EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Macfadyen
Lord Mackay of Drumadoon
Lord Marnoch

[2006] CSIH24
XA67/04

OPINION OF THE COURT

delivered by LORD MACFADYEN

in the Appeal by

FATEMA TORABI

Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents:

Against

A Determination of the Immigration Appeal Tribunal

Act: Bovey Q.C. and Blair; Allan McDougall.
Alt: Drummond; Office of the Solicitor to the Advocate General.

5 May 2006

Introduction

[1] This is an appeal, at the instance of an Iranian national, against a determination of the Immigration Appeal Tribunal ("the tribunal") dated 3 April 2003. By that determination the tribunal refused the appellant's appeal against the determination of an adjudicator dated 19 July 2002 in which it was held that her return to Iran (a) would not contravene the United Nations Convention Relating to the Status of

Refugees 1951 ("the Refugee Convention"), and (b) would not contravene Articles 2, 3 or 6 of the European Convention on Human Rights ("the Human Rights Convention"). On 8 May 2003 the tribunal refused the appellant's application for leave to appeal to this court, but this court subsequently granted such leave by interlocutor dated 5 May 2005.

The factual background

[2] The appellant was born on 22 May 1953. In May 2001 she left Iran with her daughter, who was born on 21 August 1988. The appellant and her daughter travelled by way of Turkey, where they stayed for two months, and another unidentified country, to the United Kingdom, where they arrived on 18 July 2001. On arrival, the appellant made a claim for asylum. By letter dated 10 September 2001 the respondent refused that claim. A Notice of Refusal of Leave to Enter after Refusal of Asylum dated 23 September 2001 was served on the appellant. She appealed against that notice to the adjudicator. As we have already recorded, he refused her appeal. He did so both in so far as it was based on alleged contravention of the Refugee Convention, and in so far as it was based on the proposition that her return to Iran would involve contravention of the Human Rights Convention. In the appellant's appeal to the tribunal, she did not maintain her reliance on the Refugee Convention, but did maintain that her return to Iran would contravene Articles 2, 3 and 6 of the Human Rights Convention. The appeal to this court was of the same scope.

[3] In these circumstances it is not necessary to summarise the events which gave rise to the appellant's asylum claim, except in so far as they form the background to her human rights claim. The appellant was a teacher. She was also a supporter of the Azadi Movement. They and she believed in openness and, as a result, when her

students asked her about politics, she gave what she regarded as honest answers. That brought her to the attention of the Intelligence Services, and she was arrested, detained and badly treated. Her husband was unhappy about these developments, and mistreated her. They were divorced on 20 April 2001. In face of opposition from her husband, she was awarded custody of her daughter. Then the appellant received a summons requiring her to go to court on 2 May 2001. She was accused of adultery. When she went to court, she spoke to the court administrator, and learned that there was a statement on file that bore to prove her adultery. Although she maintains that the statement was false, and that she has never committed adultery, she was greatly frightened when she learned of the existence of the statement. That was because the punishment for adultery was and is death by stoning. She fled the court building and arranged to flee from Iran to the United Kingdom. She travelled to the United Kingdom with her daughter in the manner already indicated.

The scope of the appeal

[4] The present appeal to this court against the determination of the tribunal is on a question of law material to that determination. In order to succeed in this appeal, therefore, the appellant must demonstrate an error of law on the part of the tribunal.

The relevant provisions of the Convention

[5] Before considering the submissions made by the parties before us, it is convenient to note the terms of the familiar provisions of the Human Rights Convention on which reliance was placed in the course of argument.

[6] Article 2 is headed "*Right to Life*" and is in *inter alia* the following terms:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[7] Article 3, headed "*Prohibition of Torture*", is in the following terms:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[8] Article 6, headed "*Right to a Fair Trial*", is in *inter alia* the following terms:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Submissions for the appellant

[9] In opening his submissions for the appellant, Mr Bovey identified five features of the evidential material before the adjudicator and the tribunal against the background of which he said that the case fell to be determined. These, in summary, were that in Iran:

(a) a woman's testimony is worth only half that of a man;

(b) judges are responsible for prosecution;

(c) trial hearings are often held in camera;

(d) the penalty for adultery is death by stoning or lashes; and

(e) the penalty of death by stoning is implemented.

Mr Bovey submitted that the tribunal had failed to make clear whether it accepted the evidence on those points or not. In any event, if it had not accepted the evidence on these points, it had failed to give adequate or comprehensible reasons for not doing so.

[10] The tribunal dealt with point (a) in paragraph 8 of its determination. It quoted a passage relied on by the appellant from the US State Department 1999 Country Report on Human Rights Practices relating to Iran ("the State Department report"):

> "It is difficult for a woman to obtain legal redress. A woman's testimony in court is worth only half that of a man's, making it difficult for a woman to prove a case against a male defendant."

