A0163

HUMAN RIGHTS AND REFUGEE LAW UPDATE

Contents

HUMAN RIGHTS AND REFUGEE LAW UPDATE

SECTION ONE: HUMAN RIGHTS

Which rights are available to inhibit removal? There has been a recent dramatic limitation of those which can be pleaded:

1. Lord Phillips MR in the Court of Appeal in *Ullah v An Adjudicator; Do v Secretary of State for the Home Department* [2002] EWCA Civ 1856:

"Strasbourg jurisprudence

> 7. The Convention was opened for signature in November 1950. Most signatories to that Convention also subscribed to the Refugee Convention. It is notable that Article 33(2) of the latter Convention permitted a state to remove someone convicted of a particularly serious crime, or constituting a danger to the community, notwithstanding that removal would be to a country where that person's life would be threatened. We do not believe that the signatories to the Convention conceived that it would impact on their rights under international law to refuse entry to or to remove aliens from their territory.
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> 8. Our belief receives support from the terms of the Convention itself. The right of immigration control is recognised by Article 5.1(f) which qualifies the right to liberty by permitting arrest or detention of a person 'to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Nowhere else in the qualifications to those Convention rights which are not absolute is there any reference to the right of a state to control immigration. We do not believe that this was because this right would, or would arguably, be covered by express limitations, such as 'the interests of national security, public safety or the economic well being of the country', which justify derogation from Article 8 rights. We believe that it was because the contracting states had no intention of restricting their rights of immigration control. The Convention was not designed to impact on the rights of states to refuse entry to aliens or to remove them. The Convention was designed to govern the treatment of those living within the territorial jurisdiction of the contracting states.
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> 9. The Convention is, however, a living instrument. If, initially, it was not designed to impact on the right to control immigration it has, to a degree, been interpreted by the Strasbourg Court in a manner which does have that effect. The task of identifying the principles which govern the application of the Convention in this context is not an easy one.
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> 10. In cases involving expulsion or refusal of entry the Strasbourg Court has repeatedly emphasised the following principle:
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> > 11. 'Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens'
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> See, for instance, *Bensaid v United Kingdom* (2001) 33 EHRR 10. As we consider the authorities, it will become apparent that the Court does not consider that the Convention will be engaged simply because the effect of the exercise of immigration

control will be to remove an individual to a country where the Convention rights are not fully respected. Equally, where the Court finds that removal or refusal of entry engages the Convention, the Court will often treat the right to control immigration as one that outweighs, or trumps, the Convention right.

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56. That situation has, however, no relevance in the present context.

17. Article 8 has been quite often invoked in support of a submission that an immigration restriction infringes the Convention. We believe, however, that it has only successfully been invoked where removal or refusal of entry has impacted on the enjoyment of family life of those already established within the jurisdiction. The Strasbourg cases in this field were reviewed by the Master of the Rolls in *R (Mahmoud) v Home Secretary* [2001] 1 WLR 840 at paragraphs 43 to 55.

18. In the leading case of *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 applicants living within this jurisdiction complained that their Article 8 rights were infringed because their husbands were not permitted entry in order to join them. The United Kingdom argued that neither Article 8, nor any other Article of the Convention applied to immigration control. In rejecting this argument the Court remarked that the applicants were not the husbands but the wives and that they were not complaining of being refused leave to enter or remain in the United Kingdom, but as persons lawfully settled in the country of being deprived or threatened with deprivation of the company of their spouses.

19. In *Abdulaziz,* as in all similar Article 8 cases, the Court has been astute to recognise the right under international law of a state to control immigration into its territory. This right has been weighed against the degree of interference with the enjoyment of family life caused by the immigration restriction often , as we see it, not because this served a legitimate aim under Article 8(2) but because it acted as a free-standing restriction on the Article 8 right.

20. A recent case in which Article 8 was invoked as a bar to expulsion was *Bensaid v United Kingdom* (2001) 33 EHRR 205. The applicant was a schizophrenic, faced, as an illegal immigrant, with removal to Algeria. He claimed that the proposed move would deprive him of essential medical treatment and sever ties that he had developed in England that were essential to his well-being. He claimed that his Article 3 and Article 8 rights would be infringed and his complaint focused, in part, on the treatment that he would receive, or fail to receive, in Algeria. The Court held that his case under Article 3 was not made out. It went on to deal with his Article 8 claim:

> " 46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.
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> 47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender, identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.

48. Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin as based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8, namely as a measure "in accordance with the law", pursuing the aims of the protection of the economic well-being of the country and the prevention of disorder and crime, as well as being "necessary in a democratic society" for those aims."

14. Part of the reasoning of the Court suggests that the treatment that a deportee is at risk of experiencing in the receiving state might so severely interfere with his Article 8 rights as to render his deportation contrary to the Convention. The more significant Article 8 factor was, however, the disruption of private life within this country. There is a difference in principle between the situation where Article 8 rights are engaged in whole or in part because of the effect of removal in disrupting an individual's established enjoyment of those rights within this jurisdiction and the situation where Article 8 rights are alleged to be engaged solely on the ground of the treatment that the individual is likely to be subjected to in the receiving state. In *Bensaid* the Court considered that the right to control immigration constituted a valid ground under Article 8(2) for derogating from the Article 8 rights of the applicant in that case.

15. We shall now set out our conclusions in relation to the Strasbourg jurisprudence that deals with the apprehended treatment of a deportee in the receiving state. The application of Article 3 in expulsion cases is an extension of the scope of the Convention and one that is at odds with the principle of territoriality expressed in Article 1. That extension has occurred because the Convention is a living instrument. The extension no doubt reflects the fact that it would affront the humanitarian principles that underlie the Convention and the Refugee Convention for a state to remove an individual to a country where he or she is foreseeably at real risk of being seriously ill-treated. To date, with the possible exception of *Bensaid* , the application of this extension has been restricted to Article 3 cases. To apply the principle to other Articles where the apprehended treatment would fall short of that covered by Article 3 would be likely to constitute a further extension. While the Strasbourg Court has contemplated the possibility of such a step, it has not yet taken it. The obligations in sections 3 and 6 of the HRA do not require this court to take that further step. We turn now to consider the approach that has been taken by the English courts.

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22. The two decisions of the Court of Appeal that we have cited are inconclusive on the question of whether an expulsion decision can engage Articles other than Article 3 on the ground of the treatment to be anticipated in the receiving state. In Ahmadi no issue was raised as to whether on the facts, which bore similarities to those in Bensaid , Article 8 was capable of being engaged. The decisions of the Tribunal accept that other Articles can be engaged in principle, although, in Devaseelan , only where a flagrant violation is anticipated. In Kacaj Collins J. considered that the right to control immigration would almost inevitably outweigh any interference with a Convention right other than one arising under Article 3. These decisions are not binding on this Court. There is no domestic authority which requires us to hold that where an alien is

removed to a country where his right to practice his religion is inhibited, Article 9 will, or can, be engaged.

26. Mr Blake accepted that the Strasbourg Court has not gone this far. He submitted, however, that this Court should take the lead in recognising that removal in the interests of immigration control can engage Article 9. In our judgment there are compelling reasons why this Court should not do so. The Refugee Convention and Article 3 of the Convention already cater for the more severe categories of ill-treatment on the ground of religion. The extension of grounds for asylum that Mr Blake and Mr Gill seek to establish would open the door to claims to enter this country by a potentially very large new category of asylum seeker. It is not for the Court to take such a step. It is for the executive, or for Parliament, to decide whether to offer refuge in this country to persons who are not in a position to claim this under the Refugee Convention, or the Human Rights Convention as currently applied by the Strasbourg Court. There may be strong humanitarian grounds for offering refuge in this country to individuals whose human rights are not respected in their own country, and it is open to the Secretary of State to grant exceptional leave to remain where he concludes that the facts justify this course. There are, however, practical and political considerations which weigh against any general extension of the grounds upon which refuge may be sought in this country. It is not for the courts to make that extension.

27. For these reasons we hold that a removal decision to a country that does not respect Article 9 rights will not infringe the HRA where the nature of the interference with the right to practice religion that is anticipated in the receiving state falls short of Article 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practice religion in such circumstances will not result in the engagement of the Convention unless the interference is 'flagrant'.

Other Articles

25. This appeal is concerned with Article 9. Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other Article of the Convention is, or may be, engaged. Where such treatment falls outside Article 3, there may be cases which justify the grant of exceptional leave to remain on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the Convention.

26. Our conclusion renders it unnecessary to consider further the facts of Mr Ullah's case, for it has already been determined that these do not engage Article 3. We would simply observe that most of the matters urged by Mr Blake in relation to the facts applied to all Ahmadis in Pakistan. Mr Ullah's special position as a preacher added little to his case in the light of the adjudicator's finding that his preaching 'did not result in any serious problems for him'. In Miss Do's case, her claim under the Refugee Convention as well as her claim under Article 3 remain to be considered, in addition to her claim under Article 9. We turn to the facts of her case."

Article 3: Poverty Abroad

1.2 *El Deaibes* [2002] UKIAT 02582 (12 July 2002)

His Honour Mr Justice Collins (President), Mr Fox

"13. Poverty, hardship and unsuitable living conditions do not by themselves justify requiring a third country to permit a person to remain. And the fact that those conditions may result from discrimination does not necessarily make any difference. Citizens of many countries in the world face living conditions to which the epithet appalling can properly be ascribed. Many displaced persons have to exist in camps under conditions which are equally appalling. Some face discrimination which makes poverty in a poor state worse: there are many examples to be found across the world of minorities or those caught up in a class system endemic in a particular society who suffer considerable hardship. It is impossible for a third country to be compelled to take care of the world's poor even though that poverty results from discrimination. It is only if it reaches the level of persecution that the Refugee Convention will come to their aid and persecution is a strong word. Economic hardship must be extreme and the discrimination must effectively destroy a person's economic existence before surrogate protection can be required."

Article 3: Disproportionate Punishment

1.3 *Saeedian* [2002] UKIAT 05326 (21 November 2002)

Mr Barnes, Mrs Hewitt, Mr Smith

"17. The first issue which we consider is whether, on the face of it, the sentence of imprisonment imposed on the Appellant is to be regarded as potentially persecutory in nature. In our view, it is. The judgment makes it clear that the three sentences of imprisonment, which may or may not be concurrent rather than consecutive, but which we have assumed for the purposes of this determination to be the former, have been imposed because the Appellant complained about the way in which the security forces had carried out their search of his mother's home and the arrest of his nephew. It has been accepted that he did this because he believed that their behaviour had directly led to his mother suffering a heart attack from which she subsequently died. It is further accepted that after an initial informal complaint to the branch of the security services concerned, he formalised it by making a complaint to the President's Office which referred it back to the Military Court for adjudication as that was the court in Iran which had jurisdiction over the actions of the security forces. It is also accepted that he subsequently withdrew the complaint and it is clear that the act of formal withdrawal immediately triggered the serious charges which were then brought against him on a duplicitous basis by the Ministry of Information and Security. Whilst we would not regard a sentence of 6 months imprisonment on the first charge as being disproportionate, albeit somewhat harsh in those circumstances, it is difficult to see how from that factual basis he could reasonably be sentenced to 3 years imprisonment for actions against Iran's internal security, although even that sentence might not be regarded as so disproportionate as to breach international law

standards. It is, however, the third sentence to 8 years imprisonment which is, in our judgement, wholly disproportionate, taking into account his previous record in respect of which he had already been sentenced to and served and completed terms of imprisonment many years previously. We are satisfied that this part of the sentence, at least, is so disproportionate as to be persecutory in nature.

