not taken by the decision maker in relation to stages three and four of the process to which I have referred.

160. It follows from the above that in relation to Ms Dubinsky's Submission (b) in support of the Claimant's Ground Two that I accept it subject to one qualification. In my view the Secretary of State does have a discretion over whether to certify a claim under section 96 (1) and (2) of the 2002 Act and the Secretary of State has failed to have regard to that discretion in the Claimant's case but has erroneously treated the question of whether the Claimant relies on a matter which could have been raised and the question of whether the Claimant relies on a matter which should have been but was not raised earlier as determinative of the question of whether to certify. In addition in my view the Secretary of State has erroneously treated those questions as determinative of the question of whether in his opinion there was no satisfactory reason for that matter not having been raised earlier.

161. It further follows from the above that in relation to Ms Dubinsky's Submission (c) in support of the Claimant's Ground Two I accept that the test of whether there is, in the opinion of the Secretary of State, a "satisfactory reason" under section 96 (1) (c) or

section 96 (2) (c) requires the decision maker to consider as one of the matters to take into account whether the underlying claim has merit and, in a case where it has been held to have a realistic prospect of success the reasons why it has been held to have such a prospect of success, and that the decision maker in this case failed to have regard to the underlying merit when determining that there was no satisfactory reason.

Submission (a): it is incompatible with the Secretary of State's duties under Section 6 of the Human Rights Act 1988 and/or unreasonable ever to certify a fresh asylum or human rights claim.

(i) The Claimant's Submissions

162. I turn now to Ms Dubinsky's Submission (a), namely that where the Secretary of State has made a finding that the claim is "significantly different" from the earlier claim and has "realistic prospects of success" on appeal to the AIT it is incompatible with the Secretary of State's own duties under Section 6 of the Human Rights Act 1998 and/or unreasonable then to deprive that person of access to a court or tribunal.

163. In a subsequent note Ms Dubinsky refined the submission in these terms:

> "It is inconsistent with the prohibition on refoulement under the Geneva Convention Relating To The Status of Refugees 1951 ("the Refugee Convention") and with the absolute prohibition on torture contained in Article 3 ECHR to deprive a person who has a current disputed and arguable asylum and Article 3 ECHR claim of a right of appeal against an adverse immigration decision before removal to the country of feared persecution."

164. Ms Dubinsky, rightly in my view, accepted that the challenge set out under Submission (a) has the effect if correct that the Secretary of State could never lawfully certify under Section 96 of the 2002 Act a fresh asylum or Article 3 ECHR claim. No doubt as a result of this realistic acknowledgment, although Submission (a) is that certification is incompatible with the Secretary of State's own duties under Section 6 of the Human Rights Act 1998, Ms Dubinsky in her later more detailed submissions felt compelled to support her argument by submitting that Section 96 must be read and given effect to by reading in the words (a) "this provision is to be read and given effect in a manner that is compatible with the European Convention of Human Rights"; or (b) "this provision does not apply where a person has made a fresh asylum or human right claim". In my view (subject to substituting the words "a fresh Article 3 claim" for the words "a fresh human rights claim") this was a necessary part of her argument under section 6 of the Human Rights Act if it were to succeed.

165. Section 6 (1) on which Ms Dubinsky relies is qualified by section 6 (2). Together those subsections provide:

> "6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

> (2) Subsection (1) does not apply to an act if – (a) as the result of one of more provisions of primary legislation, the authority could not have acted differently;….."

166. Although Section 96 (1) and (2) do not in terms impose a mandatory duty on the Secretary of State to certify even if the conditions in section 96(1) (a), (b) and (c) or Section 96(2) (a), (b) and (c) are met, and even if, as I consider to be the case, Section 96 confers a discretion on the Secretary of State whether, assuming those condition are met, to certify, it would in my view render the provisions of Section 96 wholly, illusory and redundant, assuming that they were intended to apply to an asylum or Article 3 claim, if Parliament intended that there are no circumstances in which the discretion could ever be lawfully exercised in favour of certification in respect of such a claim because to do so would be contrary to the Secretary of State's duty under Section 6 of the Human Rights Act not to act in a way which is incompatible with a Convention right.

167. I have already foreshadowed some of the arguments which were deployed by the parties in respect of Submission (a). Ms Dubinsky's principal submissions can be summarised as follows.

168. The prohibition against refoulement prevents the removal of refugees to the country of feared persecution. See Article 33(1) of the Refugee Convention which provides: "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"

169. The prohibition against refoulement applies not only to recognised refugees but to those awaiting a final determination of their refugee status: see *R v SSHD ex parte Onibiyo* [1996] QB768 at 781 where Sir Thomas Bingham MR as he then was held:

> "The obligation of the United Kingdom under the [refugee] Convention is not to return a refugee (as defined) to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of return. A refugee (as defined) has a right not to be returned to such a country and a further right not to be returned pending a decision as to whether he is a refugee (as defined) or not"

170. Although the Refugee Convention has not been formally incorporated into domestic law, the British asylum regime has "closely assimilated" to it. S*ee R (Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2AC1 at 45 where Lord Steyn stated:

> "Parliament must have intended that the strengthened reference to the Refugee Convention in primary legislation would be treated by the courts as an incorporation of the Refugee Convention into domestic law…in my view it is clear that the Refugee Convention has been incorporated into our domestic law"

However see also *R v Asfaw* [2008] UKHL31 where Lord Bingham of Cornhill stated:

> "The appellant sought to address this disparity by submitting that the Convention had been incorporated into our domestic law. Reliance was placed on observations of Lord Keith of Kinkel in *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958, 990G; Lord Steyn in *R (Roma Rights Centre) v Immigration Officer at Prague Airport (United nations high commissioner for refugees intervening*) [2004] UKHL55, [2005] 2AC1, paras 40-42; section 2 of the Asylum and Immigration Appeals Act 1993; and para 328 of Statement of Changes in Immigration Rules (HC395). It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law. While therefore one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation."

171. Article 3 ECHR incorporated into English law by the Human Rights Act 1998 imposes an absolute prohibition on the removal of those who face a real risk of torture to the country of feared persecution, irrespective of their conduct. See *Chahal v UK* (1996) 23 EHRR 413 at paras 79,80, where the European Court of Human Rights said:

> "…the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. …the prohibition provided by Article 3 against ill treatment is equally absolute in expulsion cases. Thus whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion (see the above mentioned *Vilvarajah and Others* judgment page 34 para 103). In these circumstances the activities of the individual in question however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by article 32 and 33 of the United Nations 1951 Convention on the Status of Refugees (see para 61 above)."

172. Where there is a current disputed and arguable asylum or Article 3 ECHR claim, Article 3 and the Refugee Convention require that a right of appeal will be given by which the current refusal of international protection can be challenged. See *Jabari v Turkey* Application 40035/98 where the European Court of Human Rights considered

the case of an Iranian asylum seeker in Iran deprived of a right of appeal before expulsion (paras 49-50):

> "Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However this course of action entitled her neither to suspend its implementation nor to have an examination of the merits of her claim to be at risk…in the court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill treatment alleged materialised and the importance which it attached to Article 3 the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned".

173. See also *Etame v SSHD* [2008] EWCH 1140 (Admin) where Blake J held:

> "It is obviously important that there is an in country appeal in asylum and human rights claims at least engaging Article 3 ECHR. A claimant with a current well-founded fear of persecution may face irreparable harm on return if his or her claim is dismissed and the claim can only be exercised from abroad…Where there is a current and disputed asylum or human rights claim it would make every sense for the appeal by which the outcome is disputed to have suspensive effect and enable it to be brought before removal in order to give practical effect to the non-refoulement principle reflected in article 33(1) Refugee Convention."

174. These obligations apply to fresh asylum and Article 3 ECHR claims (i.e. those further representations found to be significantly different from previous representations and to have realistic prospects of success) as they do to arguable initial asylum and ECHR claims. See *R v SSHD ex parte on Onibiyo* 1996 QB 768 where Sir Thomas Bingham MR held:

> "It would in my judgment undermine the beneficial object of the Refugee Convention and the measures giving effect to it in this country if the making of an unsuccessful application for asylum were to be treated as modifying the obligation of the United Kingdom or depriving a person of the right to make a fresh "claim for asylum (781F)."

175. See also *R v SSHD ex parte Kazmi* [1995] ImmAR73 where the question was whether the Secretary of State was required to make a further immigration decision (attracting rights of appeal) where an asylum application had been made following an earlier unsuccessful appeal. Dyson J concluded in the claimant's favour:

> "It cannot have been the intention of Parliament that an applicant for asylum should be denied the right of appeal simply because he had previously made an unsuccessful

> application for leave to enter on another ground. It is inherently unlikely above all in asylum cases that Parliament should have intended to emasculate the right of appeal in this way."

It was accepted by Ms Dubinsky that Dyson J went on emphasise that this entitlement to a further appealable immigration decision would only arise where the new representations were different from the previous representations and amounted to a fresh claim:

> "Parliament cannot have intended that immigration officers should be required to issue successive refusals of leave to enter each attracting a right of appeal on the same claim."

It was also accepted by Ms Dubinsky that in *Etam*e Blake J drew a distinction between fresh representations which do not under the Refugee Convention or Article 3 ECHR require a suspensive in-country right of appeal on the one hand and fresh claims which do require a suspensive in-country right of appeal on the other:

> "…only a first claim to asylum or a fresh claim will result in an in-country appeal under section 92(4)…where a claim for protection has been considered and rejected and the rejection upheld on appeal there is no violation of the principle of non-refoulement in removing the person concerned. Where a repeat claim is made that is not a fresh claim for protection there is accordingly no need to grant a suspensive right of appeal" (paras 56-57).

176. The same anxious scrutiny is required of an asylum or article 3 ECHR claim even in the extreme case of an asylum or ECHR claimant acting in bad faith. See for example *Danian v SSHD* [2000] Imm AR 96 which concerned a repeat and abusive claimant where the Court of Appeal found that the same scrutiny must be applied to a bad faith applicant as to any other. Brooke LJ stated:

> "I do not accept the Tribunal's conclusion that a refugee sur place who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to protection of the Convention and this country is not entitled to disregard the provisions of the Convention by which it is bound if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered."

177. The Defendant's case is that section 96 certification may be applied to fresh asylum and article 3 ECHR claims wherever the fresh claim relies on matters which could have been raised earlier but, without satisfactory reason, were not. The effect of this would be that even an asylum applicant who is (as is submitted happened in the

present case) frightened and ill-advised, but who has not acted in bad faith in failing to raise matters earlier, would lose his rights of appeal through certification under section 96 of the 2002 Act. In light of the overriding requirement to safeguard those facing expulsion from torture or persecution, as stressed by the Court of Appeal in Danian, this cannot be correct.

178. Section 3 of the Human Rights Act requires legislation to be read compatibly with ECHR rights where possible to do so. Section 3 (1) applies even where there is no ambiguity in the language of the primary legislation and even where the language under consideration is inconsistent with a convention-compliant meaning.

Section 3 provides:

> '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.'

179. In **R v A (2),** [2002] 1 AC 45 Lord Steyn stated at paragraph 44:

> "The interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: **R v Director of Public Prosecutions, Ex p Kebilene** [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F ; and my judgment, at p 366B .The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see Rights Brought Home: The Human Rights Bill (1997) (Cm 3782), para 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights**. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect**. **It is a general principle of the interpretation of legal instruments that the text is the primary source of**

> **interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so.** In the progress of the Bill through Parliament the Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention": Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading)..…... **In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so.** If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise: **R v Secretary of State for the Home Department, Ex p Simms** [2000] 2 AC 115, 132A -B , per Lord Hoffmann. (Emphasis added)

180. In **Ghaidan v Godin –Mendoza** [2004] 2 AC 557, at paragraphs 31 to 33, Lord Nicholls of Birkenhead stated: :

> **'**On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the "interpretation" of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. **But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.**
>
> **From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant.** In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.

> **Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed.' [**Emphasis added**]**

Lord Steyn stated at paragraphs 41 and 44:

> "Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under section 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved."

> "**It is necessary to state what section 3(1), and in particular the word "possible", does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two *possible* meanings. The word "possible" in section 3(1) is used in a different and much stronger sense**. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation."

In his dissenting judgment, at paragraph 67, Lord Millett similarly stated:

> **"**This does not mean that it is necessary to identify an ambiguity or absurdity in the statute (in the sense of being open to more than one interpretation) before giving it an abnormal meaning in order to bring it into conformity with a Convention right: see **R v A (No 2)** [2002] 1 AC 45, 67, 87, per Lord Steyn and Lord Hope of Craighead. I respectfully agree with my noble and learned friend, Lord Nicholls of Birkenhead, that even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, section 3 may require it to be given a different meaning. It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must "strive to find *a possible* interpretation compatible with Convention rights" (emphasis added): **R v A** [2002] 1 AC 45, 67, para 44, per Lord Steyn. But it is not entitled to give it an impossible one, however much it would wish to do so." [emphasis added]

And at paragraphs 119 and 121, Lord Rodger of Earlsferry stated:

> "…where the court finds it possible to read a provision in a way which is compatible with Convention rights, such a reading may involve a considerable departure from the actual words."
>
> "For present purposes, it is sufficient to notice that cases such as **Pickstone v Freemans plc** [1989] AC 66 and **Litster v Forth Dry Dock & Engineering Co Ltd** [1990] 1 AC 546 suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case**. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights**. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute" [Emphasis added]

181. Section 96 of the 2002 Act can and, under Section.3 of the Human Rights Act, must be read and given effect in a manner that is compatible with Article 3 ECHR. This can be done by reading in the words (a) 'this provision is to be read and given effect in a manner that is compatible with the European Convention of Human Rights' or (b) 'this provision does not apply where a person has made a fresh asylum or human rights claim.'

182. Applying the principles set out by the House of Lords in *R v A (2***)** and in *Ghaidan v Godin-Mendoza,* it is clear that each of the above interpretations is possible:

(i) It is consistent with the scheme and essential principles of the legislation. Nothing in this approach renders Section.96 otiose, since certification under that provision applies to a wide range of situations in which a person will have a repeat appealable decision but no fresh asylum or Article 3 ECHR claim. Further this approach is consistent with an overall legislative scheme. The appeals structure is one which, under Section 92 (4)and as discussed in ***Etame***, preserves in-country appeal rights for those who have made arguable initial asylum or Article 3 ECHR claims (i.e. not certified as 'clearly unfounded' under Section 94); and which, as discussed in ***Etame***, also preserves in-country appeal rights for those who have made fresh asylum or Article 3 ECHR representations which, having realistic prospects of success and not having been made earlier, meet the fresh claims test. And;

(ii) It is 'intellectually defensible".

These interpretations being 'possible', Section 3 of the Human Rights Act requires that the legislation be given this interpretation.

183. Section 6 of the Human Rights Act prohibits public authorities from acting incompatibly with ECHR rights**.** The Secretary of State is for these purposes a public authority and in certifying the Claimant's fresh asylum and Article 3 ECHR claim, acted contrary to her [sic] duties under Section 6.For the reasons already set out above it is incompatible with Article 3 ECHR to certify a fresh asylum and Article 3 ECHR claim under Section 96 of the 2002 Act and so take away any right of appeal. Section 6 therefore applies. Nothing in Section 96 compels the Defendant to certify any particular claim or any particular category of claims. Thus the Secretary of State does not have a defence under Section 6 (2) (a) of the Human Rights Act, which provides that Section 6(1) does not apply to an act if as the result of one or more provisions of primary legislation, the authority could not have acted differently.