The tribunal went on to comment that the passage quoted was of limited value in the appeal, because the appellant was not seeking to bring an action against her husband, but was defending herself against a criminal charge of adultery. Although recognising some force in the submission that it showed that a woman's testimony is worth only half that of a man, the tribunal went on to observe: "... but it is not clear from this passage whether the reference is to proceedings against a man by a woman only or if it relates also to criminal proceedings against a woman.". There is in our view some force in Mr Bovey's criticism of the tribunal that it has not made it clear whether and if so to what effect it accepted that evidence. The critical point in the quotation is that a woman's evidence is treated as of less weight than a man's. The context in which the point is made is in discussing a woman seeking legal redress against a man, but there is nothing to indicate that the rule applies only in that context.

[11] On points (b) and (c) it is accepted by the respondent that the tribunal fell into error. In paragraph 9 of its determination it referred to the October 2001 report by the Country Information and Policy Unit of the Immigration and Nationality Directorate of the Home Office ("the CIPU report"), which contained the following passage:

> "Since May 1994, judges have been responsible for prosecution in public and revolutionary courts. Amnesty International has reported that trial hearings are often heard in camera."

The tribunal's only observation on that passage was to the effect that its value was "somewhat undermined" by the fact that it had not been repeated in the October 2002 CIPU report. That observation is incorrect. The passage was repeated in the October 2002 CIPU report at paragraph 4.19. We note too that while paragraph 4.19 does not make it expressly clear whether it means that judges may act as prosecutors in cases which they decide as judges, or merely that the same personnel may act as judges in one case and prosecutors in another, paragraph 4.15 states: "Revolutionary Court judges have acted as prosecutor and judge in the same case." While it is not clear which sort of court the appellant was summoned to on the charge of adultery, it is indicated in paragraph 4.14 of the October 2002 CIPU report that Revolutionary Courts may assume jurisdiction in cases which would normally come before the civil and criminal courts. Mr Bovey's complaint was that, without reaching the stage of considering the meaning of the evidence, the tribunal dismissed it on the erroneous basis that it was not repeated in the October 2002 CIPU report.

[12] So far as points (d) and (e) are concerned, there is in our view some force in Mr Bovey's criticism that the tribunal gives no clear explanation of whether it accepts the evidence as to the nature of the penalty for adultery and the fact that the death penalty by stoning is enforced. However, it seems to us to be a reasonable inference, reading the determination as a whole, that the tribunal proceeded, at least hypothetically, on the basis that, if there was a real risk of the appellant being convicted of adultery, there was a real risk of her suffering the penalty of death by stoning. Their decision turned on the conclusion that there was not a real risk of conviction.

[13] Mr Bovey also took issue with the tribunal's treatment of the fact that the appellant denies that she has committed adultery. The tribunal had, in effect, gone

further than to note and accept that the appellant denies adultery; instead it had proceeded on the basis that it was an established fact that she has not committed adultery. In paragraph 7 of the determination, seeking to distinguish the case of *Jabari* v *Turkey* [2001] INLR 136 in which the return to Iran of a woman who had admitted adultery was held to give rise to a violation of Article 3, the tribunal said:

> "... this present appeal is quite different in that **the Appellant has never committed adultery**. She maintains that the charge against her is false and malicious" (emphasis added).

The point was taken up again in paragraph 12 of the determination, where the tribunal said:

> "Most important, **the Appellant has never committed adultery** and there would therefore be no genuine evidence against her" (emphasis added).

Mr Bovey submitted that approach was erroneous. It was not properly founded in the adjudicator's findings in fact. In paragraph 11 of his determination the adjudicator recorded the appellant's claim that there was no truth in the allegation of adultery. In paragraph 28 he expressed satisfaction with her general credibility and found that the "core story" of the appellant was credible. Mr Bovey submitted that her denial of adultery was not part of the "core story" accepted as credible by the adjudicator; it was not an essential element in her asylum claim. The adjudicator made no finding that the appellant did not commit adultery. Even if the adjudicator found the appellant's denial of adultery credible, it did not follow that a finding by a court in Iran that the appellant was guilty of adultery would necessarily be perverse. Proof of adultery is often by inference. Therefore it could not be said that acceptance of the truth of her denial in proceedings in the United Kingdom meant that no evidence could be led before a court in Iran which was liable to be accepted by that court and

could be capable of being regarded as yielding an inference of guilt of adultery. The tribunal erred in going beyond a finding that the appellant denied adultery.