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20. We have considered the Home Office Country Information and Policy Unit (CIPU) Iran Country Assessment for April 2002. At paragraph 4.10, it is said that the traditional court system is not independent and is subject to government and religious influence. It is further stated that the Military Court investigates crimes committed in connection with military or security duties by members of the Army, Police and Revolutionary guards. In order to found its jurisdiction, the court has clearly found as a fact that the Appellant was a member of one of those bodies and since the complainant was a government ministry, which must have asserted that fact in order to ground the jurisdiction of the court, it seems to us that the most that can be said is that the Appellant may be able to raise an arguable issue as to his status to overturn the accepted government assertion that he is amenable to the jurisdiction of the Military Court. That, of course, assumes that he has any right of appeal currently under Iranian law.

21. Miss Paddick frankly accepted that there was no background evidence which demonstrated this conclusively. All she could point to was a passage at paragraph 4.14 of the CIPU Report which reads:

> "The Supreme Court, which has 16 branches, revoked all laws dating from the previous regime which did not conform to Islam. It has limited authority to review cases."

She coupled this with a reference to a passage in the current United States State Department Report, under the heading "Denial of Fair Public Trial" which reiterated that "The Supreme Court has limited authority to review cases" and later stated:

> "In late December 2000, a Military Court began the trials of 18 persons in connection with the killings of several prominent dissidents and intellectuals in late 1998. In January, 15 of the defendants were convicted; however, the results were overturned by the Supreme Court in August."

22. Those passages do not, in our judgement, provide credible evidence that it is reasonably likely that the Appellant will have a right of appeal from the Military Court judgment to the Supreme Court. The passages indicate that any power of review is limited, but there is no information as to the limitations. The one instance quoted would seem clearly to suggest that the review by the Supreme Court was part of an on-going appeal process brought timeously after the original convictions but, in that case, the Military Court had taken the somewhat unusual step of actually convicting members of the security forces for the unlawful killing of members of the public. Bearing in mind what has been said also in the reports about the degree of government influence over the courts, it might be argued that there was a reasonable likelihood that the government had brought pressure to bear for the protection of its own servants. What is certain is that this Appellant would not be in a position similar to the convicted members of the security forces whom the government might have a vested interest in continuing to protect. This one clearly isolated example has to be put in the context of the generality of the commentary about the Iranian court system.

23. It is pertinent to quote a passage a little earlier in the State Department Report dealing with trials in the Revolutionary Courts, which reads as follows:

> "Trials in the Revolutionary Courts, in which crimes against national security and other principal offences are heard, are notorious for their disregard of international standards of fairness. Revolutionary Court judges act as both prosecutor and judge in the same case, and judges are chosen in part based on their ideological commitment to the system. Pre-trial detention often is prolonged and defendants lack access to attorneys. Indictments often lack clarity and include undefined offences such as 'anti-revolutionary behaviour', 'moral corruption' and 'siding with global arrogance'. Defendants do not have the right to confront their accusers. Secret or summary trials of 5 minutes duration occur. Others are show trials that are intended merely to highlight a coerced public confession."

Whilst we appreciate that this defendant was tried before a Military Court, if what he says as to his discharge from the security services is correct, and the government is intent on pursuing him, it would appear that jurisdiction would be in the Revolutionary Courts and the passage quoted can give little comfort that there is a reasonable likelihood that he would there receive a fair trial with proper representation. The Adjudicator has, in our view, fallen into the error of applying the standards applicable in this country to a judicial system which, on the face of the evidence, bears no resemblance to English or, indeed, Western European norms.

24. It seems to us that what was said by Simon Brown LJ in *Arif v Secretary of State for the Home Department* [1999] Imm AR 271, at page 275, in relation to the overturning of duly made convictions by foreign courts is relevant to the appropriate approach to such situations. In that case, Mr Arif claimed that he had been falsely accused in Pakistan by political opponents, who were then the government in power, of serious offences which had led to his being convicted unjustly to 7 years imprisonment in his absence. The relevant passage reads as follows:

> "Altogether more important is the Tribunal's central conclusion. This is that, assuming (as they declined to find but are prepared to assume) that the Appellant was indeed falsely charged with these grave offences and thus unjustly sentenced to 7 years imprisonment in his absence, he may nevertheless now expect to be able to 'have these mis-convictions quashed' on return. If the convictions were procured in the first place by a corrupt judicial system (as the Appellant contended), then equally, they say, now that there has been a change of government, the convictions could be expected to be overturned by a corrupt judicial system, politically influenced this time in the Appellant's favour. Weight moreover is given to that expectation by the 1992 correspondence implying that the Appellant would be able to return safely following a change of government.

In my judgement, that conclusion is seriously flawed. In the first place, it appears to overlook the Appellant's evidence, accepted by the Special Adjudicator, that although the PPP have taken action in a number of cases before verdict has been given, that is unlikely to happen where, as here, there has already been a verdict, even though one reached in the accused's absence. Perhaps more fundamentally, however, the Tribunal's approach seems to me to attach altogether too much importance to the justice system itself and altogether too little importance to the __osecution's role in all this. The gravemen of the Appellant's complaint here is that for purely political reasons he was falsely accused, and for good measure then tortured awaiting trial. Assume that the justice system were not corrupt: it does not follow that he would have escaped wrongful conviction, nor does it follow that he would now be released. The evidence against him may have been made to appear invincible. To say that the justice system may now be corruptible, so that however strong the case was made to appear against him he may now nevertheless succeed on appeal, seems to me to leave far too much to chance."

25. We take a similar view, bearing in mind additionally what is said as to the corruptible nature of the justice system in Iran and giving weight to the fact that the prosecutor is a ministry of the state itself, coupled with the absence of any clear evidence that a sentence imposed some 10 months ago is now in any way appealable under the Iranian legal system in any event.

26. On the facts, and having regard to what we have said above, we find that the punishment is so disproportionate for the offence under the existing conviction as to amount to treatment in breach of the Appellant's human rights under Article 3 of the 1950 Convention and that it is speculative to say that there will be legal redress open to the Appellant so as to avoid such treatment in breach of his human rights. We are therefore satisfied that he is entitled to succeed before us on the human rights claim."

Article 3: Racial Discrimination

1.4 *S&K* [2002] UKIAT 05613 (3 December 2002) (starred)

His Honour Mr Justice Collins (President), Mrs Gleeson, Mr Batiste

"17. We do not doubt that discrimination on the ground of race is a factor that should be taken into account in deciding whether a breach of Article 3 has been established. It may in some circumstances tip the balance. In *Cyprus v Turkey* the conditions of the enclaved Greek Cypriots was such as to breach Article 3 and the discrimination on racial grounds was the motive. The Court did not suggest that merely to discriminate on racial grounds would have sufficed to breach Article 3: the effect of the discrimination and its purpose are important. In both *East African Asians* and *Cyprus v Turkey*, the racial discrimination was government policy intended to achieve a result which was degrading to the victims. While we accept that an intention to degrade is not necessary and treatment which in fact degrades will constitute a breach (see *Pretty v United Kingdom* at Paragraphs 52 and 53), its absence will be relevant in forming an overall view. Thus here the treatment in issue is the removal by the United Kingdom to Croatia in circumstances where it is said there is a real risk of degrading treatment. The knowledge that the government opposes such discrimination and is taking measures to try to prevent it is clearly a most relevant factor. It would be very different if return were in issue when the Tudjman regime was in power and ethnic cleansing was the policy. We have to consider whether notwithstanding the government's measures the treatment which the claimants will receive does mean there is a real risk that there will be a breach of Article 3. That some will discriminate despite government policy to the contrary is not sufficient: it must be shown that that there will be a real risk that whatever is done amounts to degrading treatment."

Article 8: Delay in decision making

1.4.1 ***Article 8***:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1.4.2 The Master of the Rolls in ***R v SSHD ex parte Mahmood*** [2001] 1 WLR 840 summarised the operation of Article 8 in the immigration context thus:

"55. From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls:

(1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.

(3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.

(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on

(i) the facts of the particular case and

(ii) the circumstances prevailing in the State whose action is impugned."

1.5 *Zakrjevsky* [2002] UKIAT 03189 (15 November 2002)

Dr Storey, Mr Edinboro

"26. A separate and somewhat more forceful point made by Mr Nicolson was that the adjudicator was wrong not to treat delay in deciding the appellant's asylum appeal as a relevant factor to be taken into account when conducting the Article 8 balancing exercise. In support of this argument, it can be seen that the adjudicator only expressly identified this as a relevant factor in the context of his recommendation for exceptional leave to remain. However, given his clear reference earlier to the circumstances under which the appellant had arrived in and remained in the United Kingdom, we do not think that he failed to weigh this factor when conducting the Article 8 balancing exercise. Even if we thought he had, we do not think in this case that that delay was significant enough to warrant revision of any of his principal conclusions. In particular it is clear that, even after three and a half years in the United Kingdom (to the date of decision), the children remained of tender and adaptable age and indeed Arnold has already spent some time in Israel."

1.6 *Ul-Haq* [2002] UKIAT 04685 (4 October 2002)

"4. The real question before the adjudicator, and us, was whether removal of the appellant would be an interference with his family life which would be proportional to the legitimate purpose of immigration control. He has a shocking immigration history, which the adjudicator was well entitled to take into account: on the other hand, (which she did not) the Home Office were hardly energetic about removing him. If they had set about it promptly, by dealing with his first marriage application as soon as possible after he had withdrawn his asylum appeal, then they could almost certainly have achieved it before he and his wife had started a family. Then, although they won twice on judicial review, the Home Office not only delayed enforcing the deportation order each time while a child was born, which may have been reasonable; but left any final decision till the birth of a third child was imminent.

5. Clearly a family with young children this age needs to be kept together if possible. The adjudicator was right not to take the wife's present condition into account in deciding whether she could reasonably be expected to go and live in Pakistan; though she is said not to speak Urdu, and has probably lived here too long for that to be at all easy for her. The daughter, just over 4 at the date of the decision, had not settled into school; and even now would at her age adapt well to life in Pakistan; so would the son, nearly two at the date in question. However, the main proviso in each of their cases, we think, is that their mother should also take to it. Even as she was then, in the final trimester of what appears to have been a normal pregnancy, she was not only a British citizen, but had lived most of her life here; and there is nothing to contradict the assertion that she speaks no Urdu. We do not think she could reasonably have

been expected to settle down at all easily in Pakistan with three young children. The adjudicator was right to accept that she was likely to refuse to go with him; but in the circumstances that was likely to result in a serious interference with their family life."

Article 8: Family life with Non-Combined Appellants

1.7 *Zakrjevsky* [2002] UKIAT 03189 (15 November 2002)

"The adjudicator's allowance of Article 8 in qualified terms

36. This brings us to the adjudicator's qualified allowance of the appeal on Article 8 grounds limited to his concerns about the possible removal from the United Kingdom of the appellant and his son prior to Miss Shtrickman having exhausted her rights of appeal against refusal of asylum.