184. *Ladd v Marshall* principles must be flexibly applied in asylum and Article 3 ECHR cases. See *Haile v IAT* [2002] INLR 283 paras 25-26(per Simon Brown LJ):

> "Were the old *Ladd v Marshall* principles to be strictly applied, then surely the appellant would fall at this first hurdle. The fact is however that these principles never did apply strictly in public law and judicial review…Nor am I persuaded that the House of Lords' decision in ***Al-Mehdawi*** precludes this Court having regard to the wider interests of justice here, not least given that this is an asylum case rather than a student leave case as was ***Al-Mehdawi***."

185. See also *FP v SSHD* [2007 EWCA Civ 13 para 43 (per Sedley LJ):

> "The result in *Al Mehdawi* was that a foreign student whose leave to remain had expired forfeited his entitlement to an appeal hearing because of his solicitors' errors. Not only did the case not concern the possibility of returning somebody to persecution, torture or death; it left to the Home Secretary, if he thought the application had merit, a power to invite an adjudicator to hear the applicant's evidence and report whether in his opinion it would have made a difference to the decision: see p.901. Although Lord Bridge's opinion is carefully framed in terms of principle and not of pragmatism, the case before the House was far distant from the kind of case we are concerned with. These cases do not only involve asylum–seekers who are either making a first appeal or have lost their first appeal and are making a second endeavour to establish their claim: they include asylum seekers who have won their initial appeal before an immigration judge and are seeking to hold the decision against the Home Secretary's appeal. For some of these, the exercise of the right to be heard may literally be a matter of life and death; for all of them save the bogus (and even they have to be identified by a judicially made decision) it is in a different league from the loss of a student's right to remain here. The

> remedial discretion which afforded Mr Al Mehdawi a fallback is absent from asylum law."

186. See further *R (Gungor) v SSHD* [2004 EWHC 2117 (Admin) per Collins J para 17:

> "If fresh evidence which was clearly available at the time of an appeal is put before the Secretary of State and he accepts that it is both credible and does show that there is a real risk that if returned the individual will suffer a breach of Article 3 of his Human Rights, it would then be wrong for the Secretary of State to disregard it purely because it was available at the relevant time."

187. In the result the Defendant has acted contrary to Section 6 of the Human Rights Act and has acted unlawfully in certifying the Claimant's fresh asylum and Article 3 ECHR claim.

188. Further or alternatively, in certifying the Claimant's fresh asylum and Article 3 ECHR claim, the Secretary has acted unreasonably.

In taking away appeal rights from a person who has an arguable claim that he may face irreparable harm - torture or death - on return to his home country, the Secretary of State has acted *Wednesbury* unreasonably.

(ii)The Secretary of State's Submissions

189. Mr Strachan's submissions on behalf of the Secretary of State in response to Ms Dubinsky's Submission (a) can be summarised as follows. A determination under Rule 353 that further submissions amount to a fresh claim does not prevent the Secretary of State from exercising his power under Section 96 in respect of that fresh claim. The existence of such a power in such circumstances is well-established: see e.g. *Balamurali and Sandhu and The Secretary of State for the Home Department* [2003]EWCA Civ 1806 at [34]-[36] per Kennedy L.J.in respect of the predecessor process under the 1999 Act and, in particular:

> "35. If any representations are made after one appeal has been determined the Secretary of State will consider them in order to decide whether they amount to a fresh claim. If he concludes that they do, but his decision on that fresh claim is not in favour of the applicant, that is a decision on an application which would normally give rise to the possibility of an appeal and appeal notices will be sent out to the applicant. Conversely if he decides that the representations do not amount to a fresh claim the applicant can only obtain relief by seeking judicial review
>
> 36. Where the Secretary of State makes a decision which does give rise to the possibility of an appeal he can then contemplate certification pursuant to section 73(8)[of the 1999Act] "

Balamurali , R(Borak) v SSHD [2005] EWCA Civ 110 and *R ex parte Khan v Secretary of State for the Home Department* [2008] EWHC 600(Admin) are all cases

where the Section 96 power (or equivalent) has been considered by the Courts and no objection in principle identified to its existence or exercise.

190. The statutory power to certify would be illusory if it could not be exercised in respect of new representations that have been determined by the Secretary of State under Rule 353 to constitute a fresh claim, because the power to certify under Section 96 is only ever material where such a determination has been made. If the representations are determined not to amount to a fresh claim, no new immigration decision will have been made, there will be no possibility of a right of appeal arising under Section 82 and thus no scope for considering whether such a right should be precluded by certification under Section 96.

191. The proposition (which the Claimant accepted was implicit in his case) that the Secretary of State could never lawfully exercise the power under Section 96 of the 2002 Act in respect of a fresh claim, on the basis that it would be incompatible with Section 6 of the Human Rights Act or otherwise unreasonable under the common law to do so, is inconsistent with the clear statutory intention in the granting of such a power. It must therefore be wrong.

192. Section 96 does not remove an existing right to appeal. Rather it precludes such a right from arising in specified circumstances for obvious policy reasons which Parliament plainly considered to be a legitimate and necessary restriction that forms part of the statutory framework to ensure that immigration appeals are comprehensive and cover every available ground for seeking relief and that the system is not abused by subsequent appeals where the opportunity for an appeal has already arisen.(see for example *Balamurali* at para 34)

193. As a matter of statutory construction the language of Section 96 is clear and unambiguous: it is unqualified and general in the scope of its application. There is nothing to suggest that it does not apply to a fresh asylum or human rights claim. This is to be contrasted with Section 92 where explicit distinction is made, in the context of precluding the right to pursue in-country appeal, between different categories of claim or claimant, including in Section 92(4) by reference to whether the appellant has made an asylum or human rights claim (defined in Section 113 as a claim that removal from the UK would be unlawful under Section 6 of the Human Rights Act as being incompatible with the claimant's Convention rights). That shows that where the draftsman intended to draw distinctions between different kinds of claims they are spelled out. The irresistible inference is that no similar distinction can have been intended in Section 96 and the Claimant's construction is inconsistent not only with the clear words but also with the structure and context of Part V of the 2002 Act. If the draftsman had wanted to exclude the application of Section 96 to human rights claims he could readily have done so using the same definition contained in Section 113. Section 92 thus serves to confirm the specificity of the draftsman of Part 5 of the 2002 Act. Where it is intended that there should be distinctions in respect of the rights of appeal applicable to different types of claim, they are expressly identified in the statutory scheme. No such distinction exists in Section 96, nor could it have been intended.

194. In the alternative, even if that is wrong, the analogy with and inference to be drawn from the wording of Section 92 would lead to the conclusion that the category of claim to which Section 96 was not intended by Parliament to apply was asylum and

human rights claims generally. That is a wider excluded category than that contended for by the Claimant, whose formulation of the excluded class is more limited, namely asylum and Article 3 claims. No argument was sought to be advanced by Ms Dubinsky that certification of a non Article 3 human rights claim was incompatible with the Convention. Likewise, if the Claimant is right and Section 92(4) is intending to create a special status for certain appeals which then precludes the certification process under Section 96, it would presumably be an argument that should also apply to Section 92(4)(b) which deals with appeals relating to EEA nationals. But there is no argument advanced at all to explain why such certification should be precluded in such cases. The Section 92 argument thus falls down.

195. If the construction contended for by the Claimant were right it would mean that the One Stop Notice procedure would be effectively redundant in respect of human rights and asylum claims since there would be no effective sanction for non-compliance if the "teeth" in the form of Section 96 certification could never apply.

196. As a matter of principle the process set up by the statutory regime does not involve any incompatibility with Article 3 or the common law in the ways alleged by the Claimant. The person making a fresh claim which is being certified will already have had a determination of his asylum and/or human rights claim, with an opportunity for appeal to a Court. That is a pre-requisite for the application of section 96. There will have been the opportunity to pursue the claim based on an alleged breach of Article 3, which will have already been rejected. The content of the further submissions amounting to a fresh claim will itself necessarily have been considered by the Secretary of State on its merits pursuant to Rule 353 but rejected. While determination that it is a fresh claim will mean that the content of the further submissions gives rise to a realistic prospect of success on appeal, that content will also have been rejected by the Secretary of State after an assessment of its merits. The Secretary of State will have carried out an assessment and concluded that no breach of Article 3 will arise by the rejection of the Claimant's further submissions. The precluding of a right to appeal in such circumstances cannot properly be said to infringe Article 3 of the ECHR at all, nor any alleged procedural content to the Article (which is not specified).

197. It is clear that it is lawful and compatible with the rights under the Convention to impose procedural restrictions on such appeals pursuant to section 96: see e.g. *Balamurali* (supra) and *R(Borak) v SSHD* [2005] EWCA Civ 110 at [35] - [37].

198. Article 3 does not contain any express procedural rights of appeal and cannot properly be interpreted as requiring that a fresh claim must be subject to a further right of appeal to an independent tribunal. That proposition cannot be extracted from *Jabari v UK (*Application 40035/98). *Jabari* establishes that Article 13 of the Convention in respect of Article 3 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of a relevant Convention complaint, and to grant appropriate relief. In *Jabari* itself there had been no such assessment at all, merely the mechanical application of a time limit preventing any further scrutiny of the claim.

199. Article 13 has not been incorporated into UK domestic law, but that aside, it is clear that no such complaint could realistically be made against the UK or in respect of the Claimant's case. The Claimant's claim does not concern an original claim. There has been a very thorough assessment of his original claim, coupled with a full right of

appeal which has been exercised and exhausted. His fresh claim has been examined and scrutinised by the Secretary of State as the competent national authority on the merits, and what is more, the Claimant is not at risk of return at all until his further representations have also been considered. In addition the Claimant had the ability to seek a judicial review of Secretary of State's decision on the merits if he considered that decision to have been challengeable under Article 3 grounds, but he has not sought to do so.

200. *Vilvarajah v UK* at [88]-[93] and [117)4127] and *R v SSHD ex parte Turgut* [2001] 1 All ER 719 at 724-9 demonstrate that decision-making by the Secretary of State on an Article 3 claim, subject to judicial review at the level of anxious scrutiny by the UK courts in accordance with well-established principles, satisfies the requirements of Article 3.

201. As to the correct approach to the issue of the availability at a previous appeal of material relied on to support a new claim, in *R v SSHD ex parte Onibiyo* [1996] QB 768, the Court of Appeal considered the status of further representations made after the refusal of initial applications and exhaustion of appeal rights therefrom and whether a person might make more than one 'asylum claim' within the meaning of the then Asylum and Immigration Appeals Act 1993. The Court of Appeal concluded that more than one claim for asylum could be made during a single interrupted stay ,provided it was a fresh claim: see Sir Thomas Bingham MR 781F-782G The Court of Appeal went on to consider what constituted a "fresh claim" for these purposes and identified (at 783H at 784A):

> "…the acid test must always be whether comparing the new claim with that earlier rejection and **excluding material on which the claimant could reasonably have been expected to rely in the earlier claim**, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim, despite the unfavourable conclusion reached on the earlier claim" (emphasis added)

202. The acid test described by the Court of Appeal in *Onibiyo* assumed the exclusion in principle of material on which the claimant could reasonably have been expected to rely in the earlier claim, although clearly identified that the existence of a fresh claim was a matter of judgment for the Secretary of State. There is therefore no doubt that the question of availability of previous material on which a claimant could reasonably have expected to rely has always been a relevant consideration when dealing with further representations.

203. In *E v SHDD [2004]* EWCA Civ 49 Court of Appeal stated:

> "…we would not 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".(paragraph 82)

In *Gungor* Collins J observed at [19]:

> "The effect of all that, as I see it, is that, as the court said in *E*, *Ladd v Marshall* is the starting point and availability is a factor to be taken into account and certainly will be given considerable weight because it is important that there should be finality. It seems to me that in cases of availability the court should look with care to see whether in reality the evidence could have affected the result and if ignored would mean that there was a risk that human rights would be breached."

The Courts in *Haile*, *E* and *Gungor* were therefore not in any way rejecting the relevance of previous availability of material in dealing with further representations and potential new claims, but articulating the point that there should not be an absolute rule of exclusion of such material in making decisions in this context.

204. As to *Wednesbury* unreasonableness it is not unreasonable or unlawful to restrict a right of appeal in respect of a decision where each of the relevant criteria in Section 96 has been met and a matter is raised which could have been raised in an earlier appeal and there is no satisfactory reason for not doing so.

Conclusions on Submission (a)

205. I have given anxious consideration to the parties' submissions on this issue. Taken in the abstract the proposition that an asylum seeker whose claim that if returned there is a real risk that he would face persecution, death and/or torture has been held by the Secretary of State to have a realistic prospect of success even though it has been rejected can without redress be precluded from exercising a right of appeal which he would otherwise have because the matters on which he relies should have been but for no good reason were not raised earlier seems counterintuitive.

206. In *Gungor* in the passage relied on by Ms Dubinsky Collins J stated:

> "…if fresh evidence which was clearly available at the time of an appeal is put before the Secretary of State and he accepts that it is both credible and does show that there is a real risk that if returned the individual will suffer a breach of Article 3 of his human rights it would then be wrong for the Secretary of State to disregard it purely because it was available at the relevant time." (para 17).

That was, as Collins J said, an extreme example. It is also materially different from the present case in that the Secretary of State has not accepted that the fresh evidence is credible or that it shows that there is a real risk that the Claimant will suffer a breach of Article 3 if returned to Sri Lanka. He has found the evidence to be incredible and has only found that there is a realistic prospect that the claimant might succeed in persuading the IAT to take a different view. Collins J's comment was also made in the context of construing an immigration rule (the old Rule 346) rather than primary legislation with which I am concerned in this case. However the dictum well illustrates why it is that the courts have been astute to avoid where possible the application of strict *Ladd v Marshall* principles in the context of asylum and human rights claims. As Collins J said earlier in the same paragraph, referring to the head

note in *The Queen on the application of Haile v Immigration Appeal Tribunal* [2002] INLR 283:

> "That approach to *Ladd v Marshall* in the context of asylum cases recognises that there is a conflict between the need for finality and the need to ensure that there is the sufficient anxious scrutiny to ensure no-one is returned to persecution. In the human rights context it has added importance because both the court and the Secretary of State as public bodies have an obligation to ensure that they do not breach any human rights in a decision that they make and accordingly there is a need to be satisfied that the decision that is in fact made is not one which can be said to fall into that category."

207. In a later passage Collins J, having referred to other authority in this field, said:

> "There is no doubt that the court does have the power to and indeed should depart from the strict principles in *Ladd v Marshall* indeed any strict principles if the interests of justice so require."

He then referred to a passage in the judgment of Carnwath LJ in *E v Secretary of State for the Home Department* 2004 QB 1044 at 1076 para 82 in which, referring to a dictum of Sir John Donaldson MR in *R v Secretary of State for the Home Department ex parte Momin Ali* [1984] 1WLR663at 673 he stated:

> "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"

Collins J then concluded:

> "The effect of that as I see it is that, as the court said in *E, Ladd v Marshall* is the stating point and availability is a factor to be taken into account and certainly will be given considerable weight because it is important that there should be finality. It seems to me that in cases of availability the court should look with care to see whether in reality the evidence could have affected the result and if ignored would mean that there was a risk that human rights would be breached."