[14] Mr Bovey criticised the tribunal's treatment of the appellant's submission that her return to Iran should be refused for reasons related to article 6 of the Human Rights Convention. In paragraph 11 of its determination, the tribunal referred to *Secretary of State for the Home Department* v *Fazilat* [2002] UKIAT 00973. In that case a tribunal chaired by Collins J said (at paragraph 16):

> "So far as the question of a fair trial is concerned, Article 6 can be engaged if an individual is to be removed from this country. ... But, it is only if the breach of Article 6 would be flagrant, that is to say that there would clearly be a thoroughly unfair trial, that Article 6 could be engaged. Again, it is not for the signatories to the Convention to impose their system on all the world."

After paraphrasing only the last sentence of that passage, the tribunal in the present case said:

> "In this context that Tribunal considered, after careful analysis of the objective material, that the court procedures in Iran in criminal trials would not be in breach of Article 6, and on the evidence before us we have come to a similar conclusion."

Mr Bovey disputed that the tribunal in *Fazilet* had undertaken "careful analysis of the objective material" (a point with which Miss Drummond for the respondent was not inclined to disagree), and in any event he disputed that *Fazilet* was of any assistance in the present case. He submitted that the correct test to be applied in connection with article 6 was that which was set out in *Regina (Ullah)* v *Special Adjudicator* [2004] 2 AC 323 per Lord Bingham of Cornhill at paragraph 24, page 352C:

"Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state."

(See also per Lord Steyn at paragraph 44, page 360E: "... a real risk of a flagrant denial of justice ...".) The tribunal in the present case had not addressed that test. Instead it had looked at the matter exclusively "through the prism" of article 3. The question was not whether there was a real risk of a perverse decision (as the tribunal formulated the matter in paragraph 11 of its determination), but whether there was a real risk of an adverse decision following an unfair trial. The tribunal had failed to evaluate the risk of an unfair trial in the context of the potential consequence for the appellant (*AB* v *Slovakia*, European Court of Human Rights, Application 41784/98, Judgment 4 March 2003, paragraph 55). The consequences that were at stake for the appellant had to be assessed at the commencement, not at the end, of the proceedings in Iran (*Ezeh and Connors* v *United Kingdom* (2004) 39 EHRR 1 at paragraph 120). In the light of those consequences, it was irrational to conclude, as the tribunal did at paragraph 14 of its determination, that the appellant should have remained in Teheran to defend the proceedings against her. The conclusion that "court procedures in Iran in criminal trials would not be in breach of Article 6" (paragraph 11 of the determination) was, in the absence of clear findings on the points mentioned in paragraph [9] above, both irrational and inadequately reasoned. The tribunal had dismissed on an erroneous footing the evidence which was before it about (a) judges acting as prosecutors (as to the significance of which reference was made to *Piersack* v *Belgium* (1982) 5 EHRR 169 at 180, paragraph 30(d)), and (b) about hearings often being held in camera (paragraph 8 of the determination). Further, the evidence of the discriminatory approach to the evidence of women was evidence of breach of article 6 (read with article 14).

[15] Turning to his submissions in respect of articles 2 and 3, Mr Bovey referred to *Öcalan* v *Turkey* (2003) 37 EHRR 10. In that case, the contention was that the imposition and/or execution of the death penalty constituted (i) a violation of article 2 (on the basis that that article should no longer be interpreted as permitting capital punishment) as well as (ii) an inhuman and degrading punishment in violation of article 3. Mr Bovey relied in particular on paragraphs 198, 200 and 207 of the judgment, which are in *inter alia* the following terms:

> "198 ... for the following reasons it would run counter to the Convention, even if Art. 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.
>
> 200 ... the manner in which the death penalty is imposed or executed, ... and a disproportionality to the gravity of the crime committed ... are examples of factors capable of bringing treatment or punishment received by the condemned person within the proscription under Art.3.
>
> 207 In the Court's view to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention.

In these passages, Mr Bovey submitted, there was no indication that the unfairness of the trial required to be "flagrant". Any unfairness in the trial (as previously discussed in the context of article 6) fell to be taken into account in assessing whether there was an infringement of article 3 rights. So too did the manner in which the death penalty would be imposed - here by stoning - and the disproportionality of the death penalty to the offence - here adultery.

[16] In paragraph 11 of its determination the tribunal held:

> "We have to assess whether there is a real risk ... to the appellant of a perverse decision on the facts of this appeal with the heavy consequence that might follow and consequently whether the need for international protection is engaged under Article 3".