37. Mr Nicholson's complaint about this conclusion was carefully confined to the argument that it should have led him to make an unqualified rather than a qualified allowance of the Article 8 claim. However, we have more fundamental difficulties with it. The adjudicator mentioned his concern "with the possibility that the appellant and Arnold Shtrickman may be removed before the determination of Miss Shtrickman's appeal against the respondent's decision to refuse to her asylum". Since he found that such removal would not be proportionate, he allowed the appeal. However, he was plainly wrong to consider that there was any real (as opposed to possible) risk of removal in such circumstances happening. The decision made against the appellant was not even a decision to remove him. Furthermore, the Secretary of State has obligations under section 6 of the Human Rights Act not to act in a manner contrary to a person's human rights. The adjudicator's evaluation of the family's situation amounted to an unwarranted assumption that the Secretary of State would act in a manner which, by separating the family, would constitute a disproportionate interference with their right to respect for family lie. In reality such a risk was theoretical, not real. At the date of decision there was no violation of Article 8.

38. Accordingly the adjudicator should not have allowed the Article 8 appeal on any grounds at all, limited or otherwise."

Article 8: Draft evasion and interference with family life

1.8 *Tasyurdu* [2002] UKIAT 03722

Dr Storey, Miss Ramsumair JP, Mrs Harris

"15. As regards the human rights grounds of appeal, which Mr Soorjoo rightly observed only really engaged Article 8, we are not persuaded they demonstrate that the decision to remove the appellant was a disproportionate interference with his right to respect for private and family life. The adjudicator plainly approached the relevant issues in the light of the guidelines set out by the Court of Appeal in *Mahmood* [2001] INLR 1 and the Tribunal in *Nhundhu and Chiwera* (01/TH/0613). In concluding there were no insurmountable obstacles, he correctly treated as factors counting heavily against the appellant: that he and his wife both knew when they married that his

immigration status was precarious; that the appellant had not been in the UK for very long, having arrived in February 2000; that although the appellant's wife was a British citizen who was pregnant, she had lived in Turkey as a child and her own family was Turkish; and that there were no satisfactory evidence she would herself face any adverse attention from the Turkish authorities or that medical and other facilities there would be so inferior as to subject her to any serious harm. In conducting the balancing exercise under Article 8 he did accept that because the appellant would have to serve a period of imprisonment for draft evasion she would have to live in Turkey as a single parent deprived of the company of her family. But he did not think this hardship made her return together with her husband insurmountable.

16. Mr Soorjoo has urged us to reach a different conclusion primarily because of the particular fact in this case that the couple would be separated for up to 3 years whilst he served his term of imprisonment for evading military service. As the Tribunal said in *Hariri* [2202] UKIAT 03557(in which Mr Soorjoo was also Counsel), we do not rule out in principle that compulsory military service, if too prolonged or repeated, could give rise to an Article 8 issue. However, the appellant in this case must have been fully aware when he entered upon this marriage that he might have to serve such a period of imprisonment upon return to Turkey. And the is no reason to think that whilst the appellant is in prison the couple cannot maintain some degree of contact through prison visits and correspondence. Although prison conditions in Turkey are plainly not the same as in the United Kingdom, it is noteworthy that the Court in Strasbourg has never seen, save in very exceptional circumstances, any disproportionate interference with the right to respect for private and family life to arise from the separation of a family caused by service of a lawfully imposed punishment.

17. These reasons were more than sufficient in our view to justify the adjudicator's decision to dismiss the Article 8 ground of appeal. Indeed we consider there was an additional reason for concluding that in this case the interests of the UK government in the maintenance of effective immigration control outweighed the appellant's right to respect for private and family life. The imprisonment of up to 3 years was in punishment for failure to perform a duty which is considered part of the obligations a state can legitimately require its citizens to fulfil. The interests of the UK government in maintaining effective immigration control plainly extend to acting in a way that does not undermine the proper jurisdiction of other states over the lives of its own citizens. It is only in exceptional circumstances, such as those mentioned in *Sepet and Bulbul* and *Foughali* (00/TH/01514) (save for that of conscientious objection), that a claim based on risk arising from a *refusal* to perform military service is recognised as justifying the UK government in taking a decision whose effect is to prevent a draft evader being required to perform his legal obligations under the law of his country of origin.

18. For completeness we would note that, even had we been minded to accept that there were insurmountable obstacles to the couple continuing their family life in Turkey, it is clear from the judgment of the Court of Appeal in *Mahmood* [2001] INLR 1 and the decisions of the Tribunal in a number of cases beginning with *Baljit Singh* [2002] UKIAT 00660, that an Article 8 claim can still not succeed unless an appellant can show that there were exceptional circumstances justifying the appellant in not availing himself of the option of going back to Turkey on his own and applying for entry clearance as a spouse from there. Plainly in this case, the appellant would not be able to do that until he had completed his sentence of imprisonment for military service. However, for similar reasons to those we have already given when explaining why we do not think that this period of disruption of family life would cause disproportionality if the couple chose to resume their family life together in

Turkey, we do not think that there would be any exceptional circumstances excusing the appellant from trying this alternative option. Indeed, if his wife was concerned about separation from other family members or inadequate medical and other facilities or scarcely seeing her husband apart from prison visits, that option might well cause less interference. However, whichever option the couple chose, the decision to remove this appellant was not a disproportionate one."

Article 8: Proportionality, Burden on public funds

1.9 *Akkurt* [2002] UKIAT 04322 (20 September 2002):

Mr Rapinet, Mr Wilson, Mrs Faux

"20. Turning to Mr Armstrong's second submission in relation to family life and the Article 8 claim, we accept that there is a family life in this country. The appellant has been living with one of his siblings and his family for eight years. He has another sibling with whom he is in regular contact and with whom he stays from time to time. Certainly the three siblings have built up a family life around the appellant largely because of his dependence upon them. His incapacity clearly renders him incapable of earning a living and would appear to create a total dependency by him upon them and their respective families. That is perfectly understandable and their support of him is most commendable. We would therefore find that to deport him would be an interference with that family life.

21. Would that interference be proportionate? The appellant had an alternative family life before he left this country with his mother and, possibly, with his sister. He was, presumably, as dependant on his mother as he is now dependant upon his brothers. Mr Armstrong has conceded that the appellant would be swapping one form of family life with another form of family life were he to return. This must mitigate against a plea that it would be disproportionate. The appellant would not be on his own, he would be once more with his mother who would be able to care for him as she had done before he came to this country.

22. We return to the question of proportionality. The Secretary of State has a duty to maintain the immigration laws of this country and in doing so has to consider the possible financial effect upon a person remaining in this country under the Human Rights Act. One effect in relation to this appellant is not in dispute. That is that there is more than a reasonable likelihood that he will be dependent upon the state for the remainder of his life by reason of his mental incapacity. It is not seriously in dispute that the appellant will find it difficult if not almost impossible to obtain employment because of the incapacity. Mr Armstrong tells us that he is currently maintained financially and physically by his brothers. That may well be so but once he has the right to remain in this country there is no reasons why that situation should continue. He would be perfectly entitled to draw Disability Benefit, Unemployment Benefit, Housing Benefit and seek housing in his own independent capacity, possibly in one of the forms of accommodation for which special provision is made in relation to those who are handicapped. The right cannot be denied him once he has the right to live in this country, and there is no reason why his siblings should continue to maintain him once his status has been established. We would therefore find that one of the matters which must be considered in relation to proportionality is the fact that his unfortunate appellant because of his incapacity is going to be a permanent drain upon the finances of this country. Bearing in mind the fact that his mother and his sister are in Turkey,

that he had a family life there with them before he came to the is country, and that he will be merely exchanging one form of family life for another, we do not consider that it would be disproportionate for the appellant to be returned to Turkey. No plea has been made with regard to medical assistance that he may require. We get the impression that his incapacity is such that nothing much can be done to improve his position. Certainly neither of the medical reports referred to any prognosis that would result from any treatment. If such a plea had been put we would be inclined to come to the conclusion that medical facilities in Turkey are in any event sufficiently sophisticated to give this appellant such support as he may require from the medical authorities."

Proportionality and Non-Admissibility Abroad

1.10 *Pavlov* [2002] UKIAT 02544 (11 July 2002):

Mr Barnes, Mr Rapinet, Mr Rogers JP

"13. Mr Symonds accepted that removal to Estonia was within the lawful powers of removal of the Secretary of State but sought to raise, as a preliminary matter, whether the exercise of such powers could properly be described as lawful (as opposed to arbitrary) where it was known that the Respondent would not be admitted to Estonia so that the purpose of removal cannot be achieved. As we have pointed out, that is to put the matter far too high. The most that could be said on the evidence before us was that the Secretary of State might not be able to effect practical removal but Mr Jones made clear to us that if the Respondent were not admitted by the Estonian authorities, then it was the policy of the Secretary of State that the Respondent would be re-admitted to the United Kingdom so that his position could be reassessed on the basis that he was a stateless person. There would be no question of any repeated attempt to remove him to Estonia without such reconsideration. There is, in our judgement, a clear distinction between the question of lawfulness of intended removal, in respect of which there is specific provision for challenge under Section 66 of the Immigration and Asylum Act 1999, and the practicability of removal to a country to which the person in question may be lawfully removed under the powers given by Parliament to the Secretary of State. If the proposed removal is lawful, the Immigration Appellate Authorities are not concerned with the question of its current practicability. Were it otherwise, the obviously absurd situation that a failure by somebody unlawfully here to take steps open to him or her to procure the necessary travel documents readily available to them on application would prevent their lawful removal. Whilst we accept that that is not the position here by reason of Estonian citizenship and residence law, it is the position of the Secretary of State that he believes removal to be practicable, and that is an issue for him and not for us.

14. Mr Symonds then submits that removal would be in breach of the Respondent's human rights under either Article 3 or Article 8 of the European Convention on Human Rights.

15. So far as the Article 3 claim is concerned, it was his submission that the decision to refuse to grant the Respondent leave to enter or remain in the United Kingdom and to give directions for his removal prevented him from establishing and placed a real restriction upon his fundamental rights and freedoms with no prospect of that circumstance being altered. He submitted that, pending any attempt at removal, the Respondent would have no access to the usual support systems in the United

Kingdom and that both here, and if re-admitted to Estonia, his dignity as an individual would be denied him in such a way as to amount to degrading treatment. In this connection, he sought to rely on the views on the European Commission of Human Rights in the *East African Asians the United Kingdom* Application (1981) 3 EHRR 76. He pointed out that, at paragraph 189 of the decision, the Commission had found that degrading treatment would follow from treatment "if it lowers him in rank, position, reputation or character, whether in his own eyes or in the eyes of other people" provided that it reached a sufficient level of severity to engage Article 3. At paragraph 196, the Commission further considered the question of whether discrimination based on race could "in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3". It must, however, in our view, be appreciated that what is said in the *East Africans* case must be looked at very much in the context of the facts of that case. The applicants were citizens of the United Kingdom who, following the independence of the areas in East Africa where they had lived for many years, were in most cases deprived of their livelihood and rendered destitute, their continued residence in East Africa had become illegal and they had been refused entry by the only state of which they were citizens, namely the United Kingdom, so that they had nowhere else to go. The situation of the Respondent is entirely different. He is not a citizen of this country and there is no evidence that aliens in Estonia who are permitted to reside there suffer such severe discrimination as applied in the *East African Asians* case where the deliberate policy of the relevant government was to make their continued stay in the countries of their former habitual residence intolerable. Given the Home Office policy should the applicant not be re-admitted to Estonia, we have no hesitation in saying that there is, in our view, no merit at all in Mr Symonds' submissions that removal would be in breach of Article 3 of the Convention. The Respondent would either be accepted back into this country if the Estonian authorities refuse to readmit him or, if allowed to return, would not, for the reasons so clearly expressed in *Senitev* be reasonably likely to be subjected to treatment contrary to Article 3 by the Estonian authorities.