208. It is also pertinent to point out that, although the context of Collins J's remarks was a consideration of whether there was a fresh claim as defined by the former Immigration Rule 346 as distinct from a statutory provision precluding a right of appeal where a fresh claim has already been held to exist, the practical consequence of a construction adverse to a claimant could ultimately in both contexts lead to a similar result, namely return of the claimant in circumstances where there is a possible risk of persecution death and/or torture. However in my view neither *Gungor* nor any of the other *Ladd v Marshall* authorities to which I was referred compels the answer that Section 96 (1) and (2) must be construed so as not to apply the certification

process to an asylum or human rights claim. First none of those authorities was concerned with the construction of a statute whose clear and express terms precluded a right of appeal in specified circumstances. Second there is in my view a material difference between the situation postulated in Collins J's extreme example and the circumstances in which the putative power to certify arises in section 96 (1) and (2). In the former the fresh evidence which was clearly available at the time of the earlier appeal has been accepted by the Secretary of State as being both credible and showing that there is a real risk that if returned the individual will suffer a breach of his Article 3 rights. In the latter the fresh evidence which was available at the time of the earlier appeal has already been rejected by the Secretary of State as being both incredible and not showing that there is a real risk that if returned the individual will suffer a breach of his Article 3 rights.

209. Third the old Rule 346 was a strict exclusionary provision which provided that the Secretary of State would disregard any material which was available to the applicant at the time when the previous application was refused or when any appeal was determined even if it was significant or credible or indeed actually believed by the Secretary of State and regardless of whether there was a satisfactory explanation for the material not having been deployed on the previous application. By contrast section 96 (1) and (2) both explicitly and implicitly call for an assessment of the new material, the reasons why it was not deployed at the first appeal or in response to the first one stop notice, the circumstances surrounding the bringing of the new claim, and the potential consequences of certification. Thus, unlike the former rule 346, they provide a mechanism whereby the potentially competing policy considerations of finality and prevention of abuse on the one hand and provision of rights of appeal to a primary fact finding tribunal in the context of asylum and Article 3 claims are required to be taken into account and given the appropriate weight called for by the facts of a particular case.

210. Section 96(1) and (2) thus provide explicitly and implicitly safeguards against possible breaches of a claimant's Article 3 and asylum rights explicitly in that the right of appeal cannot be precluded where in the opinion of the Secretary of State there is a satisfactory reason for the material not having been deployed earlier and, in my view ,implicitly in the safeguard that the power to certify cannot be exercised and thus the right of appeal cannot be precluded without the exercise by the Secretary of State of a discretion. In my judgment it is in the context of those two safeguards that the evolving approach of the courts set out in the authorities to which Collins J referred can and should be applied.

211. In *Haile's* case the appeal to the Court of Appeal was based on fresh evidence which could have been obtained much sooner had the appellant's solicitor's exercised reasonable diligence at first instance. The appellant was an Ethiopian seeking asylum from political persecution. Simon Brown LJ as he then was said:

> "It is of course most unfortunate that this mistake was not uncovered until it was when and plainly it could and should have been. Were the old *Ladd v Marshall* principles to be strictly applied, then surely the appellant would fall at this first hurdle. 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 exparte Ali* 1984 1WLR 663,673: "the decision on *Ladd v Marshall* 1954 1WLR1489 has no such place in that context", although he then added: (c) "however I think that the principles that 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 then if the wider interests of justice so require" (para 25).

212. In *E*, in the paragraph cited above, Carnwath LJ stated:

> "We would respectfully accept the statement of Sir John Donaldson MR [in Ali] 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 the 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 then in exceptional circumstances" (para 82)

213. In *FP (Iran) v Secretary of State for the Home Department* 2007 EWCA CIV 13 Sedley LJ held that the appeals raised the question of what if anything can be done where an appellant's lawyers have failed to notify the AIT of a change of his or her address with the result that the appellant knows nothing of the hearing and the appeal is determined against him or her (para 1). The appeal concerned the effect of Rules 19 (1) and 56 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. It was accepted by the Secretary of State that the combined effect of those Rules was that a party who personally has done nothing wrong may find that he has lost an appeal of which he knew nothing and which he might had he been present have won.

214. Sedley LJ, having reviewed the authorities, held that the Rules were unlawful:

> "For reasons which I have given they forfeit what our constitutional law (consonantly now with Article 6 of the European Convention of Human Rights) regards as a fundamental right, the right to be heard on an issue of radical importance to the individual, on grounds which are so widely and rigidly prescribed that they shut out parties who have done nothing wrong but whose lives and safety may in consequence be put at risk. In so doing they sacrifice fairness to speed and deny the Tribunal any power to hold these two desiderata in balance." (para 49)

As appears from this review, these authorities were concerned with the admissibility of evidence on appeals to the Court of Appeal or on judicial review from the IAT or with the construction of Rules. In none of them did the court hold that a statute which on its face explicitly precluded a right of appeal in specified circumstances did not, by reason of a principle requiring departure from strict *Ladd v Marshall* principles, apply to an asylum or human rights claim.

215. However drawing from these authorities, in my view it is incumbent on the Secretary of State, when considering whether there are satisfactory reasons under Section 96 (1) (c) and 96 (2((c) and when considering whether to exercise his discretion to certify, to have well in mind the approach enunciated by the courts in these cases. If I were of the view that the Secretary of State was entitled to take a strict or blinkered approach to the question of what constitutes a "satisfactory reason" or that he did not have to exercise a discretion before certifying or that in exercising that discretion he was not obliged to take into account the matters to which I have referred earlier in this judgment, I would see force in Ms Dubinsky's submissions. It might be possible to imagine an extreme example where on a strict or narrow view of what is a satisfactory explanation and if there were no discretion not to certify even where there was no satisfactory explanation, the application of section 96 (1) and (2) to an asylum or Article 3 claims might lead to a result which it would be hard to imagine Parliament intended. However, as already indicated, I am not of that view.

216. In my view the proposition which lies at the heart of the Claimant's case, whichever way it is put, and on which its success or failure ultimately depends, is the submission that where there is a current disputed and arguable asylum or Article 3 claim, Article 3 and the Geneva Convention require that a right of appeal will be given by which the current refusal can be challenged. According to this submission the obligation on contracting states to provide an effective domestic remedy in respect of Article 3 rights is not satisfied by the combination of anxious scrutiny by the Secretary of State of new representations, following the rejection of the initial claim both by the Secretary of State and on appeal, and the availability of the right to apply for judicial review of a rejection by the Secretary of State of the new representations. Particularly in a case where the credibility of the claimant is in issue the practical shortcomings of judicial review do not provide an adequate independent examination of the merits of the second claim. Nothing short of a right of appeal involving an opportunity for the claimant to have his factual assertions believed by submitting himself to cross examination in front of an independent tribunal can constitute the effective domestic remedy to which the claimant is entitled and avoid a breach of the claimant's Article 3 rights.

217. In my view the Claimant's case depends upon that proposition being correct. Without it it seems to me clear that as a matter of statutory interpretation, for the reasons advanced by Mr Strachan, the powers to certify conferred on the Secretary of State by Section 96 (1) and Section 96 (2) of the 2002 Act do and were intended by Parliament to apply to asylum and Article 3 claims. The language used in Section 96 (1) and Section 96 (2) is entirely general and unqualified. It makes no distinction between asylum and/or human rights claims on the one hand and other claims on the other. Still less does it make such distinction by reference to the narrower category of Article 3 claims. In this critical respect it is in marked contrast to section 92 (4) which excludes the prohibition against in-country appeals under section 92 (1) in the case of an appellant who has made an asylum claim or a human rights claim. I accept Mr Strachan's submission that the irresistible inference is that no similar distinction to that explicitly created in section 92 (4) can have been intended in section 96 (1) and (2) and that the Claimant's construction is on its face inconsistent not only with the clear words but also with the structure and context of part V of the 2002 Act. If the draftsman had wanted to exclude the application of Section 96 to asylum and human rights claims he could and would have done so using the same definition contained in

Section 113. Where it is intended that there should be distinctions in respect of the rights of appeal applicable to different types of claim they are expressly identified in the statutory scheme. No such distinction exists in Section 96 nor in my view is there any warrant for inferring that it must have been intended.

218. Further and in any event the Claimant's argument by analogy with Section 92 (4) does not assist him in supporting a construction of Section 96 (1) and (2) which excludes from its operation not all human rights claims(as does Section 92(4)) but only those based on Article 3. In this context I would add that I see force in Mr Strachan's parallel argument based on Section 92(4).That is that if the Claimant is right and Section 92(4) is intending to create a special status for certain appeals which then precludes the certification process under Section 96, it would presumably be an argument that should also apply to Section 92(4)(b) which deals with appeals relating to EEA nationals. But no argument was advanced on behalf of the Claimant to explain why certification should be precluded in such cases nor indeed was it submitted that certification is precluded in such cases.

219. Further I accept Mr Strachan's submission that to construe Section 96(1) and (2) as not applying at all in the case of fresh asylum or human rights claims is to ignore and run counter to the obvious policy reasons which Parliament plainly considered to be a legitimate and necessary restriction that forms part of the statutory framework to ensure that immigration appeals are comprehensive and cover every available ground for seeking relief and that the system is not abused by subsequent appeals where the opportunity for an appeal has already arisen. In this context the analysis by Kennedy LJ of the statutory scheme in the 1999 Act is instructive:

> "Part IV of the Act deals with the various aspects of appeals and, as it seems to me, it has three main objectives –
>
> (1) to grant specific rights of appeal, for example to those who claim that in the context of immigration their human rights have been infringed (section 65) or who have been refused asylum (section 69)
>
> (2) to ensure that if an appeal is brought it will be comprehensive and cover every available ground for seeking relief (section 74)
>
> (3) to prevent abuse of the appellate system – see for example section 73, which only operates where one appeal (the original appeal) has been finally determined."

220. There are material differences between the 1999 and 2002 Acts, not least that, as appears from the passage cited, specific rights of appeal were granted in the former in respect of claims based on alleged breaches of asylum and human rights and that the power to certify conferred by Section 73(2) of the former was expressly referable to a claim that a decision was in breach of the appellant's human rights. Nonetheless it

seems to me clear that in Part V of the 2002 Act, as in part IV of the 1999 Act, two of the statutory purposes were to ensure that if an appeal is brought it will be comprehensive and cover every available ground for seeking relief and to prevent abuse of the appellate system.

221. Accordingly I would, subject to what I have said above, accept the submissions of Mr Strachan which I have summarised in paragraphs 192 to 195 above.

222. It is for those reasons that in my view the Claimant's case depends upon the contention to which I have referred as to what is required under Article 3 to be provided by the United Kingdom by way of an effective domestic remedy. Whatever might otherwise be the correct statutory interpretation of section 96 (1) and section 96 (2) must, so the Claimant submits, yield before the imperative imposed by Section 3 of the Human Rights Act to read and give effect to those subsections in a way which is compatible with Convention rights. Any interpretation which meant that Section 96 precludes a right of appeal against the rejection by the Secretary of State of a fresh Article 3 claim or which entitled the Secretary of State to certify such a claim would be incompatible with the Claimant's Article 3 rights.

223. In my view the authorities to which I was referred do not support the proposition for which the Claimant contends. Before considering them it is necessary to emphasise that, as Mr Strachan pointed out and as was not challenged by Ms Dubinsky, Article 13 of the ECHR, unlike Article 3, was not incorporated into domestic English law by the Human Rights Act. Nor is it one of "the Convention Rights" as defined in Section 1(1) of that Act so that the requirement under Section 3 of that Act to read and give effect to legislation so far as it is possible to do so in a way which is compatible with the Convention Rights does not require Section 96(1) and (2) to be read so far as it is possible to do so in a way which is compatible with Article 13, at any rate unless that is required in order to enable those subsections to be read in way which is compatible with Article 3.

224. That is of importance in the current context because it is Article 13 which guarantees an effective remedy for violation of other Convention rights and the Claimant's contention is that since his only effective remedy for the alleged breach of his Article 3 rights involved in the decision to refuse him permission to remain in the United Kingdom is an appeal to the AIT under Section 82 of the 2002 Act, Section 96(1) and (2) cannot be construed so as to permit his claim to be certified since that would be to deprive him of that effective remedy. Article 13 provides: " Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." It follows that in order to succeed on his Section 3 construction argument the Claimant must establish that any other construction would be incompatible not with his Article 13 rights but with his Article 3 rights.

225. In *Etame* Blake J said : "Although the right to an effective remedy under Article 13 of the ECHR has not been enacted as a Convention right within the Schedule to the Human Rights Act 1998, it is apparent that the case law of the Strasbourg Court as to the requirements of an effective remedy to prevent a violation of Article 3 of the ECHR would need to be considered and taken into account by any court charged with

examining whether removal would be a violation of a human right (see Human Rights Act 1998 s. 2 (1) and s. 6))" (paragraph 47).

226. Section 2(1) provides that a court determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights so far as, in the opinion of the court it is relevant to the proceedings in which that question has arisen. In this case the trigger for a requirement under Section 2(1) to take into account decisions and judgments of the European Court would have to be Article 3 since Article 13 is not a defined Convention Right under the Act. It is also in my view pertinent to repeat in this context that in relation to the construction argument it is only Article 3 and not Article 13 with which Section 3 of the Human Rights Act requires the provisions of the 2002 Act to be read in a way so as to be compatible in so far as it is possible to do so.

227. In *Soering v UK* (1989) 11EHRR 439 a West German national who had unsuccessfully challenged the Home Secretary's decision to extradite him to the US to face trial in Virginia for Murder, a trial which could expose him to the so-called "death row phenomenon", complained to the European Court of Human Rights under Article 3 and Article 13. He succeeded under the former but failed under the latter.

> "In judicial review proceedings the Court may rule the exercise of executive discretion unlawful on the ground that it is tainted with illegality, irrationality or procedural impropriety. In an extradition case the test of "irrationality" on the basis of the so-called "Wednesbury principles" would be that no reasonable Secretary of State could have made an order for surrender in the circumstances. According to the United Kingdom government, a Court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take. Although the Convention is not considered to be part of United Kingdom law, the Court is satisfied that the English Courts can review the reasonableness of an extradition decision in the light of the kind of factors relied on by Mr *Soering* before the Convention institutions in the context of Article 3 ". (paragraph 21).

228. In *Vilvarajah* five Tamils complained to the European Court of Human Rights that their removal to Sri Lanka was a breach of Article 3 and that, despite the availability of judicial review, they had no effective remedy in the UK in respect of their Article 3 complaint as required by Article 13. It was common ground between the parties that the applicant's claim under Article 3 was an "arguable" one on its merits.