Mr Bovey submitted that that was an error. The correct test for the tribunal to apply was whether substantial grounds had been shown for believing that there was a real risk of the appellant being subjected to treatment contrary to article 3 (*Jabari* paragraphs 38 and 42). In taking it as established that the appellant had not committed adultery, and that any finding of guilt would therefore be perverse, the tribunal had inverted the correct approach. In so doing they had acted in a way that could be characterised as irrational. Alternatively, they had failed to apply the correct standard to the assessment of the likelihood of an adverse decision. It was wrong to distinguish *Jabari* simply on the basis that in that case there had been an admission of adultery, whereas here the appellant had not committed adultery. In *Jabari* the court had been motivated principally by the fact that the punishment of adultery by stoning was on the statute book, and might be resorted to (paragraph 31 and 41). The attitude of the person accused of adultery was not a matter of such importance as to negate the fact

that to subject a person to trial with the possibility of such a result was contrary to article 3.

[17] In conclusion, Mr Bovey identified two strands of his argument which he submitted should lead to different results. In so far as his argument was based upon, or involved consideration of, the question of the unfairness of the trial, if we accepted the submissions that the tribunal had erred in failing to make properly reasoned or sufficient findings in fact, or in failing to take account of relevant evidence, in respect of that aspect of the case, the proper course for us to take was to quash the determination of the tribunal, so that the appellant's case would return to the Asylum and Immigration Tribunal for reconsideration. If, however, we accepted the submission that to subject the appellant to a trial at which the possibility of a sentence of death by stoning was at stake was a violation of articles 2 and/or 3, there was a sufficiently clear factual basis for us to quash the tribunal's determination and ourselves make a finding that return of the appellant to Iraq would constitute a contravention of one or other or both of those articles.

The respondent's submissions

[18] It was accepted on the respondent's behalf that the tribunal had erred in law in failing to understand that the 2002 CIPU report did reiterate the passage quoted in paragraph 9 of its determination. Miss Drummond's submission, however, was that that error was immaterial. Even if the error had not been made, the evidence before the tribunal did not support the conclusion that the appellant, if she were returned to Iran, would suffer a flagrant denial of justice, or complete nullification of her right to a fair trial. It was difficult to say what amounted to a flagrant denial of justice, or complete nullification of the right to a fair trial. On a fair reading of paragraph 4.19 of

the CIPU report, however, there was nothing to indicate that the same persons acted as both judge and prosecutor in the same case. Paragraph 4.15, which did indicate that the same people occupied both roles in the same case, was specifically concerned with Revolutionary Courts, but there was no evidence as to whether the proceedings against the appellant would come before a Revolutionary Court. It was therefore very difficult for the tribunal to make anything of paragraph 4.19 in the context of the appellant's case. The onus was on her to show that the circumstances applicable to her particular case would involve a flagrant breach of article 6, and she had not done so.

[19] The relevant principles, both for article 6 cases and for article 3 cases, were to be found enunciated in the House of Lords in *Ullah*. The starting point was to be found in the passage from the speech of Lord Slynn of Hadleigh in *R (Saadi)* v *Secretary of State for the Home Department* [2002] 1 WLR 3131 at paragraph 31, cited by Lord Bingham of Cornhill in *Ullah* at paragraph 6:

> "In international law the principle has long been established that sovereign states can regulate the entry of aliens into their territory."

But, as Lord Bingham went on to add, after considering other authorities:

> "As these statements of principle recognise, however, the right of a state to control the entry and residence of aliens is subject to treaty obligations which the state has undertaken."

Lord Bingham then went on to draw a distinction between "domestic cases" and "foreign cases". "Domestic cases" were those where"

> "a state is said to have acted within its own territory in a way which infringes the enjoyment of a [Human Rights] Convention right by a person within that territory" (paragraph 7).

"Foreign cases" were those where:

> "... it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in question in removing a person from its territory ... to another territory will lead to violation of the person's Convention rights in that other territory" (paragraph 9).

At paragraph 24 Lord Bingham summed the matter up thus:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. ... In *Dehwari* [*Dehwari* v *The Netherlands* 29 EHRR CD 74], para 61 ... the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state."

Later in the same paragraph Lord Bingham quoted the judgment of the Immigration Appeal Tribunal in *Devaseelan* v *Secretary of State for the Home Department* [2003] Imm AR 1, paragraph 111, where "flagrant denial" was equiparated with "gross violation" or "complete denial or nullification" (see also per Lord Carswell at paragraph 69). Miss Drummond also cited *Soering* v *United Kingdom* (1989) 11 EHRR 439, *Drozd and Janousek* v *France and Spain* (1992) 14 EHRR 745, and *Mamatkulov and Another* v *Turkey* (2003) 14 BHRC 149 and (Grand Chamber) 4 February 2005 (unreported). She submitted that *Öcalan*, not being a foreign case, was

distinguishable. Applying the tests set out in *Ullah*. the evidence in the present case was insufficient to found a claim under article 2, 3 or 6. The tribunal was entitled to reach the conclusions it did. No material error in law had been established.