16. The only other basis of claim advanced by Mr Symonds was that removal would amount to a breach of the Respondent's rights under Article 8 of the Convention. This is an issue which, in our view, does require to be separately considered.

17. The terms of Article 8 are as follows:

> "(1) Everyone has the right to respect his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right, except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection and the rights and freedoms of others."

18. It seems to us that if there is a potential breach of the Respondent's human rights under Article 8 by removal, then the issue for our decision is whether such removal would be proportionate to the public interest under Article 8(2). In those circumstances, it may be argued that the practicability of removal does have a direct impact on the issue of proportionality in the case of interference with the Respondent's human rights under Article 8(1).

19. The Respondent arrived in the United Kingdom in October 1999 and was followed shortly thereafter by his wife and children. It is not disputed that they live together as a family unit, in accommodation in London. The Respondent's wife sought asylum in her own right and it was not clear whether her application had been the subject of refusal, appeal and dismissal but, since the practice of the Secretary of

State, as confirmed to us by Mr Jones, is that the removal directions relating to the Respondent would not be effective unless he, his wife and children could all be removed as one family unit, it is clear that implementation of the removal directions would not result in the splitting of the family unit. It was accepted by Mr Jones that the Respondent and his wife would have established a family life in this country, albeit subject to potential removal, but it was his submission to us that removal as a family unit would not lead to any breach of the Respondent's Article 8(1) rights to family life.

20. It was, however, Mr Symonds submission that if such removal would be ineffective because the Respondent and his family would not be admitted to Estonia, any disruption of family life by such an attempted removal would not be proportionate to the legitimate interests of the state in exercising firm immigration control under paragraph 8(2). This is in contrast to the position under the Refugee Convention and Article 3 rights where, for the reasons which we have already explained, we take the view that we are not concerned with issues of the practicability of removal in circumstances where removal will not give rise to any breach of the United Kingdom's international obligations.

21. Similarly, the voluntary re-admission of the Respondent and his family to Estonia would not give rise to any breach of Article 8 rights, because the family unity would not be disrupted and, for the reasons found applicable in *Sensitev*, resettlement in Estonia would not lead to a breach of human rights because of the country conditions which will be applicable there in the former country of habitual residence of the Respondent and his family, who would indeed then be reunited with their wider family who still live there.

22. It seems to us that a successful argument on proportionality could be raised, if at all, only on the basis that there was no reasonable likelihood of re-admission to the country of former habitual residence.

23. In this respect, Mr Jones relied on the CIPU Bulletin 1 – 2001 which recorded the provision as to revocation of a residence permit or work permit for an alien by reason of unregistered absence in the terms which we have already set out but then went on at paragraph 14(10) of the Bulletin to say that on the information available to the Secretary of State it was most unlikely that in practice that an individual's failure to register absence would result in revocation of a residence permit and that "failure to comply with Article 14 would not be an obstacle to an individual re-entering Estonia".

24. We had before us three letters from the Estonian Embassy in London, all of which were signed by Mr Kart Juhasoo-Lawrence, the Consul. The first two letters to the Respondent's representatives and dated 5th February and 23rd May 2001 respectively. The latest letter was to the Appellant's Country Information and Policy Unit and was dated 27th July 2001.

25. The earliest letter summarised the position as follows:

> "Those Estonian Alien's passport holders, whose passport and residence permit have expired while they have been away from Estonia, and who have not, prior leaving Estonia, applied for a new residence permit, have to obtain some kind of valid passport for themselves before they can start applying for a temporary residence permit at the Embassy. Not all the temporary residence permit applications meet a positive reply. There is an immigration quota in Estonia, a number that is set by the government in the beginning of each year, calculated on the basis of a number of population (0.05%). A proof of family ties will here be helpful."

26. The second letter was more specific. It said that if a person had a temporary residence permit which expired on 1st June 2000, the last date for applying for a permanent residence permit would have been 1st May 2000. The last date for applying for the renewal of his temporary residence would have been 1st December 2000. After that date, the person concerned could apply for a new temporary residence permit in accordance with the Estonian Alien's Act 1993 on an equal basis as any other foreigner applying for the first time. The application could be made to any Embassy and the time for processing was one year from the day the documents had been accepted by the Board, taking into account the annual immigration quota. Unless the applicant considered applying for a temporary residence permit, he had to apply for a work permit at the same time which would require an invitation issued by an employer in Estonia to him. It concluded:

> "He would, most likely, not be admitted in Estonia if he tries to enter the country without valid documents."

27. The third letter, addressed to the Appellant, says:

> "I understand that Article 14(2) of the Estonian Alien's Act, which lists the conditions when residence permits are revoked, has left you the impression that the revocation is a somewhat automatic course of action. In fact, the revocation is a process that has to be initiated, deliberated and completed. .... Each case is considered on its own merits while the person concerned has the right to be present and participate in the discussion. In other words, there is never any automatic invalidation of a residence permit.
>
> It should be kept in mind that revocation of a residence permit is regarded as an extreme measure which is always carried out against the background of a wider legal framework of human rights. It means in practice that only very few revocations have been carried out over the past few years and the number will stay very low. I personally think it is most unlikely that failure to comply with Article 14(2)(3) of the Alien's Act would be considered a serious enough transgression to lead to the revocation of a residence permit, least of all a permanent residence permit.
>
> There has not been a single case of a revocation of a permanent residence permit. The Estonian Citizenship and Migration Board is not at all inclined to initiate processes, the results of which are likely to be overthrown by a court."

The letter then goes on to say that the lack of the registration stamp (that is relating to intended absence in excess of 183 days) in an individual's passport would not be an obstacle to him/her re-entering Estonia. Estonian border guard is under the obligation to permit re-entry to everyone who holds a valid passport and a valid Estonian residence permit, temporary or permanent. The holder of a permanent residence permit would not have a problem renewing their Estonian Alien's passport if that has expired.

28. We note also that there had, in the past, been substantial grants of permanent residence permits to many of Russian ethnicity, an Alien's passport may, under the Act, be issued to an alien who does not have a passport or equivalent document and that there is an exceptional power granted to any official authorised by the Minister of Internal Affairs who grant an entry visa to aliens whose arrival in Estonia is necessary due to hurtant and unforeseeable circumstances. It is clear, therefore, that there are wide discretions available to the Estonian authorities as to permitting entry. The 1993 Act also specifically provides that any alien lawfully admitted to Estonia shall be guaranteed the rights and freedoms equal to those of Estonian citizens or arising from the generally recognised rules of international law and international custom.

29. Finally, we bear in mind that it is the stated position of the Secretary of State in the CIPU Bulletins that he has reason to believe that, in practice, the re-entry of former lawful alien residents will be permitted.

30. Looking at the totality of the evidence produced to us, we do not think it can be said that it is not reasonably likely that the Respondent will be re-admitted with his family if now removed. Since the position is regulated by the Aliens Act of 1993 in Estonia, that would also have been the situation at the date of the Secretary of State's decision.

31. The Respondent has no right to remain in this country and, on the face of it, removal, provided it is with his remaining family members here, would be proportionate to the regular enforcement of immigration policy, a matter within the scope of the provisions of Article 8(2) of the Convention. As we have already noted, should it be that he and his family would not be re-admitted to Estonia, the Secretary of State accepts that they would have to be re-admitted to this country for their position to be reconsidered in the light of those circumstances.

32. Taking into account all those factors, we are of the view that removal pursuant to the present directions, whether ultimately effective or not, does not give rise to any breach of the Respondent's Article 8 rights."

Proportionality: Non-return of a person with refugee status cannot be assumed

1.11 *Kilala* [2002] UKIAT 05220 (13 November 2002)

Mr Moulden, Mrs Hussain JP

"25. The letter in the Appellant's bundle shows that his wife was granted refugee status on 27 March 2002 and has permission to remain in this country permanently. We accept that this indicates that she had established a well-founded fear of persecution in the DRC in March 2001. However, absent any further evidence, it does not establish that she is still unable to return to that country. We are not suggesting, as Ms Canavan imagined, that the Secretary of State or anyone else could compel her to return to the DRC. It is for him to show, doubtless with her help, that there are still good reasons why she should not make a voluntary return, with her husband and child. An individual who has been granted refugee status does not, on that basis alone, establish that he or she can never be expected to return to the country of origin. In a changing world circumstances which gave rise to a well founded fear of persecution change, sometimes for the better and to an extent that such a fear no longer obtains. Recent examples are Kosovo and Afghanistan. We are not suggesting that an individual's claim has to be re-litigated. Refugee status has been granted and consideration of current circumstances does nothing to jeopardise this. Here we have hardly any information about her Asylum claim. We do not have, for example, her witness statement or the determination of an Adjudicator. Whilst we have current country information, particularly in the Respondent's Country Assessment, we do not know on what basis she made out her claim. Although she was granted refugee status as recently as March 2001 there is no presumption that the circumstances at that date still hold good. It would not have been too onerous a task for her and the Appellant to provide the necessary information. We are in no position to judge whether she can now return. In the circumstances she has not established that she would not be able to return with the Appellant and their child.

26. We can find no merit in the submission that the Respondent should have considered the Appellant as the dependent of the woman who is now his wife for the purpose of a possible discretionary grant of exceptional leave to remain. The Appellant has never been her dependent within the terms of the policy, and set out in the guidelines which Ms Canavan has put before us. He was never included in her Asylum application. She was never included in his Asylum application. There is no basis on which it could be said that either was the dependent of the other. There was no pre-existing family unit abroad. The Appellant is not and has never been dependent on the woman who is now his wife. The discretionary policy for family reunion only applies to a spouse and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum. There was no family unit comprising the Appellant and the woman who is now his wife when she left the DRC.

27. The tribunal in *SSHD v Sukhjit Gill* said, "In considering the firm and fair immigration policy all aspects of that policy must be taken into account. So there is no policy of necessarily removing a person in the Respondent's position. Mr Gill is right to point out that there are policies which permit persons in the Respondent's position to remain in this country. Not only is the immigration policy which is such a strong factor based on executive discretion, but that discretion insofar as it is expressed in a policy is reviewable at least to some extent by the Appellate Authorities and the courts".

28. In *Bequiri* the tribunal said, "However it does not seem to us that these types of variation take matters very far, particularly when, as here, the claimant in question does not even fall under the terms of some item of concessionary policy. Such variations may qualify to some extent, but do not gainsay the interests of the state and the wider community in the maintenance of effective immigration control. Thus in our view it is not open to an Adjudicator to treat the interests of the state and wider community in the maintenance of effective immigration control as easily overridden."

29. This is a case where the Appellant cannot bring himself within the terms of any of the Respondent's concessionary policies. They do not assist him.

30. Having concluded that the Appellant has established a private and family life in the United Kingdom it is clear that there would be interference with this if he had to return to the DRC. There is no dispute that the Respondents decision was in accordance with the law and pursued a legitimate aim.