229. The applicants submitted that in judicial review proceedings the courts do not control the merits of the Secretary of State's refusal of asylum but only the manner in which the decision on the merits was taken. In particular they do not ascertain whether the Secretary of State was correct in his assessment of the risks to which those concerned would be subjected. Moreover the courts have constantly stated that in reviewing the

exercise of discretion in such cases they will not substitute their views on the merits of the case for that of the Secretary of State's. The applicants accepted that judicial review might be an effective remedy where, as in the *Soering* case, the facts were not in dispute between the parties and the issue was whether the decision was such that no reasonable Secretary of State could have made it. However this was not so in their case where the question of the risks to which they would be exposed if sent back to Sri Lanka was the very substance of the dispute with the Secretary of State.

230. The Court rejected that submission. It referred to the passage in the *Soering* judgment cited above and concluded:

> "The court does not consider that there are any material differences between the present case and the *Soering* case which should lead it to reach a different conclusion in this respect." (para 124).

It is of note that in the context of Article 3, the court observed that Contracting States have the right as a matter of well established international law and subject to their treaty obligations including Article 3 to control the entry residence and expulsion of aliens. As to Article 13, the Court held:

> "Article 13 guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order (ibid). Its effect is thus to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see inter alia Soering para 120). However, Article 13 does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in conforming to their obligations under this provision." (para 122).

231. The Court emphasised that "the Court's examination of the existence of a risk of ill-treatment in breach of Article 3 must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe" (para 108 quoting *Soering* para 88). It concluded that the procedure of judicial review in the United Kingdom satisfies that requirement for the purposes of Article 13. The Court quoted Lord Bridge's dictum in *Bugdaycay*

> "…all questions of fact on which the discretionary decision whether to grant or withhold leave to enter or remain depends must necessarily be determined by the Immigration Officer or the Secretary of State…Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. 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" (945,952).

The Court concluded:

> "Indeed the [English] courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk. Moreover the practice is that an asylum seeker will not be removed from the UK until proceedings are complete once he has obtained leave to apply for judicial review. …While it is true that there are limitations to the powers of the courts in judicial review proceedings…the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13. The applicants thus had available to them an effective remedy in relation to their complaint under Article 3." (paras 125, 126 and 127).

232. It is in my view of particular significance that the issue in *Vilvarajah* was whether the fact that the English court in judicial review proceedings is not a primary finder of fact deprives it of the character of an effective remedy such as to satisfy Article 13 in a case where the question of the risks to which the applicant would be exposed if sent back to Sri Lanka was the very substance of the dispute. The applicant's submission that it did was rejected by the Court. That is the very submission which underlies the Claimant's contentions in this case. It was of course open to him to seek judicially to review the Secretary of State's rejection on its merits of his new and indeed fresh July 2004 claim. He did not do so. If the availability of that remedy is sufficient to satisfy the Claimant's Article 13 right to an effective remedy in respect of his Article 3 claim, it follows that it would not be necessary to read Section 96 (1) and (2) of the 2002 Act and to give effect to it in such a way as to ensure that it did not deprive him of the right to an appeal to the IAT against the same refusal by the Secretary of State of his July 2004 claim. Such an interpretation would not be necessary so as to make the 2002 Act compatible with the Claimant's Convention rights even if (which they do not) those rights included Article 13, since the existence of a right of appeal under the Act would not be necessary to ensure the availability of an effective Article 13 remedy.

233. Ms Dubinsky sought to distinguish *Vilvarajah* on three grounds. First she submitted that credibility was not an issue in *Vilvarajah*, each of the asylum Claimants in that case having had his account "taken at its highest" but refused by the Secretary of State on the basis that, even on the given account, the asylum Claimant would not be at risk on return to his home country. Thus although the European Court held that the Claimants were not entitled to a full merits appeal and could only have their cases examined on judicial review on Wednesbury grounds, albeit with anxious scrutiny by the Administrative Court, the material examined by the Administrative Court (going purely to country conditions and risk on return) was no different to the material that would have been examined by a tribunal. The position she submitted is very different

where, as in the present case, the Secretary of State has rejected an asylum claim on the basis that the underlying account is not believed. In disputed credibility cases such as the Claimant's access to a hearing in which full oral evidence will be heard and the asylum Claimant has an opportunity to explain discrepancies under cross examination with the court sitting as primary decision maker is of vital importance.

234. This latter submission neatly encapsulates the material differences between the nature of an appeal to the IAT from a refusal of an immigration claim by the Secretary of State on the one hand and the nature of an application for judicial review of that decision on the other. Indeed it is no doubt because of that difference that Parliament provides in the case of initial claims just such a right of appeal to the IAT in Section 82 of the 2002 Act. If the limited role of judicial review was regarded by Parliament as insufficient protection in respect of an initial claim why should it be regarded as sufficient protection in respect of a fresh claim? The only difference between the two situations is that in the latter the Claimant relied on evidence which he could and should have deployed on the first appeal and/or in response to the one-stop Notice. How can that fact justify the lower degree of protection given that the adverse consequences of an incorrect decision are potentially the same in both cases?

235. Approached as a matter of general principle, I would find it hard to provide a satisfactory answer to that question not least because of those authorities which make it clear that because of the absolute protection afforded to Article 3 rights, those rights are not lost even by Claimants who have acted in bad faith or whose conduct is in other ways subject to criticism. However the question in my view begs the question it seeks to answer, namely whether in Article 3 cases nothing short of a full merits appeal with a tribunal acting as a primary fact finder can comply with the Claimant's right under Article 13 to an effective domestic remedy. In my view the Court in *Vilvarajah* gave a clear negative answer to that question. Although Ms Dubinsky is right to identify as one of the differences between a full merits appeal and judicial review the fact that the former but not the latter involves a hearing with full oral evidence and the opportunity for the Claimant to explain discrepancies under cross-examination that is not the only difference. Another difference is that in the former the AIT is entitled to make new primary findings of fact and substitute its own factual findings for those of the Secretary of State whereas in the latter the Administrative Court is confined to considering whether the Secretary of State's decision was one which no reasonable decision-maker could take or was in some other way irrational. That was a difference of potential importance in *Vilvarajah* itself where the facts were in dispute and findings of fact were required to be made as to the risks to which the applicants would be exposed if sent back to Sri Lanka. However that material difference was addressed head on by the Court and did not prevent it from concluding that the powers of the English courts in judicial review proceedings provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13. It thus appears that the Court considered that in so far as Article 13 requires anxious scrutiny by an independent tribunal that scrutiny need not extend to making primary findings of fact but may instead consist of reviewing decisions of the administrative authorities in asylum cases, so as to ensure that they do not offend the *Wednesbury* principles.

236. In theory there is of course a difference between a case in which the evidence is strong enough to persuade an IAT on appeal that the Secretary of State's decision was

wrong but not strong enough to persuade the Administrative Court that it was one which no reasonable Secretary of State could have taken. However as appears from the decision of the Court of Appeal in *Turgut* in practice the adverse consequences for a Claimant flowing from the difference between the two remedies may be significantly reduced by the robust approach which the Court of Appeal held to be appropriate in judicial review proceedings in such cases. Moreover to the extent that, not withstanding such a robust approach, there remain in the mind of the Secretary of State or other decision maker when considering whether to certify a fresh claim under section 96 (1) or section 96 (2) a question as to whether, because of the peculiar importance in a particular case of the credibility of the claimant and his factual version of events, as to whether the right to apply for judicial review would provide an adequate safeguard against the possibility of a wrong decision having been taken, that in my view would be a matter to be taken into account in considering whether it is right to exercise the discretion to certify or whether to allow the Claimant to exercise a right of appeal under Section 82.

237. Ms Dubinsky's second ground for distinguishing *Vilvarajah* was the submission that its conclusions were modified by the European Court of Human Rights in its later decision in *Chahal v UK* (1997) 23EHRR 413. She submitted that the Court in that case found that judicial review did not constitute an effective remedy for the purposes of Articles 3 and 13. In that case the Court concluded:

> "Having regard to the extent of the deficiencies of both the judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3" (paragraph 155).

238. The applicant in that case was a Sikh separatist leader who was refused asylum and whom the Secretary of State proposed to deport to India as a threat to national security in the United Kingdom. Following the failure of his judicial review challenge the applicant succeeded in Strasbourg under both Articles 3 and 13. However in my view the reasons why he succeeded do not support Ms Dubinsky's submission.

239. The aspect of the judicial review proceedings and the proceedings before the advisory panel which the Court held to be deficiencies which prevented those proceedings from being considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 was that neither the Courts nor the panel could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of the risk of a breach of his Article 3 rights in the event of return to India. :

> "In the present case neither the advisory panel nor the Courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security consideration. On the contrary, the court's approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see paragraph 41 above). It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3

> complaint for the purposes of Article 13 of the Convention." (para 153).

240. Thus the decision in *Chahal* was a comparatively narrow one. In an earlier decision the Court had held that in an Article 8 and Article 10 case which involved national security, Article 13 required a remedy that only had to be "as effective as can be" in circumstances where national security considerations did not permit the divulging of certain sensitive information. In that case (*Class and Others and Leander*) the Court held in *Chahal* that:

> "It must be born in mind that these cases concerned complaints under Articles 8 and 10 of the Convention and that the examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial. In such cases given the irreversible nature of the harm that might occur if the risk of ill treatment materialised and the importance the court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. Such scrutiny need not be provided by a judicial authority but if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective. In the present case neither the advisory panel nor the Courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security consideration. On the contrary, the court's approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chaahal against a danger to national security (see paragraph 41 above). It follows from the above consideration that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 of the Convention. Moreover the court notes that in the proceedings before the advisory panel the applicant was not entitled inter alia to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (see paragraph 30, 32 and 60 above). In these circumstances the advisory panel could not be considered to offer sufficient procedural safeguards for the purpose of Article 13. Having regard to the extent of the deficiencies of both the judicial review proceedings and the

> advisory panel, the court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3 (see para 150, 151, 152, 153, 153, 155)"

241. None of these deficiencies in the judicial proceeding in the case of *Chahal* is material in the present case. If the Claimant had applied for judicial review of the Secretary of State's decision to reject his July 2004 claim, on the ground that no reasonable Secretary of State could have failed to conclude that he faced a real prospect of breach of his asylum and Article 3 rights if returned to Sri Lanka, the Administrative court would not have been required to have regard to any national security claims advanced by the Secretary of State. Nor would the court's approach have been one of satisfying itself that the Secretary of State had balanced the risk to the Claimant against any danger to national security. The Claimant would have been entitled to legal representation and he was given the reason for the rejection of his claim in the Decision Letter. Thus none of the factors which the Court held rendered the judicial review proceedings in *Chahal* such as not to satisfy the requirements of Article 13 would have been present.

242. It is convenient in this context to deal with a related submission of Ms Dubinsky that the decision in *Chahal* as well as (by analogy) that in *Danian* [1999] EWCA Civ 3000 are authority for the fundamental principle that individuals are entitled to the full protection of Article 3 of the ECHR regardless of their own conduct. That submission is in my view broadly correct, with the qualification that, as acknowledged by Ms Dubinsky, in fact the Court of Appeal in *Danian* was dealing not with Article 3 of the ECHR but with an asylum claim.

243. As to *Chahal* I have quoted above, in the section summarising the Claimant's submissions, from the extract of the decision of the Court in which it held that whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion and that in such circumstances the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. (see paras 79 and 80). The Court added: "The protection afforded by Article 3 is thus wider than that provided by Article 32 and 33 of the United Nations 1951 Convention on the Status of Refugees".

244. As to *Danian* Brooke LJ held:

> "For all these reasons I do not accept the Tribunal's conclusion that a refugee sur place who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention and this country is not entitled to disregard provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against

> refoulement at the time his application is considered." (page 17)

245. As a matter of analysis, however, it is not clear to me how this submission assists the Claimant's case in support of Submission (a). In *Chahal* and *Danian* the proposition laid down by the courts was that where a claimant has shown that there exist 'substantial grounds' for believing that he would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State (*Chahal*) or that he has a 'genuine and well founded' fear of persecution for a Convention reason and there 'is' a real risk that such persecution may take place, he is not deprived of the Article 3 rights (*Chaha*l) or non refoulement rights (*Danian),* which are thereby engaged and to which he would otherwise be entitled, by reason of his own conduct, however culpable.

246. It is no part of the Secretary of State's case as I understand it in this application to argue that the conduct of the Claimant disentitles him to Article 3 or Geneva Convention rights which have been engaged by the evidence as to the risk he faces and to which he would otherwise be entitled under Section 82. It is her case that the right conferred by Section 82 of the 2002 Act in certain circumstances to an appeal against her decisions is a right conferred by statute but not a right to which he would ,but for his conduct, be entitled by virtue of Articles 3 and 13 of the ECHR or Article 33 of the Geneva Convention. Her case ,in my view, is supported by the decisions of the Court in *Soering, Vilvarajah, Chahal* and the cases referred to below which held that the availability of a right to judicial review satisfies the Article 13 right to an effective remedy.

247. Although it is plainly right that it is the Claimant's conduct in not mentioning the matters on which he relied in his second claim on the first appeal or the one stop statement that deprived him of the statutory right he would otherwise have had to appeal under Section 82, that is not a right to which, according to the Court, he is entitled by Article 3 and/or Article 13. That is to be contrasted with the facts of *Chahal* itself where the Court held that because of his alleged conduct the applicant's Article 13 right to an effective remedy to protect his Article 3 rights had been wrongly replaced by a remedy which was, in the language used to describe the approach in *Class and Leander*, merely "as effective as can be" because in the judicial review proceedings the court was unable to review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security consideration. On the contrary, the court's approach was one of satisfying itself that the Home Secretary had balanced the risk to Mr Chahal against a danger to national security.

248. The question for decision under Submission (a) is whether section 96 (1) and (2) of the 2002 Act must be read so as not to apply to deprive asylum and Article 3 claimants of a right of appeal. In support of the submission that it must be so construed the Claimant submits that a contrary construction would be incompatible with his Article 3 ECHR rights by confining him to judicial review rather than a right of appeal under Section 82. On that issue it does not seem to me that either *Chahal* or *Danian* assists the Claimant. If, as is in my view the case, the decisions in *Vilvarajah* and *Turgut* are authority for the proposition that judicial review is an adequate domestic remedy for the purposes of Article 3 and Article 13, a construction of Section 96 (1) and (2) that confines a person in the position of the Claimant to judicial

review is not incompatible with his Article 3 or 13 rights. The fact that he has failed to deploy the new material on the first appeal or in response to the one-stop notice will not deprive him of the right to judicial review and thus will not deprive him of his Article 13 effective remedy or breach his Article 3 rights. What that failure will or may deprive him of is a right to appeal under section 82. That however, according to *Vilvarajah* and *Turgut*, is not something to which he is entitled under Article 13.

249. By contrast it does seem to me that there is scope for the application of the principles enunciated in *Chahal* and *Danian* in stages three and four of the Section 96 certification process. Whereas part of the purpose of that section is in my view to promote finality and efficiency in the disposal of asylum appeals and to to provide an incentive for Claimants to be open and up front in their initial claims, it does not seem to me to be any part of the purpose of Section 96 to punish those who for whatever reason fail to do so. Thus both at the stage of considering whether there is satisfactory reason for the relevant matter not having been relied on in the first appeal or one stop statement and at the stage of considering whether or not to exercise the discretion to certify, it seems to me that the Secretary of State should bear in mind that, as pointed out in those two authorities, an asylum or Article 3 Claimant is no less entitled to full protection against the risk of a breach of his asylum and Article 3 rights because of any failure to deploy material first time round, however reprehensible that failure might be in any particular case.