[20] In response to the article 6 points made on behalf of the appellant, Miss Drummond submitted first that the objective evidence did not clearly support the conclusion that in the courts in which the appellant was liable to be tried if she were returned to Iran, the same persons acted as prosecutors and judges in the same case. The only clear statement that such a state of affairs prevailed applied to the Revolutionary Courts. There was no evidence that the appellant's case would come before a Revolutionary Court. It was for the appellant to identify the court before which she would be tried, and thus to establish that the unfairness of which she complained would arise in her case. The evidence did not establish that. The State Department report at page 6 contained the following passage:

> "Many aspects of the prerevolutionary judicial system survive in the civil and criminal courts. For example, defendants have the right to a public trial, may choose their own lawyer, and have the right of appeal."

Miss Drummond pointed out that in her request for leave to appeal to the tribunal (at page 3) the appellant accepted that she had such rights. It is right to note, however, that despite that acceptance, the appellant indicated her fear that notwithstanding those rights she would not receive a fair trial. Miss Drummond nevertheless made the point that in the State Department report a clear distinction was drawn between Revolutionary Courts on the one hand and ordinary civil and criminal courts on the other. Turning secondly to the point concerning the lesser value accorded to a woman's evidence in comparison to that of a man, Miss Drummond submitted that it was not open to the tribunal to make a clear finding as to whether they accepted that

evidence. The evidence was not clear. Account had to be taken, in addition, of the evidence referred to in paragraph 10 of the determination, which suggested that before death by stoning could be ordered the adultery required to be "witnessed by at least three others". Thirdly, the tribunal took account of the fact that the appellant denied adultery. The adjudicator had not disbelieved the appellant's denial of adultery. The risk of conviction must be greater where there is an admission of adultery than where there is a denial. It was not an error on the part of the tribunal to take that into account. *Jabari* was distinguishable on that ground. The tribunal was entitled to take into account the factors which it mentioned in paragraphs 12 and 13 of its determination. Finally, Miss Drummond referred to *Kacaj* v *Secretary of State for the Home Department* [2002] Imm AR 213 in which, in endorsing the test of real risk of relevant ill-treatment, in human rights as well as asylum claims, the tribunal said, at paragraph 12 (page 223):

> "Anxious though the scrutiny must be and serious though the effect of a wrongful return may be, the applicant must establish that the risk of persecution or other violation of his human rights is real. The standard may be a relatively low one, but it is for the applicant to establish his claim to that standard."

[21] Addressing the eventuality of our being minded to grant the appeal, Miss Drummond submitted that in that event the case should be sent back to the Asylum and Immigration Tribunal. The court should not reach its own conclusion as to whether article 2, 3 or 6 would be infringed by the return of the appellant to Iran. In that connection she referred to *Secretary of State for the Home Department* v *Akaeke* [2005] EWCA Civ 947, in which Carnwath LJ said (at paragraph 29):

> "However, [the courts] should, in my view, be cautious before interfering with decisions on matters within the special expertise and competence of the

[Immigration Appeal] Tribunal. In this field, such matters include, not only the evaluation of the difficult and often harrowing evidence produced in support of individual claims, but more generally questions of general principle relating to the conditions in particular categories of claimant or particular countries ..."

Reference was also made to *Daljit Singh* v *Secretary of State for the Home Department* 2000 SC 219 at 222A-223C, and *R (Iran)* v *Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraph 13.

The appellant's response

[22] Mr Bovey made a number of supplementary submissions in response to the submissions made on the respondent's behalf. Firstly, in relation to *Ullah*, he submitted that it was not correct to regard Lord Bingham as having endorsed the "near-certainty" test in relation to article 2 mentioned in *Dehwari* (see *Kacaj* at paragraph 23). Reference was also made to *B* v *Sweden* (Application No. 16578/03) and *Headley* v *United Kingdom* (Application No. 39642/03), in which the "substantial grounds" test was applied in relation to article 2. Secondly, it was wrong to regard Lord Bingham in *Ullah* as having endorsed the "complete denial or nullification" test in relation to article 6; Lord Bingham's reference, at paragraph 24, to *Devaseelan* was expressly in relation to "cases involving qualified rights such as those under articles 8 and 9".

[23] In relation to the evidence about the discriminatory evaluation of a woman's testimony, Mr Bovey submitted that the objective evidence fell to be construed in the appellant's favour. To do otherwise failed to accord the case the anxious scrutiny to which it was entitled. Reference was made to *R (Daly)* v *Secretary of State for the*

Home Department [2001] 2 AC 532 where Lord Bingham of Cornhill said (at paragraph 23):

> "Now, following the incorporation of the Convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether convention rights have been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy."

If the tribunal had felt that the objective evidence was that it was only in Revolutionary Courts that the judges acted as prosecutors in the same case, it was for them to establish whether the appellant would be tried before a Revolutionary Court. It was not just to leave the matter unresolved.