31. In relation to proportionality we take into account the matters already set out. On the one hand the Appellant and his wife are married. They are living together in a continuing relationship, which benefits both of them and their infant child. It hardly requires the documentary evidence submitted by the Appellant to establish the benefits of the presence of a caring father to a child of whatever age. They do not have relatives to help them in the United Kingdom or in the DRC. She is recovering from the birth and he helps her both generally and with their child. We place little weight on the possibility of additional or continuing public expense if he returns to the DRC, she cannot work and the British government has to meet the cost of dealing with a marriage application from abroad. In any event these have to be set against what the Respondent may legitimately regard as the broader issues and the far greater costs of not maintaining an effective immigration policy.

32. It is not for us to prejudge the prospects of success of any marriage application made by the Appellant from the DRC. The likely success or failure should not enter into our assessment. Likely failure should not entitle the Appellant to remain. Likely success should not weigh in favour of return. The situation might be different if there was any evidence to show that it would be excessively difficult or even impossible for the Appellant to make an application from the DRC. There is no such suggestion. The length of time that an application is likely to take and the fact that the Appellant

would be separated from his family in the meantime are factors which we take into account."

Proportionality: Historic entitlement to refugee status not queue jumping

1.12 *Xhacka* [2002] UKIAT 03352 (31 July 2002)

His Honour Mr Justice Collins (President), Dr Chaudhry, Mr Bremmer

"1. The appellant, an ethnic Albanian from Kosovo was born on 5 December 1981. He arrived in this country on 11 October 1998, hidden in the back of a lorry when he was still 16. He made his claim for asylum on 13 October 1998. Nothing was done by the Home Office to process his application until 4 May 2001 when they wrote a letter which contained this sentence:

> "As your client is an unaccompanied minor we are anxious to give this application the priority it deserves."

That is a strange observation since by May 2001 some two and a half years had already passed since the applicant, an unaccompanied minor, had arrived in this country. The refusal letter which was eventually dispatched was in the usual form indicating that although he had suffered under the Serbs the situation had now changed. Indeed at paragraph 6 of the letter the author said:

> "The Secretary of State does accept that you may have suffered persecution in the Federal Republic of Yugoslavia. You say that the Serbian authorities would constantly harass you and your family."

2. But he then went on to say rightly that the situation had changed and that therefore there was no present well-founded fear of persecution. That was accepted. The appeal was based not on the rejection of the asylum claim but on the rejection of a claim under Article 8 because the appellant has married. He met his present wife in September 1999 and as the Adjudicator has decided the marriage is one which is wholly genuine and is nothing to do with any attempt to obtain residence in this country. As he put it:

> "The appellant has clearly established family life with Vinnette Powell. The directions for his removal to Kosovo would infringe his right to that family life."

He then went on to decide that as a result of the decision of the Court of Appeal in *Mahmood*, despite the hardship there were no insurmountable obstacles to the family living together in Kosovo or to the applicant going back to Kosovo and seeking an entry clearance within the terms of Rule 281 of the relevant Immigration Rules. But the Adjudicator did go on to say this:

> "However I must say that the appellant's wife was very moving when she gave her evidence. Taking into account what I assess as the fairly good chances of success of an application made under paragraph 281 by the appellant in Kosovo, his age, the loss of his family and the persecution endured and witnessed by him in Kosovo, I recommend that the Secretary of State grants this appellant indefinite leave to remain obviating the need for an application under paragraph 281."

3. In our judgment the Adjudicator could and should in the circumstances of this case have gone further and allowed the appeal under Article 8. He cites extensively from the relevant part of the decision in *Mahmood*, but the court there made it plain that if

a person had no other legitimate claim to enter then in the absence of exceptional circumstances which would justify the waiver of the normal rules which were established to obtain consistency in dealing with marriage cases, the application would not succeed. In the circumstances of this case, the fact is that the appellant did have a legitimate claim to enter, namely that he was at that time a refugee, and that coupled with the delay in dealing with his claim as an unaccompanied minor until the situation changed, is capable of amounting to exceptional circumstances and does in the circumstances of this case justify a decision that he is entitled to remain here because to remove him would be a breach of Article 8 of the European Convention on Human Rights.

4. We emphasise that this is a decision which depends entirely upon the facts of this case and must not and cannot be taken as a precedent to be relied on in any other case at all. Each will depend upon its own facts."

Proportionality: non-precarious immigration status, factors leading to removal being unreasonable

1.13 *Jobe* [2002] UKIAT 05444 (26 November 2002)

Mr Drabu, Mr Bremmer, Dr Chaudhry

"14. The refusal letter, we note acknowledges in paragraph 7 that the appellant has been "in a relationship with a British citizen since 1999" but states in paragraph 8 that he knew of his "precarious immigration status" when he began the relationship with his partner and she must have been aware of it also. On the facts established before us, we do not find the assertion made in paragraph 8 to be well-founded. The appellant has been living with his wife since 1999 and at the time he did not know that his appeal had been dismissed. His immigration status was by no means "precarious" at the time. At best it could be described as uncertain but certainly not as precarious. His asylum claim, as has been accepted by the Adjudicator was credible and plausible. It is therefore entirely possible that his asylum appeal would have succeeded had he been able to pursue it properly, as he had intended to. This is not a case where an unmeritorious asylum applicant has entered into a relationship to found a claim to remain under human rights. This is a case where a genuine relationship came into being at a time when the appellant sincerely believed that he was pursuing his lawful right of appeal against a decision to refuse him asylum.

15. On the issue of proportionality, not only is the duration of relationship gives rise to the right of family life important but equally important is the strength and quality of that relationship. In our view the relationship in this case is one of long standing – over three years at the time of the impugned decision. Its nature – husband and wife – rather than that of siblings etc is substantial and its quality – the obvious and demonstrable bonds of affection between the parties – is excellent. The appellant has two children from this relationship and we share entirely the view of the Adjudicator who saw them at the hearing before him as we did at the hearing before us, that the children are very fond of the appellant. We were also impressed by the presence and its manner of the appellant's wife at the hearing before us. We have no doubt that we are dealing with a loving, stable and strong family relationship between the appellant and his wife and their children.

16. We accept that if the appellant is removed to Gambia he will have no house to go to and that he has no family in Gambia. His employment prospects will be grim. More importantly, it is our view that it is possible that he may be at risk for a Convention reason on removal to Gambia. We do not say that there is a reasonable likelihood of persecution. We cannot and do not go as far as that but we cannot discount or disregard the possibility of persecution and ill-treatment to the appellant given the past history and the nature of politics in Gambia. This is a factor that we weigh in balance on the issue of proportionality.

17. We do not find it reasonable to expect the appellant's wife and two infant children to accompany him or to join him in Gambia, should he be removed. We do not think that the appellant's wife and children will be able to adapt to living in Gambia. We also cannot ignore the economic consequences of removal of the appellant upon his wife and children in the United Kingdom. In our judgment the appellant cannot conduct his family life with his wife and children in Gambia as the obstacles for the same are many and are of serious nature. We also give weight to the argument advanced on the appellant's behalf that if removed, he may be unlikely to qualify to re-enter as a spouse because of the maintenance requirement."

Proportionality: failure to avail oneself of opportunity to return abroad and claim for re-entry under the immigration rules

1.14 *Masood* [2002] UKIAT 05549 (2 December 2002)

Mr Mackey, Mr Thursby

"**Decision**

18. At the outset, we do note that the Adjudicator did not give consideration to the potential ability of the claimant to return to Pakistan and lodge an application for entry as the spouse of a British citizen in her determination. We find that consideration of this ground by us is not limited by the terms of the grant of leave. The decision in *Mahmood* itself notes that the facts of the particular case must always be considered in determining whether interference with family life is justified in the interests of controlling immigration (paragraph 55(6)).

19. Such a proposal would at most cause a temporary interference in the family life of the claimant, his wife and stepdaughter. Mrs Masood would then have the option of returning with him or otherwise. It is also valid to note that the appellant has had seven years in which he could have, at any time, gone to Pakistan and made such an application, together with the rights of appeal if necessary that came with that. He has thus clearly not taken what could be considered as reasonable steps to ensure his own long term residential status in the United Kingdom. This, to a large extent we consider sets off the provisions of paragraph 51(4) of the *Mahmood* decision. The claimant may have been in the United Kingdom with a valid status over that period of time, however, clearly it was not one that in any way could be seen as having the certainty and assurance that could have been achieved by him going to Pakistan and lodging an application for entry clearance as a spouse at any time.

20. Beyond this we are satisfied that if the appellant did travel to Pakistan with his wife, and perhaps his stepdaughter, that there are not insurmountable obstacles to the family continuing to live together in Pakistan. While it is correct that there is a large cultural gulf there is substance in the submission that Mrs Masood and her daughter,

have now been living with the appellant for some seven years, they have therefore had the opportunity to absorb and understand a considerable amount of his religious and cultural background. The test of "no insurmountable obstacles" is a high one and as stated in *Mahmood* applies "even where this involves a degree of hardship for some or all members of the family." Thus while there may be some hardship in the relocation of Mrs Masood and her daughter we consider, on balance taking into account all the evidence, that such a relocation would not amount to an insurmountable obstacle.

21. We do however, lay particular stress on the ability of the claimant to lodge an application within the rules on returning to Pakistan rather than seeking to remain within the UK "from a position where he is effectively outside of the rules". We consider that it would be incorrect for us to ignore this as it is part of the totality of the facts before us."

SECTION TWO: REFUGEE LAW

Internal Relocation

* Undue harshness is to be created with a serious breach of human rights.

2.1 *Appellant AE & Appellant FE* [2002] UKIAT 05237 (Starred)

His Honour Mr Justice Collins (President), Mr Ockelton (Deputy President), Mr Drabu

"14. As well as having a claim in her own right, she is a dependent of her husband. He does have a well-founded fear of persecution in his home area. Thus in his case the question whether there exists a safe area, which we shall call internal relocation (IR) is relevant. There is no suggestion that it would be unduly harsh to expect him or his children to remain in Colombo. The adjudicator has decided that it would not be reasonable to expect her to return to Colombo and so, it would be unreasonable to expect the family to return. This conclusion could only properly have been reached if the adjudicator was persuaded that it would be unduly harsh to require the husband to return to Colombo because his wife should not be required to go there. The 'unduly harsh' test is established by the Court of Appeal in *R v Secretary of State for the Home Department ex p. Robinson* [1998] QB 929 which is binding on us.

15. The adjudicator has accepted that the wife's condition is such that it would not be reasonable to expect her to return to Sri Lanka. That we suppose reflects the language of Paragraph 91 of the UNHCR Handbook which, in dealing with a fear of persecution in a part of the country of nationality, provides:-

> "In such circumstances, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so".

If his wife cannot be expected to return, it is not reasonable to expect him to return since the family should remain together. That we must assume reflects the adjudicator's reasoning.

16. The concept of IR is based on the recognition that surrogate protection is only required if there is no part of the country of nationality which can be regarded as safe in that no well-founded fear of persecution exists there and to which it would not be unreasonable to expect the claimant to relocate. At p.935F in Robinson, Lord Woolf M.R. said, after citing La Forest J in *A.G. of Canada v Ward* (1993) 103 D.L.R. (4th) 1, as follows:-

> "It follows that if the home state can afford what has variously been described as 'a safe haven', 'relocation', 'internal protection' or 'an internal flight alternative' where the claimant could not have a well-founded fear of persecution for a Convention reason, then international protection is not necessary. But it must be reasonable to expect him to go to and stay in that safe haven;".

In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case,

against the backcloth that the issue is whether the claimant is entitled to the status of refugee".