250. Ms Dubinsky's third ground for distinguishing *Vilvarajah* is that when it was decided there was no in-country right of appeal at all for asylum claimants in the United Kingdom whether on an initial or on a fresh claim. That was first introduced by the Asylum and Immigration Appeals Act 1993. In my view that does not justify the conclusion that *Vilvarajah* is no longer good law in relation to the adequacy of judicial review proceedings as an effective Article 13 compliant remedy. I further note that this point did not deflect the Court of Appeal from endorsing the *Vilvarajah* approach in *R v SSHD ex parte Turgut* [2001] 1ALLER 719 at 724-9, to which I now turn.

251. Although the context in which it was considered by the Court of Appeal was different from the present case, the first issue raised in *Turgut* is of direct relevance to the issue I have to decide. The applicant was a Turkish Kurd asylum seeker whose asylum claim was rejected by the Secretary of State and again on appeal by the Special Adjudicator who found him entirely lacking in credibility, his evidence being littered with discrepancies.The matter came before the Court of Appeal as an appeal against the refusal by Carnwarth J of the applicant's challenge of the Secretary of State's subsequent refusal to grant him exceptional leave to remain on the ground that there were substantial grounds for believing there to be a real risk that on return to Turkey he would face treatment proscribed by Article 3. The first issue considered by the Court of Appeal was:

> "Is it for the Court to assume upon such a challenge the primary fact-finding role? Must we, in other words, decide for ourselves whether on all the material before us we for our part regard the applicant (and those in like case) as subject to the risk in question? Or are we exercising what still remains essentially a supervisory jurisdiction, heightened though our responsibilities

> would undoubtedly be in the context of so fundamental a human right as that at stake here?"

252. The applicant submitted that the conventional approach to a judicial review challenge on Article 3 grounds of a conclusion by the Secretary of State that no substantial grounds exist for believing that an applicant would be at real risk of Article 3 ill treatment would fail to satisfy the UK's obligation under Article 13 to provide an "effective remedy". Simon Brown LJ identified what he described as "the conventional approach" to such a challenge as being that set out in Sir Thomas Bingham MR's judgment in R *v Ministry of Defence ex parte Smith* [1996] QB517 at 554:

> "Mr David Pannick submitted that the Court should adopt the following approach to the issue of irrationality: 'The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision in unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above'. This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC514 *and R v Secretary of State for the Home Department ex parte Briand* [1991] 1AC696. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to "do right to all manner of people"…" (554,556).

253. Simon Brown LJ said that on what he called the Smith approach

> "It is clear that the court's role even in a case involving fundamental human rights remains essentially supervisory. It must, of course, as Lord Bridge observed in *ex parte Bugdaycay* review the impugned decision (certainly in an Article 3 case) with "the most anxious scrutiny". But it must not adopt the role of primary decision-maker."

The Court of Appeal rejected the submission that the Smith approach was inadequate as a means of providing an effective remedy and thus satisfying the UK's Article 13 obligation in an Article 3 case. Simon Brown LJ, in a judgment with which the other two members of the court agreed, having reviewed *Soering*, *Vilvarajah* and *Chahal* cited the following passage from the decision of the European Court of Human Rights in *D v UK* [1997] 24EHRR 423:

> "70. In its *Vilvarajah and others* judgment and its *Soering* judgment the Court considered judicial review proceedings to be an effective remedy in relation to the

> complaints raised under Article 3 in the contexts of deportation and extradition. It was satisfied that English Courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of judicial review would have power to quash a decision to expel or deport an individual to a country where it was established that there was a serious risk of inhuman or degrading treatment on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.
>
> 72. The applicant maintained that the effectiveness of the remedy invoked first before the High Court and subsequently before the Court of Appeal was undermined on account of their failure to conduct an independent scrutiny of the facts in order to determine whether they disclosed a real risk that he would be exposed to inhuman and degrading treatment. He relied on the reasoning in the *Chahal v United Kingdom* judgment. However the Court notes that in that case the domestic courts were precluded from reviewing the factual basis underlying the national security considerations invoked by the Home Secretary to justify the expulsion of Mr Chaahal. No such considerations arise in the case at issue."

The decision in *D v UK* was thus a further confirmation by the European Court of Human Rights of its conclusion that the availability of judicial review on grounds of irrationality satisfies the requirements of Article 13 in an Article 3 case. It also explicitly confirmed that the decision in *Chahal* turned on the narrow point that the domestic courts in that case were precluded from reviewing the factual basis underlying the Secretary of State's decision and that provided the domestic court has the power to review the factual basis underlying the decision of the Secretary of State there is no breach of Article 13 by reason of a failure to conduct a independent scrutiny of the facts.

254. It is of interest that the Court in *D v UK* stated that where it is "established" that there is a serious risk of inhuman or degrading treatment the English Court on a judicial review has the power to quash the decision to expel on the ground that the decision was one that no reasonable Secretary of State could take. There might be thought to be implicit in that formulation a suggestion that in an Article 3 case the gap between the powers of a fact finding tribunal on an appeal and the power of a reviewing court in judicial review may be less wide than in other contexts. But the formulation begs the question of what it meant by "established", a question answered by Simon Brown LJ in *Turgut*. Concluding his review of the Strasbourg jurisprudence on Article 13, he cited the following passage from the decision of the Court in *Smith and Grady v UK* (27th September 1999):

> "138…the present applications can be contrasted with the cases of *Soering* and *Vilvarajah* cited above. In those cases the Court

> found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and expulsion matters coincided with the Court's own approach under Article 3 of the Convention."

255. Simon Brown LJ stated:

> "Mr Nicol's argument runs essentially as follows. "the Court's own approach under Article 3 of the Convention" (see concluding words of paragraph 138) is, he says, plain. It is that set out in paragraph 108 of its judgment in *Vilvarajah* and in paragraphs 95 and 97 of its judgment in *Chahal*: the ECHR will rigorously examine all the material before it and make its own assessment on risk as at the date of the hearing that, therefore, must be the approach of the domestic court too: only thus will it have "coincided with" the ECHR's approach (as paragraph 138 states that it does) and so explain why the court regards judicial review as an "effective remedy" in Article 3 cases (save of course, in *Chahal* where the national security aspect of the case precluded the domestic courts from forming their own view upon it), but not in a case like *Smith and Grady* itself."
>
> Plausible though this argument appears, in my judgment it reads too much into paragraph 138. As the cited passages from the court's judgments show, the ECHR know full well the nature of the judicial review process and cannot be thought to suppose that the reviewing court ever adopts the role of primary fact finder. It is one thing to say that an administrative decision to deport will be rigorously examined and subjected to the most anxious scrutiny: quite another to say that the court will form its own independent view of the facts which will then necessarily prevail over whatever view has been formed by the Secretary of State.
>
> Where therefore the court in *Soering*, *Vilvarajah* and *D* speak of the domestic court in judicial review having the power to quash a decision "where it was established that there was a serious risk of inhuman or degrading treatment" that can only mean "where it was established that on any reasonable review of the facts there was a serious risk of inhuman or degrading treatment" i.e. where it was established that no rational Secretary of State could have reached a different conclusion upon the material in the case.
>
> ….I therefore conclude that the domestic court's obligation on an irrationality challenge in an Article 3 case is to subject the Secretary of State's decision to rigorous examination, and this it does by considering the underlying factual material for itself to see whether or not it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed.

> All that said, however, this is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on facts. In the first place, the human right involved here – the right not to be exposed to a real risk to a Article 3 ill-treatment – is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly the court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it. Thirdly whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the "discretionary area of judgment" – the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal (see Lord Hope of Craighead's speech in *R v DPP ex parte Kebilene* [1999] 3WLR972 at 993 – 994 is a decidedly narrow one.

256. In my view the decision in *Turgut* makes it plain that the availability of judicial review of the Secretary of State's decision to reject a new claim satisfies the requirements of Article 13 and does not breach the claimant's Article 3 rights. The fact that in any particular case the new claim may, by virtue of a determination that it has a realistic prospect of success, be deemed to be a fresh claim does not in my view affect that proposition. That being so, the submission that where a new claim has been held to have a realistic prospect of success that fact of itself renders the availability of judicial review of the rejection of the claim an inadequate remedy for the purposes of Article 13 in the context of an Article 3 claim is in my view unsustainable. It follows that the interpretation of section 96 (1) and (2) of the 2002 Act contended for by the Secretary of State would not be incompatible with the Claimant's Convention rights under Article 3 and thus one which is prohibited by virtue of Section 3 of the Human Rights Act. Accordingly, in my view, the House of Lords authorities on Section 3 of the Human Rights Act referred to above do not assist the Claimant. The approach to statutory construction laid down in those cases is simply not engaged where the interpretation suggested by ordinary canons of construction is not incompatible with Convention rights. It also follows that i the interpretation of Section 96 (1) and (2) of the 2002 Act contended for by the Secretary of State would not be incompatible with the Claimant's Article 13 right to an effective remedy. In itself that is not a critical conclusion because,as already pointed out, since Article 13 is not one of the defined Convention rights under Section 1 of the Human Rights Act Section 3 of that Act does not require legislation to be read so as to be compatible with Article 13. It is nonetheless, in my view, of considerable assistance to the Secretary of State in defeating the Claimant's alternative submission that even if the interpretation for

which she contends is not prohibited by Section 3 as being incompatible with Convention rights it cannot be one which Parliament intended.

257. Ms Dubinsky sought to distinguish *Turgut* on three grounds. The first was that in *Turgut* there was no fresh claim. As already indicated it seems to me that nothing material turns on that distinction. If judicial review is an effective remedy for a claim that has been determined not to have a realistic prospect of success why should it be an ineffective remedy for a claim just because it has been determined to have a realistic prospect if success? The differences between the procedure on an appeal to the IAT and on a judicial review are the same in both cases. The second was that credibility was no longer in issue in *Turgut* so that it was not a case in which there was a need for oral evidence. As in the case of *Vilvarajah*, it does not seem to me that this fact justifies the conclusion that the reasoning of the Court of Appeal in *Turgut* was confined to cases where credibility of the applicant is no longer in issue.

258. Ms Dubinsky's third ground for distinguishing *Turgut* was that *Turgut* did not concern appeal rights and that there was no discussion of whether it would be appropriate, particularly in a case where credibility was an issue, to deprive a person of appeal rights and thereby of an oral hearing. In my view, while that is correct, it does not detract from the powerful support which the decision in *Turgut* gives to the Secretary of State's submissions in this case. That support lies in the fact that the Court of Appeal held that even though the High Court is not required to stand in the position of primary decision-maker in a judicial review of the refusal of an Article 3 claim, the existence of the right to judicial review is nonetheless an effective domestic remedy such as to satisfy the requirements of Article 13. That being so, in my view, it follows that a statutory provision which confines an asylum seeker to the remedy of judicial review by precluding a right of appeal to a fact finding tribunal cannot be said for that reason to be incompatible with Article 13 by reason of the fact that the latter remedy lacks the characteristic of access to a fact finding tribunal.

259. Ms Dubinsky relied on further authorities in support of her argument. The first was the decision of the European Court in *Jabari v Turkey* Application 40035/98. Ms Dubinsky submitted that *Jabari* is authority for the proposition that where a viable asylum claim has been made but refused there must be a full appeal in which that refusal can be challenged before the asylum claimant is removed to the country of feared persecution. The applicant in *Jabari* was a Iranian woman who sought asylum in Turkey on the ground that she would be subjected to the real risk of ill-treatment and death by stoning for adultery if returned to Iran. She was granted refugee status by the UNCHR on the basis that she had a well founded fear of persecution if removed to Iran. However her application for asylum was rejected by the police for failure to comply with section 4 of the Asylum Regulation 1994 which required asylum applications to be lodged within five days of arrival in Turkey. Her applications to the Ankara Administrative Court against her deportation and seeking a stay of execution were dismissed on the ground that her deportation was not tainted with any obvious illegality.

260. The Court held that the order for her deportation to Iran if executed would give rise to a violation of Article 3 and that there was a violation of Article 13. The Court held:

> "40. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of

> the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (see paragraph 16 above). In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention. It fell to the branch office of the UNCHR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court, on her application for judicial review, limited itself to the issue of the formal legality of the applicant's deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country of origin.

42. Having regard to the above considerations the Court finds it substantiated that there is a real risk of the applicant being subjected to treatment contrary to Article 3 if she would be returned to Iran. …

48. The Court recalls that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy and allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Moreover, in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13 (see the *Chahal* judgment cited above).

49. The Court reiterates that there was no assessment made by the domestic authorities of the applicant's claim to be at risk if removed to Iran. The refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal. Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However this course of action entitled her neither to suspend its implementation nor to have an

> examination of the merits of her claim to be at risk. The Ankara Administrative Court considered that the applicant's deportation was fully in line with domestic law requirements. It would appear that, having reached that conclusion, the court felt it unnecessary to address the substance of the applicant's complaint, even though it was arguable on the merits in view of the UNCHR's decision to recognise her as a refugee within the meaning of the Geneva Convention.
>
> 50. In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attached to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure inpugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13. Accordingly there has been a violation of Article 13 of the Convention"

It is apparent from the foregoing that there was no independent and rigorous scrutiny of the Claimant's claim that deportation would expose her to a risk of persecution by any domestic authority. The role of the Ankara Administrative Court was confined to considering whether the late filing of her asylum claim complied with the technical requirements of the Asylum Regulation 1994. Thus although the application to the Ankara Administrative Court was described as "judicial review proceedings", those proceedings were of a qualitatively different nature from judicial review proceedings in this country, in which the substance of a decision that there is no risk of persecution can be challenged, albeit applying *Wednesbury* principles. In *Jabari* Article 13 was breached because the competent national authority neither dealt with the substance of the claimant's Article 13 complaint nor was able to grant appropriate relief. In my view there is no warrant for suggesting that the Court was laying down a general proposition that the availability of judicial review in the sense in which it is available in the United Kingdom does not constitute an effective remedy under Article 13, still less that the reason it does not do so is because the English Administrative Court is not a primary fact-finding tribunal. Such a finding would be wholly out of line with the other decisions of the European Court of Human Rights referred to above. *Jabari* was an extreme case in which there had been no assessment by any organ of the national authority of the substance of the claimant's complaint, merely the mechanical application of a time limit preventing any further scrutiny of the claim. The conclusion that that breached Article 13 does not in my view assist the Claimant in this case.

261. In *R v Secretary of State for the Home Department ex parte Saleem* [2001] 1 WLR 443 the issue was whether Rule 42(1)(a) of the Asylum Appeals (Procedure) Rules

1996 was invalid and *ultra vires* as being outside the rule-making power in Section 22 of the Immigration Act 1971. That Rule deemed any notice served under the Rules to have been received two days after it was sent, regardless of whether it was received. A notice notifying the Applicant that her appeal against the rejection by the Secretary of State of her asylum claim to the Special Adjudicator had been dismissed, coupled with notice that application for leave to appeal to the IAT had to be received within five days, was sent to the Applicant's old address and not received by her. The Secretary of State argued that the Applicant was thereby debarred from exercising her right of appeal from the Adjudicator to the Tribunal conferred by Section. 20 (1) of the Immigration Act 1971, which provided:

> "Subject to any requirement of the rules of procedure as to leave to appeal, any party to an appeal to an adjudicator may, if dissatisfied with his determination thereon, appeal to the Appeal Tribunal and the Tribunal may affirm the determination or make any other determination which could have been made by the adjudicator."