[24] In relation to the tribunal's approach to the appellant's denial of adultery, Mr Bovey made reference to *Karanakaran* v *Secretary of State for the Home Department* [2000] 3 All ER 449 (a Refugee Convention case) in which Sedley LJ at page 479 observed that:

> "... convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions."

[25] In response to the point made by Miss Drummond to the effect that respect should be accorded to the decision of a specialist tribunal, Mr Bovey submitted that the decision of the tribunal in the present case was not entitled to such respect. He referred to four points, namely the syntactical disjunction in the last sentence beginning on page 1 of the determination; the erroneous reference in paragraph 7 to *Jabari* as a decision of the European Court of Justice; the erroneous view that the evidence mentioned in paragraph 9 of the determination was not repeated in the 2002

CIPU report; and the view expressed in paragraph 11, and accepted by the respondent not to be justified, that *Fazilat* proceeded on a careful assessment of the objective material. He accepted that individually these points might be thought to be minor, but suggested that in aggregate they demonstrated a careless approach.

Discussion

[26] It is convenient to consider first the appellant's case under article 6. We are in no doubt that the test to be applied is the one identified in *Ullah*. As Lord Bingham of Cornhill pointed out in that case at paragraph 6, a different approach is required when considering a foreign case from that which is appropriate in the domestic context. That is because, as Collins J put it in *Fazilat* at paragraph 16:

> "... it is not for the signatories to the Convention to impose their system on all the world".

The formulation of the appropriate approach adopted by Lord Bingham in *Ullah* at paragraph 24 was that:

> "Where reliance is placed on article 6 [in foreign cases] it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state."

(See also *Soering* v *United Kingdom* at paragraph 113.) We did not understand there to be any dispute between the appellant and the respondent on the soundness of that test. Miss Drummond, however, relied on the alternative formulations contained in *Devaseelan* at paragraph 111, where "flagrant denial" was equiparated with "gross violation" and "complete denial or nullification". Mr Bovey submitted that it was a misconstruction of what Lord Bingham said in paragraph 24 in relation to *Devaseelan* to regard him as adopting those alternative formulations in relation to article 6. In our

view there is force in Mr Bovey's submission on that point: Lord Bingham's reference to the passage which he quoted from *Devaseelan* was specifically said to be in relation to cases involving qualified rights such as those under articles 8 and 9. On the other hand, the alternative formulations adopted in *Devaseelan* were used in that case in the context of articles 5 and 6. Moreover, Lord Carswell in *Ullah* at paragraph 69, after pointing out that the concept of flagrant breach may not always be easy for domestic courts to apply, suggested that it was well expressed in *Devaseelan* in the phrase "completely denied or nullified". Another paraphrase is to be found in *Fazilat* at paragraph 16, namely that there would "clearly be a thoroughly unfair trial". We do not think that much turns on particular phraseology. It suffices to note that what the appellant must show is that there is a real risk of a flagrant breach of her right to a fair trial.

[27] We accept Mr Bovey's submission that, in assessing whether there is a flagrant breach of article 6, it is relevant to take into account the seriousness of what is at stake for the appellant (*A.B.* v *Slovakia*, paragraph 55). We accept, too, that what is at stake is to be assessed at the commencement of any proceedings in Iran (*Ezeh and Connors* v *United Kingdom*, paragraph 120). It follows that, if it is accepted that a trial on a charge of adultery might result in a sentence of death by stoning, as the tribunal appears to have accepted, that potential consequence must be taken into account in assessing whether there has been a flagrant breach of the appellant's rights under article 6. It is not clear that the tribunal took that matter into account.

[28] The tribunal did not expressly enunciate in its determination that the test which it sought to apply in relation to the article 6 case was whether there was a real risk of flagrant breach of the appellant's rights under article 6. It may be, however, that it had that test in mind, since it referred to the passage in paragraph 16 of Collins

J's judgment in *Fazilat* which immediately follows his adoption of the "flagrant breach" test. Be that as it may, the first question for us to consider is whether it has been shown that the tribunal erred in law in its decision on the appellant's article 6 claim. In our opinion it is clear that the tribunal did fall into such error. It was conceded on the respondent's behalf that the tribunal's error in failing to appreciate that the point which they quote from the 2001 CIPU report was repeated in the 2002 CIPU report was such an error. In our view it can be characterised as a failure to take into account relevant evidence which was before it, and thus as an error in law. The effect of that error was to lead the tribunal to place less weight than it would otherwise have done on the points quoted from the 2001 CIPU report in paragraph 9 of its determination. The value of that evidence is said to have been "somewhat undermined" by the supposed non-repetition. Quite what is meant by "somewhat undermined" is not clear, but it does appear that as a result the tribunal did not go on to consider what the significance was of the passage about judges having been responsible for prosecution. It also appears that it dismissed the report by Amnesty International about trials often being heard in camera. We therefore conclude that it has been shown that the tribunal fell into error of law in its consideration of the article 6 case.