It must be borne in mind that he will only be entitled to that status if he shows that he has a well-founded fear of persecution for a Convention reason. Lord Woolf summarises the correct approach at p.943B in these words:-

> "In our judgment, the Secretary of State and the appellate authorities would do well in future to adopt the approach which is so conveniently set out in Paragraph 8 of the European Union's Joint Position. Where it appears that persecution is confined to a specific part of a country's territory the decision-maker should ask: can the claimant find effective protection in another part of his own territory to which he or she may reasonably be expected to move? We have set out, ante, pp.939H-940B, appropriate factors to be taken into account in deciding what is reasonable in this context. We consider the test suggested by Linden J.A. in the *Thirunavukkarasu* case, 109 D.L.R. (4th) 682, 687, "would it be unduly harsh to expect this person.....to move to another less hostile part of the country?" to be a particularly helpful one. The use of the words "unduly harsh" fairly reflects that what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country".

17. It is important to note what factors the Court considered to be of relevance in deciding whether it would be unduly harsh to require IR. These are set out at p.940B where Lord Woolf says: -

> "Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the "safe" part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination. In the *Thirunavukkarasu* case, 109 D.L.R. (4th) 682, 687, Linden J.A., giving judgment of the Federal Court of Canada, said:
>
> "Stated another way for clarity.....would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?"

He went on to observe that while claimants should not be compelled to cross battle lines or hide out in an isolated region of their country, like a cave in the mountains, a desert or jungle, it will not be enough for them to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there".

Lord Woolf there lays emphasis on the preamble to the Convention. The first paragraph of this reads: -

> "Considering that the Charter of the United nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human being shall enjoy fundamental rights and freedoms without discrimination".

The Universal Declaration of Human Rights is proclaimed as a common standard of achievement for all people and all nations. The rights set out in it are similar to those

contained in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights (ICCPR).

18. If an individual is not afforded basic human rights, he may often be properly said to be persecuted. If he is subjected to discrimination for a Convention reason, he may be entitled to be regarded as a refugee. But if he is not within the Convention, the fact (if it be the case) that the country of his nationality does not maintain the standards of the Universal Declaration will not make him a refugee. The Refugee Convention does not apply merely because persons have to exist in miserable conditions or there is economic deprivation. And the conditions on return cannot create a person a refugee unless he has a well-founded fear of persecution. Equally, the absence of medical or welfare facilities cannot of themselves make someone a refugee even though his health or his life would be in danger.

19. It follows that logic might suggest that, however wretched the conditions in what we shall call the safe area if IR is applicable, they cannot in the absence of a real risk of persecution for a Convention reason prevent return. But in the light of *Robinson* and the conclusion that a failure to meet the basic norms of human rights is a relevant factor, that cannot be a correct approach for us to adopt. It is in our view important to remember at all times that what is in issue is the need for surrogate protection. If the circumstances in the so-called safe area are such as Lord Woolf has referred to, there may be a real risk that the claimant will be compelled to return to his home area where he faces persecution. There is an analogy with refoulement. Thus if, persecution apart, the conditions are worse than those in the home area, it may be easier to conclude that it was unduly harsh to expect IR. In addition, if there is in the safe area a real risk that the conditions would expose the claimant to a serious breach of basic human rights, he should not be expected to go there. It may be said that there is a degree of illogicality in this if the risk of breaches of basic human rights are no worse than in his home area. It is perhaps possible to criticise the *Robinson* approach on the basis that the preamble to the Refugee Convention emphasises, as might be expected, the need for fundamental rights and freedoms to be enjoyed without discrimination. It is discrimination which will engage the Refugee Convention. However, it is not open to us to limit the issue of unreasonableness or undue harshness in this way since we are bound by *Robinson*. However it is in our view right that for IR to be regarded as unduly harsh any breach of fundamental rights must be established to be serious.

20. In *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, the Court of Appeal considered further the correct approach to IR. At p.456F Brooke LJ said this: -

> "The argument turns on the correct interpretation of a few words contained in the definition of 'refugee' in Article 1A(2) of the Convention, being any person who:
>
> > ".....owing to well-founded fear of being persecuted [for a Convention reason] is outside the country of his nationality and *and is unable* or, owing to such fear, is unwilling to *avail himself of the protection of that country*" (My emphasis).
>
> The words I have italicised have not been interpreted literally. In theory it might be possible for someone to return to a desert region of his former country, populated only but camels and nomads, but the rigidity of the words 'is unable to avail himself of the protection of that country' has been tempered by a small amount of humanity. In the leading case of *Ex p. Robinson* this court followed an earlier decision of the Federal Court of Canada and suggested that a person should be regarded as unable to avail himself of the protection of his home country if it would be unduly harsh to expect him to

live there. Although this is not the language of 'inability', with its connotation of impossibility, it is still a very rigorous test. It is not sufficient for the applicant to show that it would be unpleasant for him to live there, or indeed harsh to expect him to live there. He must show that it would be unduly harsh".

This shows that the threshold is a high one but the 'small amount of humanity' will apply to enable regard to be had to the situation in the safe area and if it will not afford basic human rights IR will not be reasonable. Nonetheless, the risk of compulsion to go to his home area is likely to be in many cases a helpful test. And the height of the threshold is illustrated by the decision of the EctHR in *Bensaid v United Kingdom*. In reality, the application of the preamble will mean that where IR is in issue the Refugee Convention and the European Convention on Human Rights will march together. That in our view is justified because the individual in question has shown that he does have a well-founded fear of persecution in his home area and may well have left the country of his nationality because of that fear. To send him back to suffer treatment that fails to afford him his basic human rights can properly be regarded as unduly harsh and unreasonable.

21. The absence of proper medical facilities to deal with a particular individual's problems will not normally be determinative unless his right to life is thereby put in jeopardy. If proper facilities are available, a person's medical condition however serious cannot make him a refugee. In *Antonipillai* at pp.32-33 of the determination the Tribunal said this: -

> "This is the first occasion where we have had to consider whether or not a medical or mental condition is an aspect which has to be considered when considering whether it would be unduly harsh for a person to seek internal flight. It is our view, and one to which we have given considerable thought, that within the context of that expression "unduly harsh" it would be unduly harsh to insist on internal flight or return to Colombo, as in the instant cases, where the option being exercised is a case where a person is suffering from an terminal illness or suffering from a physical or mental disability of such a nature as to render constant or almost constant attention of a medical or nursing nature, or whether, in the long term, such mental or physical condition is such as to preclude the person from obtaining employment, accommodation and generally acclimatising to the social conditions of the area to which internal flight is sought".

Far from being unduly restrictive, we think that what is there said is too wide. It is only if adequate facilities are not available that IR may be said to be unduly harsh. There may be compassionate reasons for not returning but not on the basis that the individual is a refugee."

Particular Social group: Women fearing adultery in India

2.2 *Kaur* [2002] UKIAT 03387 (2 August 2002)

Mr Latter, Mr Burns, Mr Smith

"6. The Tribunal must now turn to the issue of whether the Appellant has a well-founded fear of persecution for a Convention reason under the Refugee Convention. The case put by Ms Weston can be summarised succinctly: the Appellant

has committed adultery. The very fact of the birth of Karan proves this. The Appellant is from a simple rural background. If she returns to her home area, she will be ostracised by the community but, more to the point, will be at risk of violence from her father and family members. She will not be able to look to the Indian authorities for protection as they rarely involve themselves in domestic matters and, in any event, her position will be aggravated by the fact that the police will be even less inclined to protect her because her husband is a suspected terrorist. Although India is a very large country, it would not be reasonable to expect her to relocate because she will be returned to a situation where she will be destitute. Both she and her son would suffer unduly. Mr Buckley's response to this is that the criteria for a social group, set out by the House of Lords in *Shah and Islam*, is not fulfilled. The Appellant would be able to look to the authorities for protection as the criminal justice system is available to all in India. She would be able to go to a different area where there will be no real risk of any contact with her husband.

7. The Tribunal has been referred to reports prepared by Dr. Purna Sen from the London School of Economics and an opinion from Professor Patricia Jeffrey from the Department of Sociology at the University of Edinburgh, both dealing specifically with the situation in which the Appellant finds herself. There is also a letter from Hannana Siddiqui from the Southall Black Sisters. Dr. Sen in her report summarises the background to the Appellant's claim, and summarises her fears as being from a hostile husband who she fears would kill her, a police force which she feels will continue to harass her about her husband's activities and a community which she considers will be hostile to her condition of having an illegitimate child. The report deals with the situation facing single adult women in India and in particular the problems arising from divorce and separation. The general cultural attitude is that a women belongs to her husband once married and this proprietorial relationship is offended by a man other than the husband having sexual relations with a married woman. If the Appellant is not supported by her family, she will need to provide for herself and her son. There is no certainty of employment and there is the possibility that she would be cajoled or forced into dangerous work such as prostitution. She says that it is safe to conclude that a single adult female in India would have great difficulty in supporting herself financially and in absence of familial support may be destined to destitution or prostitution. So far as the willingness or ability of the police to protect women against violence, it is her view that the Indian State appears to succumb to communal pressures and to privileged religious interests. It is her view that Mrs Kaur will not only be subjected to allegations of adultery but there will be a factual basis to those claims. There will be significant social opprobrium if not absolute ostracism. She will be the subject of hostility even persecution and may well be socially outcast by her peers. The situation in which she would find herself would pose a threat from which the State authorities may not be quick or complete enough in their actions to protect her. The likelihood is that she would not be accepted back into her community and would probably be rejected by her family. Were she and her son to be forcibly returned to India, they would be at risk of violence from her husband or his family. This would be due to their interpretation of her behaviour as bringing shame and dishonour on the family. It is her view that the Indian State manifestly fails to protect women in such circumstances.

8. In the opinion from Professor Jeffrey, she expresses the view that there is a very serious risk that the Appellant will be in danger of losing her life were she required to return either to her husband's or mother's village in Punjab. She would be likely to become a victim of her husband's persecution in a context in which she could not realistically expect protection from the State. She has neither the resources nor qualifications to enable her to live safely as an independent woman. Throughout south Asia, the honour of a family is said to reside in the behaviour of its women and those who fail to meet these standards run the risk of some form of punishment such

as marital violence. Women who commit adultery are extremely vulnerable to being murdered by their husbands who feel that they have been dishonoured by their wives' behaviour. In her view, it is highly improbable that the Appellant would be able to obtain protection to guard her life. Police resources will be quite inadequate to do this in any event but, more to the point, the will to protect her would probably not be there. Police in north India have a very poor record in dealing with what would be called "a domestic" in the United Kingdom. It would be quite unrealistic to expect her to call on the local police to protect her from her husband. Professor Jeffrey has provided a short update to her report dated 30th April 2002. She says that, having recently returned from eighteen months' field work in north India, she can vouch that honour killings are still common for women in the Appellant's situation and there are no grounds for supposing that the police would be able or willing to protect her adequately. She reiterates her original conclusion that there is a very serious risk that the Appellant would be in danger of losing her life if compelled to return to Punjab.

9. The letter from Hannana Siddiqui from the Southall Black Sisters makes the further point that many "disgraced" and rejected women and their children are forced to live in total destitution, vulnerable to economic and sexual exploitation. Women in both rural and urban areas have little or no access to any support services and women's groups and others complain about the State's failure to provide resources.