262. Roch LJ held:

> "In my judgment, the right created by section 20 of the Act is a basic or fundamental right, akin to the right of access to courts of law. If it is correct that the section 20 right is a fundamental or basic right akin to the right of unimpeded access to a court, then there is this consequence, that infringement of such a right must be either expressly authorised by Act of Parliament or arise by necessary implication from an Act of Parliament … " (449D-E)

Roch LJ concluded that Rule 42(1)(a) was not expressly authorised by the 1971 Act. It went beyond regulating rights of appeal to the Tribunal in that it could deny a party her chance to appeal where the party had, through no fault of her own, failed to comply with the five-day rule.

263. Hale LJ agreed that Rule 42(1)(a) was not within the rule-making power granted by Parliament to the Lord Chancellor under section 22 (1) of the 1971 Act:

> "However I would confine that conclusion to the particular context in which it arises in this case: that is, to the notification of adjudicators' determinations. It is the combination of the tight time limit, with no discretion to extend whatever the circumstances, with the irrebuttable presumption of receipt whatever the circumstances, which has the effect which Parliament cannot have intended to authorise."

264. Thus far the decision in *Saleem* does not in my view assist the Claimant. It was a case in which the Court of Appeal held that a delegated rule-making power whose purpose was to regulate the exercise of a right of appeal could not be exercised so as, in effect, to destroy the very right of appeal. It did not involve the construction of primary legislation. The regulation in question was so inflexible and draconian in its effect, with no discretion to extend whatever the circumstances, that the Court of Appeal had

little difficulty holding that Parliament cannot have intended to authorise such an effect. By contrast, Section 96 of the 2002 Act is primary legislation. It does not permit the destruction of an existing right of appeal but rather is part of a statutory framework which precludes the existence of a right of appeal in certain specified circumstances. Nor does it have the vice identified in Rule 42(1)(a), namely an absolute bar on appeals based on the operation of a mechanical time limit preventing the operation of any discretion in cases where there was no fault on the part of the relevant party. The power to certify is not exercisable unless the Secretary of State is of opinion that in all the circumstances there is no satisfactory reason for the relevant matter not having been deployed earlier and if, having regard to all relevant matters, he considers it appropriate to exercise the discretion to certify.

265. Ms Dubinsky relied on the following passages from the judgments of Roch LJ and Hale LJ respectively:

> "A submission made on behalf of the Secretary of State is that Rule 42(1)(a) has to be considered in the context of all the procedures available to the asylum seeker. Because there are other remedies open to an asylum seeker, Rule 42(1)(a) is a permissible way to secure the timely and effective disposal of appeals. The alternative remedies referred to [include] … the remedy of judicial review of the decisions of the Secretary of State or a special adjudicator where, these being asylum cases, the courts give anxious consideration to applications for judicial review. I accept Mr Nicol's submission that the existence of these alternative remedies does not change the nature of Rule 42(1)(a). These alternative remedies are not as effective as an appeal to the tribunal.… Although an asylum seeker can apply for judicial review of the decisions of the Secretary of State or of a special adjudicator, the courts will only quash a decision that is flawed on relatively narrow grounds." (451A-C, E)

> "Mr Burnett also argues that the effect is not so drastic because of the alternative remedies available to someone such as Mrs Saleem.… She can ask the Secretary of State to exercise his power … to refer to an adjudicator any matter relating to the case which was not before the adjudicator or tribunal. She can seek a review of the Secretary of State's refusal to either of these things. This argument did not impress Hooper J. The intention of the legislature in granting asylum seekers rights of appeal to the immigration appellate authorities was that there should be a binding adjudication of the merits of their case by an independent adjudicator who was able to hear the oral evidence of the appellant. Credibility is a vital issue in many asylum appeals (see *R v Immigration Appeal Tribunal ex parte S* [1998] Imm A R 252, 261), yet those making decisions on behalf of the Secretary of State are not those who interview the asylum seekers. The Secretary of State will only consider a fresh application if it raises new material not available before.

> A reference under section 21 leaves the decision to him. Judicial review can challenge only the legality and not the merits." (458H-459C)

266. Again these dicta do not seem to me to assist the Claimant. They emphasise the undoubted fact that there are advantages to a claimant in the fact-finding powers of an appeal tribunal when compared to the review function of a court in judicial review proceedings. However, there was no discussion of Article 13 or whether the availability of judicial review is an effective remedy under Article 13. Nor was there any argument that Rule 42(1)(a) was incompatible with the Convention by confining claimants to the remedy of a judicial review on the basis that judicial review did not constitute an effective remedy under Article 13. A finding that an appeal to a fact finding tribunal is a more effective remedy than judicial review is not a finding that judicial review is not an effective remedy. The dicta relied on were rejecting a submission that it could not be assumed that Parliament did not intend to allow regulations to be passed which had the effect of destroying an unconditional statutory right of appeal which Parliament had seen fit to confer because the claimant would still be left with other alternative remedies. In my view it does not follow that Parliament cannot have intended in the 2002 Act to preclude rights of appeal from arising in specified circumstances which are clearly set out in the Act itself and which include ample scope for the exercise of discretion to take account of all the relevant circumstances of a particular case.

267. Mr Strachan placed great reliance on the cases of *Balamurali*, *Borak* and *The Queen on the Application of Khan v Secretary of State for the Home Department* [2008] EWCH 600 (Admin). Those were all cases where the power to certify either under Section 96 or the equivalent provisions in the predecessor legislation were considered by the Courts and no objection in principle identified to its existence, exercise or compatibility with the ECHR. Although the point raised on this application, namely whether the power to certify cannot apply to asylum or Article 3 cases either as a matter of general construction or by reason of Section 3 of the Human Rights Act and incompatibility with Convention rights, was not in issue in those cases, the decisions plainly proceeded on the assumption that it can. If the Claimant's argument to the contrary in this case is right, those decisions were wrongly decided.

268. *Balamurali* was an appeal against the dismissal by Mitting J of an application for judicial review of a decision by the Secretary of State to certify a human rights application under the 1999 Act. The Claimant was a Sri Lankan who was refused asylum and whose appeal on asylum grounds was dismissed by the Adjudicator. A subsequent application for leave to remain on human rights grounds (alleging that his removal would be in breach of Articles 2, 3, 6, 9 and 14 of the ECHR) was also refused. His appeal against that refusal was also refused after he had responded to a one stop notice pursuant to Section 74 (4) of the 1999 Act. A year later the claimant applied for exceptional leave to remain, was served with a further one stop notice, but was again directed to be removed by the Secretary of State. The claimant appealed, complaining of breaches of his rights under both Article 3 and Article 8 of the ECHR as well as of his Geneva Convention rights.

269. The Secretary of State pointed out that in response to the original one stop notice there was no reference to Article 8. The Secretary of State issued two certificates. He certified under section 73 (2) of the 1999 Act that in his opinion the claimant's claim

that his removal would be a breach of Article 8 could reasonably have been included in a statement required from him under section 74 but was no so made, or could reasonably have been made in his original appeal but was not so made, and that in his opinion one purpose of the claim would be to delay his removal from the United Kingdom and he had no other legitimate purpose for making it. By virtue of section 73 (3) of the Act his appeal, so far as it related to that claim, was to be treated as finally determined. The Secretary of State also certified under section 73 (5) that his other grounds of appeal relating to Article 3 were considered at his earlier appeal. By virtue of section 73 (6) of the Act his appeal, so far as it related to those grounds, was also to be treated as finally determined.

270. Kennedy LJ, in a judgment with which the other two members of the Court agreed, reviewed the statutory scheme contained in Part IV of the 1999 Act:

> "In my judgment although section 73 could and should have been much better expressed its meaning and purpose can be understood if sufficient weight is given to its position in the statute and to the procedure in relation to which it is designed to operate. Part IV of the Act deals with the various aspects of appeals and, as it seems to me, it has three main objectives –
>
> (1) to grant specific rights of appeal, for example to those who claim that in the context of immigration their human rights have been infringed (section 65) or who have been refused asylum (section 69)
>
> (2) to ensure that if an appeal is brought it will be comprehensive and cover every available ground for seeking relief (section 74)
>
> (3) to prevent abuse of the appellate system – see for example section 73, which only operates where one appeal (the original appeal) has been finally determined."(paragraph 34)

271. In the passage of his judgment quoted in the section of this judgment summarising Mr Strachan's submissions, Kennedy LJ then set out the procedure to be followed by the Secretary of State (paragraphs 35 and 36). He added this:

> " … but the Secretary of State can examine the notice of appeal to get rid of grounds considered in the original appeal – see section 73 (5) – and **in relation to any claim alleging breach of human rights** he can consider the possibility of certification pursuant to section 73 (2). In that sub-section if he forms an opinion adverse to the appellant in relation to paragraphs (a) and (b) he will again consider whether one purpose was to delay removal and whether the appellant had any other legitimate purpose, and the process will be the same as in relation to sub-section (8) save that because of the existence of paragraph (a) the Secretary of State will have already satisfied

> himself that what is now being said could reasonably have been said at two specific earlier stages.
>
> It follows that in general I accept the submissions made to us by Mr Wilken and adopt an interpretation which is similar to but not quite identical with that adopted by Mitting J in *Balamurali*. On the facts of that case it seems to me plain that the Secretary of State was entitled to certify as he did in relation to Article 3 under section 73 (5) and in relation to Article 8 under section 73 (2), so the appeal of *Balamurali* should in my view be dismissed." (paragraphs 37 and 38)(emphasis added)

272. It is striking that, unlike section 96 (1) and (2) of the 2002 Act, the power to certify conferred by section 73 (2) of the 1999 Act was expressed to apply specifically to a notice of appeal making a claim that a decision of the decision-maker was in breach of the appellant's human rights.(see the words highlighted in the extract of Kennedy LJ's judgment),which could of course include a claim that the decision was in breach of the appellant's Article 3 rights. Further, although the decision to certify which was upheld under section 73 (2) related to an Article 8 claim, the decision to certify under section 73 (5) which was also upheld related to an Article 3 claim. It is also apparent from his review of the statutory scheme that Kennedy LJ had well in mind that one of the main objectives of Part IV of the 1999 Act was to grant specific rights of appeal to those who claimed that in the context of immigration their human rights had been infringed or who had been refused asylum.

273. In those circumstances it seems to me clear that the Court of Appeal in *Balamurali* proceeded on the basis that there was no incompatibility between the power to certify and thus in effect preclude a right of appeal against the rejection of a human rights or asylum claim including an Article 3 claim, on the one hand, and either Article 3 or Article 13 of the ECHR on the other and that the power to certify, with the consequence that the certified appeal would thereby be treated as finally determined, was intended by Parliament to apply in a human rights claim including an Article 3 claim. While it is true that the decision in *Balamurali* related to the 1999 Act and is thus not technically binding on me in relation to the proper construction of the 2002 Act, it is in my view plain that the Court of Appeal would have adopted the same reasoning if it had been considering Section 96 (1) and (2) of the 2002 Act. It is significant, in the context of Ms Dubinsky's submission, that earlier in his judgment Kennedy LJ drew attention to the fact that

> "it follows that in each of the cases with which we are concerned before the Secretary of State even began to consider whether or not to issue the certificate now under challenge he must have concluded that the claim advanced in the fresh representations was sufficiently different from the earlier claim to give rise to a realistic prospect of the Claimant being able to satisfy the Secretary of State that refusing his application would breach the Claimant's human rights within the meaning of section 65 of the 1999 Act, or (in an asylum case) that his removal in consequence of the refusal would be contrary to the Geneva Convention." (paragraph 16).

274. This in my view serves to underline the fact that the Court of Appeal in *Balamurali* saw no incompatibility with Convention rights in a statutory power to certify being applied to a fresh human rights claim which had been determined to have a realistic prospect of success. Indeed as a matter of logical analysis, it is hard to see why any argument based on incompatibility between a power to certify and the Article 3 or Article 13 rights of a claimant should be dependent on whether the Secretary of State has formed the view that the claim to be certified has a realistic prospect of success. Both in respect of a rejected new claim which she does consider to have a realistic prospect of success but which she certifies under Section 96(1) or (2) and in respect of a rejected new claim which she does not consider to have a realistic prospect of success and which thus does not attract a right of appeal under Section 82 because no new immigration decision is involved in its rejection the claimant who alleges that the rejection of his claim and his removal will expose him to a real risk of death or torture will be confined as a remedy to challenging the refusal by judicial review. If that is an effective remedy satisfying the requirement of Articles 3 and 13 in the latter case, why should it not be an effective remedy satisfying Articles 3 and 13 in the former case? In both cases there is a possibility that the Secretary of State's rejection of the claim on its merits may be wrong and in both cases the powers of the High Court on a judicial review to overturn the decision will be the same. The fact that it may be presumed that the decision is less likely to have been wrong in the latter case does not make the consequences of any perceived shortcoming in the remedy of judicial review when compared to the remedy of an appeal under Section 82 any less serious for the claimant in the latter case should it be the case that the decision was in fact wrongly decided.

275. The decision of the Court of Appeal in the *Queen on the application of Borak v Secretary of State for the Home Department* [2005] EWCA Civ 110 does not, in my view, take the matter much further. It was a case concerning a decision by the Secretary of State to certify a fresh asylum claim under section 96 (2) of the 2002 Act in its previous form. In that case the Secretary of State certified under section 96 (2) (a) that the relevant immigration decision related to an application or claim which relied on a ground which the applicant had raised on an appeal against another immigration decision and under Section 96 (2) (b) that the immigration decision related to an application or claim which relied on a ground which the applicant should have included in a statement which he was required to make under section 120 in relation to another immigration decision or application. In relation to the latter Harrison J held that the Secretary of State was entitled to certify the fresh asylum claim under section 96 (2) (b) because certain information relied on should have been included in the claimant's one stop notice. Buxton LJ, with whom Chadwick LJ agreed held:

> "I would hold – but without deciding the limits of section 96 (2) (b) if properly understood – that the judge did not err in law in deciding as he did on the basis of the case as it was put before him." (paragraph 32)

276. In *Borak* both the original claim and the later claim were based on contentions that the Claimant would be at risk of treatment that would breach his Article 3 rights if returned to Croatia. It was thus a case in which the Court of Appeal upheld the certifying of a claim based not just on human rights but specifically on Article 3 under

Section 96 of the 2002 Act in its pre-amended form. To that extent it supports Mr Strachan's submission. Certainly there was no suggestion that the power to certify under section 96 (2) did not apply either to a human rights claim or specifically to an Article 3 claim. On the other hand the point was not argued and Buxton LJ specifically said that he was not deciding the limits of section 96 (2) (b), albeit there is no suggestion that he thereby intended to leave open such a question.