[29] Miss Drummond sought to argue that that error was not material. Her route to doing so was to undertake an examination of the evidence to see whether, if it had not been devalued on an erroneous basis, it would have been sufficient to establish a real risk of flagrant breach of the appellant's article 6 right. We are not persuaded that that is a route that it is appropriate for us to follow. In the first place, the evaluation of the objective evidence is a matter properly within the province of the specialist tribunal. That tribunal is better placed than we are to interpret the objective evidence from

sources such as the country reports (*Akaeke*, paragraph 29). Moreover, as Sedley LJ pointed out in *Karanakaran* at 479, the process is evaluative, not purely factual. What is called for is an expert evaluation of all of the relevant evidence bearing on the issue of whether there is a real risk of flagrant breach of the appellant's article 6 right. It is possible to list a number of points that ought to have been brought into that evaluation. First among them is the fact that the passage quoted in paragraph 9 of the determination from the 2001 CIPU report **was** repeated in the 2002 CIPU report, and was therefore not undermined in the way that the tribunal erroneously thought it was. That material ought therefore to have been included in the evaluation, and its significance for the appellant's case ought to have been assessed. No such assessment was made. There is an apparent divergence between what was said in paragraph 4.19 of the 2002 CIPU report about courts in general and what was said in paragraph 4.15 about Revolutionary Courts. But there is also the passage in paragraph 4.14 about Revolutionary Courts assuming jurisdiction in cases that would otherwise come before the ordinary civil or criminal courts. It occurs to us, too, that it might be thought that there would be little purpose in stating what was stated in paragraph 4.19 if the point was no more than that the same people acted sometimes as judges and sometimes as prosecutors. It would only be if they acted in both capacities in the same case that a clear human rights issue would arise. We are not in the circumstances persuaded that on this issue we should presume to substitute our inexpert view of the meaning of the objective evidence for the expert evaluation which the tribunal should have brought to bear if it had not discounted the evidence on an erroneous basis. Secondly, because of the same error, the tribunal seems to have left wholly out of account the reference to the Amnesty International report that trial hearings are often heard in camera. That may be thought to be a less serious infringement of the right to

a fair trial than the combination of the roles of prosecutor and judge, but it is part of the material that ought to have contributed to the evaluation of the article 6 case. Thirdly, in paragraph 8 of its determination the tribunal dismissed the evidence about the discriminatory devaluation of a woman's evidence as not clearly applicable in criminal proceedings. That is a possible view, but at the same time the tribunal says that there is "some force" in the point. We would only observe that it is not clear what the net effect of these conflicting observations was on the tribunal's reasoning towards the conclusion expressed in paragraph 11 of the determination that "the court procedures in Iran in criminal trials would not be in breach of article 6". The discriminatory rule of evidence referred to in paragraph 8, although discussed in the State Department report in the context of civil proceedings at the instance of a woman against a man, is not said to be confined to that context. That issue is yet another which ought to have formed part of the evaluation of the evidence. We should add, however, that we do not accept Mr Bovey's submission that, *in dubio*, the objective evidence should necessarily be interpreted in the appellant's favour. The *onus* of showing a real risk of flagrant breach of her article 6 rights remains, in our view, on the appellant. What was said by Lord Bingham, in the passage in *Daly* cited by Mr Bovey and quoted in paragraph [23] above, was said in a domestic context.

[30] On the article 6 issue, therefore, our conclusions are (1) that the relevant test which the appellant must satisfy is to show that there is a real risk, in the event of her return to Iran, of flagrant breach of her article 6 right to a fair trial; (2) that the tribunal erred in law in failing to take into account, in relation to that issue, the evidence that showed that the point quoted in paragraph 9 of the determination from the 2001 CIPU report was repeated in the 2002 CIPU report, and was thus not undermined as the tribunal thought it was; and (3) that it is not appropriate for us to attempt ourselves to

carry out the comprehensive evaluation of the objective evidence bearing on the article 6 issue which the tribunal, through its error, disabled itself from carrying out. We consider that the appropriate course for us to take in respect of this aspect of the appeal is to remit to the tribunal's successor, the Asylum and Immigration Tribunal ("the AIT"), so that it, as the specialist tribunal, may carry out the appropriate evaluation and apply the relevant test. We would add that we do not accept that, on account of the points made by Mr Bovey and recorded in paragraph [25] above, the tribunal lost its entitlement to have its determination treated with respect as a decision of a specialist tribunal. In any event, even if there were force in that submission, it affords no ground for concluding that it would be in any way inappropriate to remit the matter to the successor expert tribunal, the AIT.