10. In *Shah and Islam* the House of Lords considered the definition of a social group. On the facts of that case, they accepted that the appropriate social group was women in Pakistan. In his speech, Lord Hoffman emphasised that each case must depend upon the evidence. This point is made in his comments at page 304 where he says:

> "I am conscious, as the example which I have just given will suggest, that there are much more difficult cases in which the officers of the State neither act as the agents of discriminatory persecution nor, on the basis of a discriminatory policy, allow individuals to inflict persecution with impunity. In countries where the power of the State is weak, there may be intermediate cases in which groups of people have power in particular areas to persecute others on a discriminatory basis and the State, on account of lack of resources or political will and without its agents applying any discriminatory policy of their own, is unable or unwilling to protect them. I do not intend to lay down any rule for such cases. They have to be considered by adjudicators on a case-by-case basis as they arise. The distinguishing feature of the present case is the evidence of institutionalised discrimination against women by the police, the courts and the legal system, the central organs of the State."

11. The Tribunal will deal first with the assertion that the Appellant is at risk because of the political activities of her husband. Ms Weston did not pursue this contention at the hearing and rightly so in the light of the change of circumstances in India. However, she did make the point that the Appellant's background was such that it was even more likely that the Indian authorities would fail to protect the Appellant. The Tribunal is not persuaded by this. We see no reason to differ from the Adjudicator's findings. It seems to the Tribunal that the political background or otherwise of the Appellant's husband is not a relevant factor to be taken into account.

12. That said, the Tribunal accepts that there are considerable risks for the Appellant were she to return to India with her son. She is ill-educated and from a rural background where traditional values are at their strongest. The Tribunal has very little doubt that not only would the Appellant be ostracised by her husband's family but in all likelihood by her own family as well. In the light of the evidence about the perceived role of women and their relationship to their husbands, the Tribunal is satisfied that there is a real risk that she could face reprisals from her husband. However the degree of risk is assessed, it is certainly more than a speculative risk

which could be discounted. In our view, the combination of the factors we have referred to means that the Appellant would be at risk of treatment which could properly be described as persecution.

13. The next issue is whether it would be by reason of her membership of a particular social group. The Adjudicator identified the social group as "fallen women". The Tribunal can well understand why the Adjudicator put speech marks around this phrase which has an old-fashioned ring to it now in the United Kingdom. However, the expression has more potency when looked at in the light of the background evidence as to how the Appellant would be treated in India. The issue is whether the Appellant as a wife who has committed adultery could form part of a social group. As Lord Hoffman said in *Shah and Islam*, to identify a social group one must first identify the society of which it forms a part. Although the Tribunal has had its doubts about this, on balance we have come to the view that, looking at the Appellant's background in rural India in the light of the social, cultural and religious mores, women in the Appellant's circumstances are identifiable as a particular social group.

14. The final issue is whether the Appellant is able to look to the authorities in India for protection. Mr Buckley submits that the Indian criminal courts are open to all and the authorities would provide protection. In general terms, the Tribunal is inclined to agree with this but we must look at the specific situation faced by the Appellant were she to return to her home area, a rural area in Punjab. There are laws in place in India to protect the rights of women: see the CIPU report April 2001 and in particular paragraph 5.3.11. But at paragraph 5.3.9 it is reported that violence against women has increased in recent years. Wife-beating is a problem cutting across all castes, classes, religions and education levels. There is domestic violence in the context of dowry disputes. At paragraph 5.3.16 it is confirmed that police are reluctant to intervene in family disputes and that crime may be ignored if the perpetrators are influential. The situation may well be improving and there are thousands of grass-roots organisations working for social justice and the economic advancement of women: paragraph 5.3.20. Nonetheless, the Appellant would be returning to an exceptionally vulnerable situation in a rural area. The Tribunal has considerable doubts whether the authorities would be either willing or able to protect her and these doubts must be resolved in the Appellant's favour.

15. It has been submitted that the Appellant could live in another part of India. In theory, doubtless this is so. However, the reality is that she would be destitute, without accommodation, without housing and with no one to turn to. The Tribunal has little doubt that it would be unduly harsh to expect her to relocate in India."

The Gender Guidelines

2.3 *Terbas* [2002] UKIAT 03713 (13 August 2002)

Mr Mackey, Mr Taylor CBE, Mr Edinboro

"5. Reference was made to country of origin information and the medical evidence from Dr Z Mahmood, Consultant Clinical Psychologist. Dr Mahmood had concluded that the claimant did not have memory disorder but more likely she had post-traumatic stress disorder for which she required specialist psychological treatment and that her condition might trigger a more serious breakdown and that she would be a serious suicidal risk.

6. The Adjudicator made reference to the IAA Asylum Gender Guidelines (November 2000) which stated that "in some circumstances women may not be able to give full details for reasons of their ill-treatment. This may be a particular problem where women are persecuted for an imputed/attributed Convention reason or where they are persecuted because they are a member of a family. Women may not know details of the activities of the relatives, community members whose view/identity are imputed or attributed to them. In many cultures men do not share information about their political, military or even social activities with their female relatives, communities or associates".

7. She went on to find "the discrepancy between the appellant (claimant) and her spouse on the alleged time in Antep is not sufficient to undermine the credibility of appellant or indeed her husband. Their accounts were consistent...". Further reference was made to the IAA Gender Guidelines and country of origin information relating to the risks to the Kurdish ethnic minority in the CIPU report.

.....

12. She further submitted that the IAA Gender Guidelines should not have been relied on by the Adjudicator without indicating to the parties that this document was to be relied on so that there would be an opportunity to comment either at the hearing or by way of further written representation.

.....

21. We do not consider that the use of the IAA Asylum Gender Guidelines (November 2000) was inappropriate. We would agree with the submission that these guidelines are in the public domain along with documents such as the UNHCR Handbook, CIPU Reports etc. We see no error in the Adjudicator in obtaining guidance in her determination from those guidelines."

The Exclusion Clauses

2.4 *Gurung* [2002] UKIAT 04870 (14 October 2002) (Starred)

His Honour Mr Justice Collins (President), Dr Storey, Mr Mackey

"Relevant principles in assessing exclusion issues under Art 1F

26. Before turning to evaluate the adjudicator's treatment of this appeal, we propose setting out a number of principles which in our view adjudicators should adopt in relation to the Exclusion Clauses.

27. Whilst the provisions of Art 1F are traditionally referred to as the "Exclusion Clauses", it must not be forgotten that Articles 1D and E also exclude certain persons from the scope of the Convention. The first part of Article 1D provides that the Convention shall not apply to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. Under Article 1E the Convention does not apply "to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country". Additionally, albeit not an exclusion clause, Article 33(2) provides that the benefit of Art 33(1), the non-refoulement provision, "may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country,

in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

28. Article 1F states the provisions of the Refugee Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

> a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.":

29. Paragraph 148 of the 1979 UNHCR Handbook states the rationale behind the Exclusion Clauses as follows:

> "At the time the Convention was drafted the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order".

30. Of course, the resolve to exclude those undeserving of international protection is an abiding concern: Grotius writing in De Jure Belli ac Pacis Libri Tres commented that whilst international law for fugitives accepted asylum for those who suffered undeserved enmity, it did not accept it for those who had done something injurious to human society.

31. The wording of Art 1F makes clear that it is not any crime which brings its provisions into play: it would obviously be an error for an adjudicator to apply Art 1F to every claimant with a criminal history. Art 1F is only concerned with serious criminality. Conversely, Art 1F is not just concerned with serious crimes committed in the context of war and armed conflict. It also covers common crimes if sufficiently serious.

32. Whilst the subject matter is serious criminality it is not as assessed according to national law criteria: it is as assessed according to an international law perspective which seeks to give an autonomous meaning to the acts and crimes specified.

33. In seeking to give an autonomous meaning to key concepts in Art 1F, there is as much a need as under Art 1A(2) to adopt a dynamic approach to interpretation. Lord Mustill noted over six years ago in T, that, even though the wording of Art 1F has not changed, the world around it has. In the aftermath of the events of September 11th these thoughtful words remind us that, whilst there is nothing new about criminality, the precise forms and methods used by those who perpetrate violent acts or crimes continue to undergo change.

34. But it is not just the world which has changed, so has the law dealing with such crimes. As emphasised by the recent Summary Conclusions from the Lisbon Expert Roundtable, held as part of the 2001 UNHCR Global Consultations on International Protection, there is a need, in the interpretation and application of Art 1F, to draw on "developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law." Cases before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have greatly advanced the jurisprudence. Basing interpretation of Art 1F on international law developments yields the same advantage as has accrued

from doing the same in respect of key terms contained within Art 1A(2): it enables decision-makers to proceed on a more objective footing. In deciding such issues as complicity we will need to look more and more to international criminal law definitions.

35. Thus, in respect of the Exclusion Clauses it is particularly salient to recall the well-settled principle that the Refugee Convention is a living instrument whose interpretation requires a dynamic approach which bears in mind the objects and purposes set out in its Preamble, so as to ensure that it gives a contemporary response to contemporary realities.

36. The provisions of Art 1F being exclusionary, it will almost always be appropriate to apply them restrictively. That is the position stated at paragraph 149 of the 1979 Handbook. The basis for it is twofold: firstly that the Refugee Convention is quintessentially an instrument designed to protect those in need of asylum; and secondly that the consequences of exclusion may be very serious. In all past cases the Tribunal has consistently adopted the same approach. We see no reason to depart from it, save to note that we doubt this principle is entirely unqualified. In the Canadian Supreme Court case, *Pushpanathan v MCI* [1998] 1 SCR 982, [1999] INLR 36, Bastarache, J said this:

> "What is crucial, in my opinion, is the manner in which the logic of the exclusion in Art 1F generally, and Art 1F (c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees. As La Forest J observes in Ward, above at 66E, 'actions which deny human rights in any key way' and 'the sustained or systemic denial of core human rights... se[t] the boundaries for many of the elements of the definition of "Convention refugee". This purpose has been explicitly recognised by the Federal Court of Appeal in the context of the grounds specifically enumerated in Art 1F(a) in *Sivakumar v Canada (MEI)* [1994] 1 FC 433, where Linden JA stated (at 445):
>
> > 'When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status'".

37. If the underlying purpose of the Refugee Convention is protection of human rights, then it is surely relevant, when applying the Exclusion Clauses, to take account of the extent to which those guilty of Art 1F crimes have violated the human rights of others. As set out in the Preamble, the objects of the Refugee Convention are not confined to protection of the rights of refugees; they begin by referring to the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination". In our view, the greater the scale of the violation of the human rights of others by those who perpetrate acts or crimes proscribed by Art 1F, the less rationale there is for a restrictive approach. To take the example of an individual terrorist who exploded a nuclear device in a large city, in such a case we doubt that a restrictive approach should have any place at all.

38. A further principle of considerable importance is that the Exclusion Clauses are in mandatory terms. They stipulate that the provisions of the Convention "shall not apply..." to those who fall within Art 1F. It may be that at present appeals that come before adjudicators raising issues under the Exclusion Clauses are few and far between. Whether they should remain quite as rare as they are is a matter we shall return to below. However, it is imperative that adjudicators do not confuse the rarity of exclusion cases with the existence of some discretion as to whether to consider

them. The mandatory wording admits of no discretion. The question of whether or not a person falls under the Exclusion Clauses is not an optional one: it is an integral part of the refugee determination assessment.

39. That brings us to the important principle of the need for a holistic approach. The place of the Exclusion Clauses in the overall schema of the Convention also demonstrates that exclusion issues should never be examined in complete isolation from the examination of the appellant's overall claim. The approach must always be holistic.