277. Finally Mr Strachan relied on the case of the *Queen on the Application of Khan v Secretary of State for the Home Department* [2008] EWCH 600 (Admin). That was a case in which HH Judge Mole QC dismissed an application for judicial review of a decision by the Secretary of State to certify under section 96 (2) (in the same form as was in force when the Secretary of State made her decision in this case) that the claimant's new claim relied on a matter which should have been but was not raised in response to an earlier section 120 notice. The basis of the new claim was that the Claimant, by her family connections, was a likely target for persecution on religious grounds if she were to be returned to Pakistan. To the extent that it was a case in which a decision to certify under section 96 (2) of the 2002 Act in the form in which it was in operation at the time of the Secretary of State's decision to certify in this case was upheld it provides some support to Mr Strachan's submission that Section 96 (2) on its proper construction applies to an asylum claim. There were however no arguments raised on the question whether Section 96 (1) and (2) did not apply to asylum or human rights or Article 3 claims as being incompatible with the ECHR.

278. Finally Mr Strachan relied on an obiter dictum of Blake J in *Etame v Secretary of State for the Home Department* [2008] EWHC 1140 (Admin). That was a case concerned with the proper construction of Section 92 (4) (a) of the 2002 Act in the context of in country appeals. Blake J said this:

> "Further the defendant's construction ensures that there is a right of appeal available to challenge the decision although one that can only be exercised from abroad. This is less draconian than a section 96 certificate that would remove all rights of appeal…" (paragraph 58)

Since the context of Blake J's remarks was a discussion of asylum and human rights claims as defined in Section 113 of the 2002 Act, Mr Strachan was in my view entitled to submit that it is to be inferred that Blake J's comment was made on the assumption that Section 96 (1) and (2) and the power to certify thereunder apply to human rights and asylum claims. However, as in *Borak*, and *Khan*, the point was not argued before him. Mr Strachan also relied on another passage from Blake J's judgment where he said, in paragraph 26: "…..There are other mechanisms for certification of appeals notably under s.96 where a right of appeal at all can be removed if the matter could have been raised in a previous appeal and there is no satisfactory explanation why it is not.", although it is not entirely clear if this was merely part of his summary of counsel's argument.

279. Before this judgment was circulated to counsel in draft I received a post hearing written note from Ms Dubinsky on the effect of the decision of the Court of Appeal in the case of *R(BA(Nigeria)) vSSHD and R(PE(Cameroon)) v SSHD* [2009] EWCA Civ 119 to which I thought it right to afford Mr Strachan the right to respond which he duly exercised.

280. In that decision the Court of Appeal partially reversed the judgment of Blake J in *Etame* and held that in the absence of a fresh asylum or human rights claim a right of appeal under Section 82 of the 2002 Act against a second immigration decision which has refused an asylum or human rights claim can be exercised in country pursuant to Section 92(4) (a) . That section provides that a person may appeal under Section 82(1) while he is in the United Kingdom if he has made an asylum or human rights claim while in the United Kingdom.

281. At the hearing Ms Dubinsky had relied on a passage in Blake J's judgment in which he said : "It is obvious that a right of appeal against a decision that refuses recognition as a refugee by a person who has presented a credible arguable case that they face persecution or ill treatment on removal would be ineffective to prevent a breach on an international obligation if the challenge can only be made after removal to the place where the ill treatment is feared."(paragraph 46). This, she submitted, showed, by parity of reasoning, that Parliament cannot have intended to preclude a right of appeal altogether where it has been determined by the Secretary of State that an asylum or Article 3 claim had a realistic prospect of success. While it seemed to me that this argument by way of analogy had some attraction it was not in my view of sufficient weight to compel a construction of Section 96 (1)and (2) which would be contrary to the clear language used unless such a construction were required under Section 3(1) of the Human Rights Act.

282. In her post hearing note Ms Dubinsky submitted that the decision of the Court of Appeal assists the Claimant in the following respect. "The Secretary of State argued in the present case that, if she were unable to certify fresh claims such as the Claimant's under Section 96, '*the power to certify under section 96 of the 2002 Act would be illusory*' In oral and written submissions, the Claimant argued that there were in fact a series of circumstances in which a person would have a potential further right of appeal against a second immigration decision without having made any fresh asylum or Article 3 ECHR claim. The Court of Appeal's judgment in *BA (Nigeria*) establishes that there is a further category of cases in which Section 96 certification applies in the absence of any fresh asylum or Article 3 ECHR (or indeed any ECHR) claim. Where, in connection with a second immigration decision, a person has made a further asylum or ECHR application which does not cross the fresh claim threshold, that still gives rise to an in-country right of appeal, unless certified under Section 94 or Section 96 of the 2002 Act."

283. In my view Ms Dubinsky is right to say that even if Section 96(1) and (2) were to be construed so as not to apply to a fresh asylum or Article 3 claim, the power to certify would not be illusory in the sense that there would be other claims in respect of which a right of appeal under Section 82(1) against an immigration decision could be precluded by a certificate from the Secretary of State. One such claim is the category in issue in *BA (Nigeria*), namely a second human rights or asylum which has not been held to be a fresh claim. However I do no consider that this assists the Claimant's argument.

284. It was self evident, even before the decision in *BA (Nigeria)*, that if Section 96(1) and (2) were to be construed so as not to apply to a fresh asylum or Article 3 claim, the power to certify would not be illusory in the sense that there would be other claims in respect of which a right of appeal under Section 82(1) against an immigration decision could be precluded by a certificate from the Secretary of State. Ms Dubinsky

thus did not need the decision in *BA (Nigeria)* to establish that proposition. Indeed it is an integral part of Ms Dubinsky's case precisely that Section 96(1) and (2) were intended to apply to claims other than fresh asylum and human rights claims. Thus for example Section 96(1) and 96(2) would apply in respect of appeals based on the ground that an immigration decision was not in accordance with immigration rules (Section (84(1)(a)) or breached his rights under the Community Treaties in respect of entry to or residence in the United Kingdom (Section(84) (1) (e)).

285. However in my view the Claimant's argument is not materially advanced by that proposition or by the addition of the *BA (Nigeria)* category of case to the list of cases in which the Section 96 powers can be exercised. I can see that it may provide an answer to Mr Strachan's submission as set out in Paragraph 190 of this judgment, but in my view the Secretary of State's case does not depend on that submission. Indeed that was not the submission to which Ms Dubinsky submitted in her post hearing note that the *BA (Nigeria*) decision was an answer. The submission of Mr Strachan's which she argued was disproved by the decision in *BA (Nigeria)* was that if the Claimant were right '*the power to certify under section 96 of the 2002 Act would be illusory*'. The immediately preceding sentences in paragraph 30 of Mr Strachan's skeleton argument which Ms Dubinsky quoted were as follows: "*The Claimant is essentially contending that the Secretary of State cannot lawfully exercise his power under section 96 of the 2002 Act in respect of a fresh claim, on the basis that it is incompatible with s.6 of the HRA or otherwise unreasonable under the common law. But as a matter of general principle, this does not make any sense.*"

286. Thus the state of affairs which Mr Strachan was arguing would make the power to certify illusory was one in which Section 96 (1) and (2) which confer on the Secretary of State a power to certify was held to apply to a fresh asylum or Article 3 claim, but the power was one which could never be exercised in respect of such a claim because its exercise would be unlawful as being contrary to Section 6 of the Human Rights Act or *Wednesbury* unreasonable. That in my view is a state of affairs which would render the power to certify a fresh asylum or Article 3 claim illusory and may account in part for Ms Dubinsky's extension of her argument based on Section 6 of the Human Rights Act to include one based on Section 3(1) and the construction of Section 96(1) and (2) as not applying in the case of fresh asylum or human rights claims so as to be compatible with the Convention rights. However those arguments, which I have rejected, do not derive assistance from the decision of the Court of Appeal in *BA (Nigeria)* Nor does that decision in my view undermine or even address Mr Strachan's point that if the Section 96 power to certify could never be lawfully exercised to certify a fresh asylum or human rights claim it would render the power itself illusory assuming that as a matter of construction, and not incompatibly with the Convention Rights, it applies to such claims.

287. If anything the judgments in *BA (Nigeria)* in my view assist the Secretary of State's arguments. The first point to make is that the Court of Appeal was dealing with a different issue to the one raised on the part of this application with which I am currently dealing. The issue with which the Court of Appeal was dealing was whether, where a right of appeal exists in respect of a second asylum or human rights claim by virtue of Section 82(1), it can be exercised in the United Kingdom by virtue of Section 92(4) even if it is not a fresh claim It was not dealing with the distinct issue raised in this case of whether, in respect of an asylum or Article 3 claim which **is** a

fresh claim, a right of appeal can be precluded altogether by virtue of being certified under Section 96(1) and /or 96 (2).The fact that if a right to appeal exists it may be exercised in country does not in itself bear on the prior question of whether a right to appeal has arisen in the first place.There are thus two points of distinction between the issue raised on the appeal in *BA (Nigeria)* and the issue I have to decide:the former assumed the absence of a fresh claim and the existence of a right of appeal, the latter assumes the existence of a fresh claim and questions whether a right of appeal can lawfully be prevented from coming into existence at all.

288. There are, however, dicta in the judgments of Sedley and Lloyd LJJ which in my view are inconsistent with any assumption that Section 96(1) or (2) do not apply to a fresh asylum or human rights claim or that the exercise of the powers to certify such claims under Section 96(1) and/or 96 (2) would be ipso facto contrary to Section 6 of the Human Rights Act or Wednesbury unreasonable and on the contrary proceed on the reverse assumption. Their observations on the legislative framework within which section 92 sits support the existence and importance of a certification power that is applicable to asylum and human rights claims in that their decision to give effect to the natural and ordinary meaning of Section 92 was based on a recognition that there were other detailed and express powers to stifle in-country appeals altogether by certification under sections 94 and 96 of the 2002 Act.

289. Thus Sedley LJ accepted the argument of the appellants' counsel that "…the 2002 Act sets out Parliament's chosen control mechanism. This consists of the detailed range of powers given by ss 94 and 96 to certify (subject to judicial review) that a claim is clearly unfounded. Such a certificate stifles an in-country appeal…." (paragraph 13). Earlier he said that a certificate under Section 94 that the claims were unfounded "provided it survived any challenge by way of judicial review would bar the proposed appeals." (paragraph 2).

290. In paragraph 23 of the judgment, Sedley LJ referred to the Court of Appeal decision in *R(Kariharan) v Home Secretary* [2003] QB 393, and endorsed the principles identified in that case regarding the anti-abuse and one-stop provisions in the 1999 Act, now continued in the 2002 Act. These provisions reflected Parliament's chosen reaction to deal with last minute claims. If a case falls outside those provisions (that is to say it is not certified under sections 94 and 96 of the 2002 Act), it is not the task of the Court to fill any perceived gaps by giving an extended or purposive meaning to section 92 of the 2002 Act to restrict the right of appeal to one out of country. In my view Mr Strachan was right to submit that the implied corollary in Sedley LJ's judgment was that in a case which is certified under those powers the effect is that rights of appeal are withdrawn for the purposes of section 92 of the 2002 Act. To that extent his reasoning was based on an assumption as to the existence and indeed the importance of the power of certification under Section 96 including in an asylum or human rights claim.

291. Lloyd LJ in the course of a review of the legislative history and framework emphasised the role of the Section 120 one stop procedure in the 2002 Act and stated: "In turn, if on a subsequent appeal against another decision the person seeks to rely on matters which could have been but were not raised in relation to the earlier decision (whether or not on appeal), without there being any satisfactory reason for them not having been raised then the Secretary of State may so certify, in which case, subject to judicial review as regards the certificate, no appeal will lie against the later decision:

see section 96(1) and (2) of the 2002 Act. This provides a protection against abuse of the process analogous to *Johnson v Gore Wood* [2002] 2 AC 1." (paragraph 38) Again in my view Mr Strachan was entitled to submit that this was a recognition not just of the existence of the power of certification under Section 96 of the 2002 Act, but its statutory purpose as part of the one stop procedure and that there was no suggestion in Lloyd LJ's analysis (or anywhere in the Court of Appeal's approach) that certification under Section 96 cannot occur, or is somehow inapplicable where the claim concerns asylum or human rights.

292. Lloyd LJ's reasoning continued at paragraphs 39 to 41 to the effect that the right of appeal under section 92 of the 2002 Act only arises where a claim has not otherwise been certified under section 94 or section 96. Thus he concluded: "… the balance between the requirements of immigration policy on the one hand and compliance with the country's international obligations on the other is drawn in this respect by eliminating any purely historic claim, **and eliminating any claim which is the subject of a relevant certificate**, but leaving other claims **whether or not accepted by the Secretary of State as fresh claims**, to be dealt with appropriately and to be the subject, if rejected, of an in-country appeal under sections 82 and 92."(paragraph 41)(emphasis added).

293. It is true that the Court of Appeal were proceeding on the basis that the claims under consideration, unlike the claim in this case, were not fresh claims and had thus not been determined to have a realistic prospect of success. However it is striking that in their very careful analysis of the legislative framework there was not a hint of a suggestion that in a fresh claim the position would be completely different because the Section 96 certification procedure would not be available as a control mechanism to avoid abuse. Indeed on one reading the words highlighted in the last extract from Lloyd LJ's judgment might be taken as proceeding on the assumption (albeit the point was not argued) that the power to certify inter alia under Section 96 applies to a fresh asylum or human rights claim.

294. Moreover, as I have already suggested, it seems to me that so far as the argument based on Article 3 and/or Article 13 is concerned, it could be said that if there is merit in the argument it is hard to see why its success should be confined to cases where the Secretary of State(whose decision on the merits is sought to be challenged on appeal) has determined that there is a realistic prospect of success .That would be to make the mechanism for the availability of the protection said to be afforded by Article 3 and/or Article13 dependent on the judgment of the very person whose decision on the merits is said to have been taken in breach of Article 3.

295. Ms Dubinsky formulated her Submission (a) in an alternative way. Certifying a fresh asylum or Article 3 claim, even if not incompatible with the Secretary of State's duties under section 6 of the Human Rights Act, is unreasonable. It is apparent from the alternative formulation that, although it is based in form on *Wednesbury* principles, this part of the case is not dependant on the particular facts of this case. Those arise in Ms Dubinsky's Submissions (b) and (c). The argument advanced in Submission (a) in the alternative is that it could never be lawful for the Secretary of State to exercise her section 96 (1) and (2) powers to certify a fresh claim.

296. Ms Dubinsky prayed in aid *Bugdaycay* in support of the proposition that the duty of anxious or rigorous scrutiny in cases where it is asserted that expulsion will result in

torture is well established at common law. She further cited *Saleem* in support of the proposition that it is an established common law principle that provisions which restrict rights of access to a tribunal or court must be narrowly construed. I would accept both propositions. However neither proposition in my view supports the submission that it must always be *Wednesbury* unlawful to exercise the discretion in section 96 (1) or (2) in favour of deciding to certify. The latter proposition in my view is irrelevant in this context since it is concerned with statutory construction. The *Wednesbury* argument only arises if Ms Dubinsky is wrong in her primary submission that Section 96 (1) and (2) do not apply to asylum and human rights claims. I do not see how the approach to statutory construction supports and argument that where a discretion clearly exists it can never lawfully be exercised.

297. Similarly in relation to the first proposition I do not see how it assists the Claimant to overcome the hurdle that if it is always unlawful to exercise a statutory discretion then the discretion would in fact be an automatic duty never to certify. In my view that is inconsistent with the language of Section 96 (1) and (2).