[31] We turn now to consider the appellant's case under article 3. The starting point for consideration of that issue is again to be found in *Ullah*. As Lord Bingham pointed out in paragraph 24:

> "In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."

In adopting that approach, it is in our view necessary to take account of a point made by Mr Bovey in his submissions. That point is that, if a person is at risk of being subjected to the death penalty, any unfairness in the trial he would face is a factor which ought to be taken into account in determining whether there would be an infringement of his article 3 rights (*Öcalan*, paragraph 207). We accept Mr Bovey's submission that, in an article 3 case the "flagrant breach" test applicable to an article 6 case does not fall to be applied when a tribunal or a court is considering the question of whether a trial in a foreign country would be unfair, as a factor to be taken into

account in determining whether return to that foreign country would give rise to an infringement of article 3. The "flagrant breach" test is applicable where the question is whether a breach of article 6 justifies refusing to order to return the appellant to a foreign state. Where, however, unfairness of the trial is merely a factor relevant to the determination whether return would infringe article 3 rights, it need not be subject to that stringent test. Rather the point is simply that the risk of being subjected to treatment contrary to article 3 may be increased if the trial at which the death penalty would be at stake would be unfair in any way and to any degree. The unfairness is simply one factor which falls to be taken into account when assessing the risk of treatment contrary to article 3. There is nothing in the tribunal's determination to indicate that they took issues of unfairness into account in that way.

[32] The tribunal did not formulate the article 3 issue which it required to address in terms of a real risk of being subjected to treatment contrary to article 3. Instead it expressed the issue as being whether there was a real risk "of a perverse decision". The tribunal expressed the matter that way because of the way in which it treated the evidence bearing on whether the appellant had committed adultery. It proceeded on the basis that, her denial of adultery having been accepted by the adjudicator, the appellant was in fact innocent of adultery, and any decision to the contrary would necessarily be perverse. That, in our opinion, involved a material misdirection. As Miss Drummond submitted, the fact that the appellant denied adultery made it less likely that she would be convicted of adultery in Iran than would have been the case if she had admitted adultery. It was therefore legitimate for the tribunal to take that into account. In our opinion, however, the tribunal went much further than that. It appears to have proceeded on the basis that, because of the appellant's denial of adultery, any finding of a court in Iran that she was guilty of adultery would be perverse. That, in

our view, constitutes a material misdirection. The acceptance by the adjudicator and by the tribunal of the appellant's denial of adultery does not mean that a court in Iran would have been bound to take the same view. There was apparently evidence laid against her in the court in Iran. It was the discovery that there was a statement purporting to show that she was guilty of adultery that led the appellant to flee Iran. Proof of adultery is no doubt often a matter of inference rather than direct evidence. The appellant's denial, judged credible by the adjudicator, as it appears to have been, does not mean that there could not be evidence before the court in Iran, given in good faith, which that court might accept as supporting an inference that she was guilty of adultery. In the circumstances, therefore, it was in our view a misdirection on the part of the tribunal to suppose that, because the adjudicator accepted the appellant's denial of adultery, any verdict against her in Iran would necessarily be perverse. The basis on which the tribunal distinguished *Jabari* is, in our opinion, affected by that misdirection.

[33] There are other points relied upon by the tribunal in paragraphs 12 and 13 of its determination which it was, no doubt, entitled to bring into account when considering whether there was a real risk that the appellant would be subjected to treatment which contravened article 3. We are of opinion, however, that the tribunal's determination on the article 3 issue cannot stand, given (1) the tribunal's failure to take account, in the context of the article 3 case, of the evidence of the risk of unfairness in the appellant's trial, (2) the tribunal's misdirection as to the effect of the adjudicator's acceptance of the appellant's denial of adultery, and (3) the tribunal's consequent application of the test of whether there was a real risk of a perverse decision, rather than the appropriate test of whether there was a real risk of treatment contrary to article 3. In our view, as in the article 6 aspect of the case, the appropriate

course for us to take in respect of the article 3 aspect of the case, is to set aside the tribunal's determination and remit to the AIT to make a fresh evaluation of the evidence in the light of the appropriate test.

[34] Although Mr Bovey maintained a separate argument under article 2, we do not consider that it is necessary for us to deal separately with that.

Result

[35] For the reasons which we have set out we accept that the tribunal fell into error of law, both in relation to the appellant's case under article 6 and in relation to her case under article 3. We therefore set aside the tribunal's determination. We do not consider that it would be appropriate for us to substitute our decision for that of the tribunal. For the reasons which we have given we consider that the preferable course is for us to remit to the AIT to enable that expert tribunal to address the issues raised by the appellant afresh, and make an appropriate determination of what is established by the evidence on a proper application of the relevant legal tests.