298. Accordingly in my view the alternative formulation of Submission (1a) fails as well as the primary formulation. For the avoidance of doubt that is not to say that the decision by the Secretary of State to certify the July 2004 claims was not *Wednesbury* unlawful. In my view, for the reasons set out above it was. However that is for the reasons which I have given in accepting, subject to qualification, Ms Dubinsky's Submissions (b) and (c) which relate to the facts of this particular case and the way in which the decision-maker approached the four stage Section 96 process.

Ground one: Delay in the Secretary of State's failure to review the section 96 certificate in light of the additional evidence submitted by the Claimant in June and July 2006 is unreasonable.

299. The relevant chronology is set out in the summary of facts earlier in this judgment. In short, the Claimant having been refused permission to rely on the first ground by Fulford J on 12th March 2007, the Secretary of State on 2 June 2008 declined the Claimant's invitation to agree to an adjournment of the hearing of this application in respect of the second ground to enable him to consider the representations and evidence submitted on the Claimant's behalf in June and September 2006. Accordingly in her skeleton argument Ms Dubinsky sought permission to amend the grounds to include the contention that the Secretary of State's failure to review the section 96 certificate in the light of the additional evidence submitted by the Claimant in 2006 is unreasonable.

300. Ms Dubinsky supported this ground with two submissions. First she sought to distinguish the decision of *R (FH and others) v SSHD* [2007] EWCH1571 (Admin) in which Collins J held that delays in excess of three years were not unlawful for applicants who were seeking to establish that their representations constituted fresh claims. In that case Collins J stated:

> "It is to be noted that those Claimant's whose initial claims have been refused and whose appeals have been dismissed are seeking to persuade the Defendant that they are making a fresh claim. They have that hurdle to surmount before any consideration is to be given as to whether they are indeed

> refugees. That puts them into a different position from initial applicants and Mr Gill was constrained to accept that it would not be irrational to treat them differently and to prioritise initial claims. Any judge sitting in the Administrative Court cannot fail to be aware that many allegedly fresh claims are brought when removal is at last attempted and that the majority of such claims are unarguable, being attempts to delay a justifiable removal. But some, albeit a small minority, are genuine. Nevertheless, the number of largely unmeritorious claims places a burden on the Home Office since each has to be considered on its merits and a decision made whether it should be regarded as a fresh claim and, if so, whether it should be rejected or allowed. Having regard to the numbers, some delay is unsurprising. Furthermore, cases in which claims have succeeded because of delay have on the whole involved delay in deciding initial claims. While nothing I say should be construed as approval of the delays in the present cases, I am not prepared to find that they are (with the possible exception of that in H's case with which I shall deal with specifically) so excessive as to be for that reason alone unlawful" (para 25).

301. The earliest date on which the unsuccessful Claimants in that case made their applications was September 2003 and the hearing took place in June 2007. Thus the delays which Collins J held not to be unlawful were by a considerable margin greater than the gap in this case between the receipt in September 2006 by the Secretary of State of the Claimant's supplemental material and the date of Ms Dubinsky's skeleton argument in May 2008. Nonetheless Ms Dubinsky sought the distinguish the decision in *R(FH and others) v SHHD* on the basis that the Claimant in this case does not need to surmount the fresh claim hurdle, that hurdle having, so Ms Dubinsky submitted, already been crossed when the Secretary of State determined in June 2006 that the Claimant's July 2004 claim was a fresh claim. Thus, submitted Ms Dubinsky, this is a claim in which a person who has already been found to have a realistic prospect of success on appeal is unable to pursue his appeal. In the circumstances the delays it was argued are unreasonable.

302. The test cases considered by Collins J in *FH and others* were brought by claimants who were what are described by the Home Office as incomplete asylum cases. That is to say cases where an initial decision was made on a claim for asylum and the application in question was a subsequent one. In most of the cases before Collins J the original claim had been rejected, an appeal had been unsuccessful but removal had not taken place. There was then what was asserted to be a fresh claim based upon further evidence or circumstances which were said to justify a fresh consideration of the application. Collins J identified the common question to be identified in all the test cases as being whether the delays in dealing with the applications could properly be regarded as unlawful so that some remedy could be granted by the Court. With one exception he answered the question in the negative.

303. Collins J held, as was accepted by the Secretary of State in that case, that there is an implicit obligation on the Secretary of State to decide the applications within a reasonable time but that this did not mean "speedily" (see paragraph 6). On the

question of the extent to which if at all it is permissible to take into account the availability of resources when considering the reasonableness of delay, Collins J distinguished the cases before him with those involving a determination of the lawfulness of a claimant's detention:

> "In *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 4 All ER 575 the Court of Appeal was concerned with an Article 5 (4) claim and the requirement for a speedy determination of the lawfulness of detention. In such a case lack of resources could not be relied on by the defendant. Buxton LJ referred to counsel's recognition that she could not dispute that the Strasberg Court would not regard the failure to provide the necessary resources as a defence to a claim that there was a breach of Article 5 (4) and proceeded to reject her submission that the situation was different before the domestic courts. …Article 5 (4) imposed, as Buxton LJ put it at paragraph 25, "a more intense obligation than that entailed in the need for a prompt trial of people who are not in custody."
>
> The distinction being drawn was with the requirement under Article 6 (1) of a fair trial within a reasonable time. In *Procurator Fiscal v Watson* [2002] 4 All ER, the Privy Council had considered the "reasonable time requirement". It was said that the threshold of proving a breach of the reasonable time requirement was a high one, not easily crossed and unless the period of delay was one which, on its face and without more, gave grounds for real concern it was almost certainly unnecessary to go further. This was because the concern in such a case was that there were infringements of basic human rights and not departures from the ideal: see per Lord Bingham at paragraph 52 [2002] 4ALLER at P21A-D. While if there was delay which gave grounds for real concern, general lack of proper resources could not be relied on as an excuse, the individual circumstances must be taken into account. It follows in my view that a system of applying resources which is not unreasonable and which is applied fairly and consistently can be relied on to show that delays are not to be regarded as unreasonable or unlawful.
>
> As was emphasised by Lord Bingham the question was whether delay produced a breach of Article 6 (1). Here the question is whether the delay is unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6 (1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the Defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. **But in**

> **deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible.** (paragraphs 9-11).(emphasis added).

Collins J then considered the evidence in relation to the Secretary of State's system for prioritising applications and claims. :

> "The system devised to deal with the situation must recognise that there will be delays which are thoroughly undesirable. It must also be appreciated that there is a continuing detriment in that individuals whose allegedly fresh claims have not been dealt with are in the limbo referred to in the 1998 White Paper. If they are genuine refugees, they are entitled to the rights conferred by the Convention and, if they are not, their position should be known within a reasonable time. It is also important that the system caters for the possibility of advancing consideration of applications if exceptional or compassionate circumstances are shown. The question is whether the manner in which the backlog is being dealt with is in all the circumstances reasonable and fair overall. It is not for the court to require greater resources to be put into the exercise, no doubt to the detriment of other matters which must be funded by the government, unless persuaded that the delays are so excessive as to be unreasonable and so unlawful." (paragraph 21).

304. In the passage already cited Collins J concluded that with the exception of one case he was not prepared to find that the delays in the test cases before him were so excessive as to be for that reason alone unlawful. Nor did he see any reason to castigate the priorities decided on by the Secretary of State in devising the system as unreasonable (paragraph 26). He added at the end of his judgment:

> "It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the Claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the Court." (paragraph 30).

305. On behalf of the Secretary of State Mr Strachan submitted that the delay in this case in dealing with the further representations submitted on 27th June and 6th September 2006 while regrettable in not "so excessive as to be *Wednesbury* unreasonable". He further submitted that there is nothing so exceptional about the facts of this case which would render the Secretary of State's refusal to take this case out of turn *Wednesbury* unreasonable. He pointed out that, in response to the Treasury Solicitors invitation in the letter dated 2 June 2008 to the Claimant's representatives to put forward any reason why his case was so exceptional that it should be processed

outside the stated priorities and ahead of all other cases in the Case Resolution Programme awaiting decisions, no such reasons had been identified.

306. In response to Ms Dubinky's submission that *FH* can be distinguished on the basis that the Claimant in this case has already overcome the hurdle of satisfying the Secretary of State that he is making a fresh claim, Mr Strachan's answer was that that previous claim has already been certified by the Secretary of State. Until and unless that certification is held to have been unlawful the question for determination on the June and September 2006 representations and evidence was whether they constituted a further fresh claim. That being so the question raised in those submissions and evidence is identical to those raised in the test cases. Further and in any event he argued that the attempted point of distinction would not affect the general applicability of the principles upheld in *FH* and the lawfulness of taking the Claimant's new representations in turn.

307. In my judgement Mr Strachan's submissions are correct. As I understand the reasoning in Collins J's rejection of the test claimants' arguments in paragraph 25 of his judgment, it was that having already had one bite of the cherry and an unsuccessful bite in the sense of their claims having been rejected both by the Secretary of State and on an earlier appeal therefrom, there was no justification in giving priority to people in that position who were now seeking to advance further representations and seeking to persuade the Secretary of State to treat them as fresh claims. To do so would be unfair to people whose initial applications have not been determined and who, ex hypothesis, have not been and may never be held to be bringing bad claims.

308. Although Ms Dubinsky is, in my view, right to the extent that the Claimant's February 2004 representations have been held to constitute a fresh claim and thus to have a realistic prospect of success, it seems to me unrealistic to ignore the fact that at the same time they have been certified with the effect that (until and unless the certification is quashed by the Court) those claims are precluded from proceeding to appeal. Thus the Claimant in this case in my judgment is in the same position as any other failed asylum seeker whose initial application has been rejected by the Secretary of State and on appeal by the AIT and who is inviting the Secretary of State to make a fresh determination on new representations, in this instance the representations submitted in June and September 2006.

309. While it is true that it follows from the Secretary of State's determination that the February 2004 claim was a fresh claim that he considered it to have a realistic prospect of success on appeal, it does not in my view follow that for that reason the Claimant is in a materially different position from many failed asylum seekers whose initial applications are rejected by the Secretary of State and subsequently on appeal. Such rejection is not of itself necessarily inconsistent with the view having been formed by the Secretary of State first time round that although unmeritorious the claims had a realistic prospect of success.

310. Ms Dubinsky's second submission in support of the first ground was that the documents and representations submitted by the Claimant in 2006 are such that even if she was wrong on her first submission the Secretary of State could not lawfully maintain the certificate on the Claimant's claim. That is because the Claimant in the material submitted in June and September 2006 was relying on matters which could

not have been raised in the earlier appeal or in response to the one-stop notice because they arose subsequently. Thus the evidence of Dr Smith the country expert related to a deterioration in Sri Lanka which occurred after the Claimant's initial claim. The Tamil Tiger refugee whose statement purports to corroborate the Claimant's second version of events only arrived in the UK in April 2003 over a month after the Claimant had finally exhausted his appeal rights in the IAT and the evidence from Dr Fisher the Claimant's treating consultant physiatrist related to treatment for post traumatic stress disorder since 25th March 2004. Ms Dubinsky submitted that the Secretary of State has never to sought to suggest that these matters are irrelevant to the Claimant's claim or that they can be lawfully certified under Section 96 of the 2002 Act.

311. In my judgment this submission is based on an incorrect analysis of the nature of the Claimant's challenge to the Secretary of State's decision to certify the February 2004 claim and the nature of the June and September 2006 representations. The legality of the decision to certify the February 2004 claim falls to be considered by reference to the content of that claim and the evidence in support of it which was before the Secretary of State when he was deciding prior to 15th June 2006 whether to certify it. The legality of that decision must stand or fall by reference to that material. If (contrary to what I have held) that decision had been lawfully arrived at it could not, in my view, be rendered unlawful by demonstrating (if this could be demonstrated) that evidence which was not before her predecessor at that time proves that the Claimant does indeed have a valid Article 3 and/or asylum claim.

312. If, as appears on its face may well be the case, the later evidence was not available to the Claimant and could not reasonably have been adduced on his first appeal or in response to the original one-stop notice, the relevance of that fact would be that if, when the Secretary of State considers the 2006 materials, she rejects them but nonetheless concludes that they constitute a fresh claim, they would point to there being a satisfactory explanation as to why they were not relied on in the earlier appeal and in response to the original one-stop notice such that the power to certify the 2006 claim would not arise. However even if the timing of the 2006 materials would render it unlawful for the Secretary of State in due course to certify the 2006 claim, it does not follow that it would render unlawful the decision of her predecessor to certify the 2004 claim (assuming that decision was otherwise lawful).

313. The same logical fallacy in my view underlies Ms Dubinsky's submission made in reply that the reason why it is to be inferred that the Secretary of State indicated in the letter of 2 June 2008 that she would deal with the Claimant's 2006 submissions after the conclusion of the proceedings is that she is aware that if the further material had been considered before hand she would have been wholly unable in these proceedings to defend the maintenance of the 15 June 2006 decision to certify.

314. It follows that in my view the first ground of challenge, which the Claimant sought to reinstate by amendment in Ms Dubinsky's skeleton argument, would not succeed if permission to amend were granted. Accordingly I refuse to grant permission to amend or permission to appeal for judicial review on that amended ground.

315. However that is not in my view the end of the matter. It follows from my rejection of Ms Dubinsky's first submission under ground one that if I had held that the decision to certify the February 2004 claim was lawful, the Secretary of State's decision not to

allow the Claimant to jump the queue by giving priority to considering her 2006 claim was not unlawful. Nor, regrettable though it was, was the Secretary of State's refusal to respond to Fulford J's invitation to consider the 2006 materials before the hearing of this application itself unlawful. That is because, as already pointed out, what fell to be considered on this application by this Court was the lawfulness of the previous decision made on 15th June 2006 to certify the February 2004 claim. A subsequent determination of the 2006 claim could not have affected the court's decision on the legality of the earlier decision in respect of the earlier claim.

316. However the effect of my findings and ruling on ground two is that the Secretary of State must now reconsider the February 2004 claim and whether or not to exercise her power to certify it. In doing so, as I have held, one of the matters to be taken into account is the strength or otherwise in her view of the merits of the Claimant's 2004. The fact that the Secretary of State has been ordered by this court to reconsider the matter and in doing so to revisit the evidence and submissions adduced by the Claimant in February 2004 is, in my view, an exceptional circumstance which takes this case out of the ordinary run of claims brought by people in the position of the claimants in the test cases before Collins J in *FH and others*. I can entirely see that it was not necessary, as part of her defence of these proceedings, for the Secretary of State to consider the 2006 materials. However in my view it would offend common sense if, on the review of the 2004 claim which because of what I have found to be the error of the official appointed by her predecessor must now take place the Secretary of State were to exclude from her consideration the 2006 material. Consideration of that material would be unlikely to add significantly to the length of time required to be devoted to the review. Given the time and resources which have already been deployed in respect of this Claimant's claims, it would in my view be artificial and a potential waste of resources for a review of the 2004 claim to be taken without regard to the 2006 materials. That could lead to a situation in theory where the 2004 claim is again certified but in due course the 2006 claim is either allowed on its merits or, if refused, allowed to proceed to appeal on the basis that the power of certification could not lawfully be exercised having regard to the timing and non-availability of the 2006 materials.