40. This simple axiom provides the key we think to the proper answer to be given to the question of when, if at all, an adjudicator is justified in addressing exclusion issues even when the respondent in his Reasons for Refusal letter has not raised them.

41. If the respondent has raised them prior to the hearing, then obviously the appellant has been put on notice that exclusion is in issue and the adjudicator can and should (unless he thinks the issue is not truly raised) require both parties to deal with the issue during any oral examination and submissions. The adjudicator's determination should then make clear findings on whether the Exclusion Clauses apply or not.

42. What should happen, however, when (as happened in this case) the respondent has not expressly raised any exclusion issues prior to the hearing?

43. In our view the first step should be to scrutinise what was actually said in the Reasons for Refusal letter. Even when not expressly raising exclusion issues, their contents may sometimes nevertheless be considered to have effectively put the appellant on notice that exclusion is an issue. Here what seems crucial to us is to focus on the subject matter of what is raised in the Reasons for Refusal letter rather than on formal reference to Art 1F or the Exclusion Clauses. The subject matter of Art 1F is, as already noted, serious criminality. Where, as we think happened in this case, the terms in which the respondent deals with the prosecution/persecution issue sufficiently indicate that exclusion subject-matter is involved (e.g. in this case the Reasons for Refusal letter noted that the appellant claimed to be a member of an armed, illegal, revolutionary organisation committed to armed struggle), that may be viewed as enough to put the appellant on notice that his possible criminality made Art 1F a live issue.

44. But, assuming there is nothing in express or implied terms raising exclusion issues by the time of the hearing, what should an adjudicator do? It may be he or identifies an exclusion issue immediately prior to the hearing or at the outset of the hearing or at some point during the hearing itself. But at whichever point such identification is made, even when late in the day, the basic question is the same. Can an adjudicator ever raise such issues of his or her own motion? Mr Braid on behalf of the appellant argued that an adjudicator should either never raise such issues of his own motion or do so only in the most exceptional circumstances.

45. Mrs Grey, by contrast, submitted that the adjudicator may raise the issue of his own motion but that, if he does so, he should inform the parties that he considers Art 1F to be relevant during the course of the oral hearing, so as to give them an opportunity to deal with the issue: procedural fairness required that an appellant is aware of the issues under consideration. The same applied, mutatis mutandis, if the Tribunal considered the issue relevant. As to when it would be appropriate for the appellate authorities to raise it of their own motion, that would inevitably depend on the facts of the case. Guidance on the circumstances in which such a duty would arise could, she submitted, be derived from *R v Secretary of State for the Home Department, ex p. Robinson* [1997] 3 WLR 1162, [1997] 4 All ER 210, at para. 39:

"The appellate authorities should, of course, focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the

special adjudicator or, so far as the tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of convention law which favours the applicant although he has not taken it, the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but could properly be categorised as merely 'arguable' as opposed to 'obvious'... When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do."

46. Although the Court of Appeal was here discussing the duty of the appellate authorities to consider points which, although not raised by the asylum-seeker, were in his favour, the same logic, submitted Mrs Grey, should apply with equal force to points which are not so favourable. Thus if an adjudicator considers that on the facts that have emerged (whether on the papers or at the hearing) there is a "strong prospect" that one of the three limbs of the exclusion clause might apply, he should raise the issue.

47. We find ourselves in agreement with Mrs Grey's submissions on this point. Because Art 1F is in mandatory terms, the answer an adjudicator must give to the overall question of whether someone is a refugee can only be made by reference to the elements of the definitions variously set out in Articles 1A – IF. So long as the Art 1F issues are "obvious" they can, indeed must, be raised.

48. When raised in this way by an adjudicator (or the Tribunal), the difficult issue then arises of whether an adjournment should be granted (or, if so, for how long) so as to ensure the parties have had an opportunity to deal with the issue. We do not propose to lay down any separate guidelines on this issue here save to emphasise that adjudicators will no doubt bear in mind that after the events of September 11, the EU Commission has echoed UNHCR's call to States to apply the Exclusion Clauses scrupulously and rigorously.

49. That brings us to the contentious issue that has arisen as to whether consideration of the inclusion clauses should always precede consideration of the exclusion clauses.

50. Mr Braid has raised or adverted to a number of arguments in favour of his argument that it would be an error of law not to address inclusion issues first. We have identified the following arguments in favour of inclusion first.

51. Firstly it is said that "logically" one cannot exclude someone who has not first being included.

52. Secondly it is said that the fact that the Exclusion Clauses are listed last within the schema of Article 1 indicates they should be approached sequentially.

53. Thirdly it is said that exclusion being exceptional it is not appropriate to consider an exception first.

54. Fourthly it is said there are textual reasons why exclusion should be dealt with first, most notably the reference within Art 1F(b) to the appellant being a refugee: he is said to be excluded where there are serious reasons for considering that:

> "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" (emphasis added).

55. In *Re SK*, Refugee Appeal No. 29/91, New Zealand Refugee Status Authority, 17 February 1992, it was arguably implicit in the reasoning of the Authority that Art 1F(b) was only to be applied after the applicant had been found to be a refugee.

56. Fifthly it is said that inclusion first conforms to the long-established UNHCR approach: paragraph 141 of the UNHCR Handbook propounds that it will normally

be during the determination process under Art 1A(2) that the facts leading to exclusion under Art 1F will emerge. The 1996 UNHCR Guidelines on Exclusion also recommend (chiefly because cases of exclusion are "inherently complex") that the Exclusion Clauses should only be applied "after the adjudicator is satisfied that the individual fulfils the criteria for refugee status".

57. Sixthly it is said that exclusion before inclusion risks "criminalising" refugees. Given that Art 1F speaks of "crimes" and "guilt", it is argued that refugee decision-makers should adopt a presumption of innocence and apply Art 1A(2) first. To apply Art 1F before Art 1A(2), so it is said, involves an erroneous presumption that all applicants for refugee status are potentially excludable.

58. Inclusion first is also seen as the only approach which is compatible with a holistic approach to the assessment of a refugee claim. The Global Consultation Conclusions state that: "Interviews which look at the whole refugee definition allow for information to be collected more broadly and accurately". Allied to this argument is the concern that exclusion first is too akin to an admissibility test. In its 1996 Guidelines UNHCR stated that exclusion should not be used to determine the admissibility of an application or claim for refugee status:

> "A preliminary or automatic exclusion would have the effect of depriving such individuals of an assessment of their claim for refugee status. By their very nature, the exclusion clauses relate to acts of an extremely serious nature. As such, the refugee claim and any related exclusion aspects should in every case be examined by officials trained in refugee law."

59. Another contention has been that dealing first with inclusion issues can help avoid having to address complex criminality issues. In this regard inclusion before exclusion is said to allow proper distinction to be drawn between prosecution and persecution. It is argued that dealing with exclusion first could encourage adjudicators to fail to see that a claim may not even get to first base under the Inclusion Clauses in any event – because the appellant's apparent criminality in fact amounts to a case of prosecution as opposed to persecution. Particularly in countries of origin where there is no reason to think that the laws of the country are unjust or that the appellant will not receive a fair trial, at least in its bare essentials, a finding of prosecution should be all that is necessary. When such a finding is made and an appellant has not shown he can bring himself within the Inclusion Clauses, there is then no basis for an adjudicator proceeding to consider the Exclusion Clauses. If, however, an adjudicator is satisfied the appellant has shown persecution rather than prosecution and so comes within the Inclusion Clauses, then plainly the appellant is entitled to succeed in his appeal unless he is caught by the Convention's (Cessation or) Exclusion Clauses.

60. A point is also made regarding the situation of family members. It is said that inclusion before exclusion enables consideration to be given to protection obligations to family members. The 1996 UNHCR Guidelines state:

> "The exclusion of an applicant can have implications for family members. Paragraph 185 of the Handbook states that the principle of family unity generally operates in favour of dependants, and not against them. In cases where the head of a family is granted refugee status, his or her dependants are normally granted ("derivative") status in accordance with this principle. If a refugee is excluded, derivative refugee status should also be denied to dependants. Dependants and other family members can, however, still establish their own claims to refugee status. Such claims are valid even where the fear of persecution is a result of the relationship to the perpetrator of excludable acts. Family members with valid refugee claims are excludable only if there are serious reasons for considering that they, too, have knowingly participated in excludable acts".

61. There is one final argument we need to consider. Mr Braid implicitly raised it although in order to properly evaluate it we shall put it in our own words. It is one specific to countries such as the UK which feature parallel systems of legal protection of asylum-seekers under the Refugee Convention and international human rights treaties. Since 2 October 2000 provisions of the Human Rights Act 1998 and the Immigration and Asylum Act 1999 (and other pieces of legislation dealing with appeals involving national security that come before the Special Immigration Appeals Commission) require that, even if a person is found to be excluded from the Refugee Convention for Art 1F reasons, the decision against him may still be unlawful if it exposes the claimant to a real risk of treatment prohibited by Art 3 of the European Convention on Human Rights: Art 3 prohibits in absolute terms torture or inhuman or degrading treatment and punishment.

62. Thus it can be argued that, since adjudicators must address human rights issues in any event, it makes doubly bad sense for them to deal with exclusion first. One way or another, whether under the Refugee Convention's Inclusion Clauses (which focus on real risk of persecution) or under the ECHR (whose Art 3 focuses on real risk of ill treatment), an adjudicator has to make findings on the issue of serious harm.

63. What are we to make of these various arguments in favour of inclusion first? Plainly some simply concern the order in which the two issues are to be tackled; others have wider implications for whether, regardless of the order, both issues or only one need tackling.

64. It seems to us that the primary question here must be whether or not to deal with exclusion first constitutes an error of law. We are satisfied it does not. Whilst in our view (for reasons we shall come to) exclusion should only be dealt with first in limited circumstances, an adjudicator will not err if he or she goes straight to the exclusion issue in the appropriate case. Indeed for an adjudicator not to go straight to exclusion is certain types of cases would frustrate the objective set out at Rule 30 of the Immigration and Asylum Appeals (Procedure) Rules 2000 of securing "the just, timely and effective disposal of appeals..." We would echo the words of Kirby, J when considering this issue in *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7 at paragraph 87:

> "The Convention is expected to operate in the real world of speedy, economical and efficient decision-making. Where there is a choice between a construction of the Convention that would further decision-making of that character and one that would frustrate those objectives, the former construction should be preferred".

65. We are not persuaded by the arguments advanced in favour of inclusion first as a general principle.

66. The argument that "logically" one cannot exclude unless one has first included does not withstand examination. Art 1F states that: "The provisions of this Convention shall not apply to any person with respect to whom ...". It does not state that, having applied the provisions of Art 1A(2), a person is to be excluded. To illustrate by use of the metaphor of a garden gate, it would only be illogical to talk about excluding people from entering through a gate if they were already inside the garden.

67. Nor do we see any force in the argument that Art 1F dictates a sequential treatment of a refugee claim. Apart from Art 1C which specifies that the Convention shall cease to apply to any person falling under the terms of Art 1A, there is no apparent reason why, if someone falls within Art 1D or IE, there would be any reason to have first considered Art 1A(2).

68. As regards the exceptionality argument, it is true the Exclusion Clauses amount to an exception to the rule that if one has a well-founded fear of persecution one qualifies as a refugee. But it does not follow that, in order to apply an exception one has first to decide whether a person falls within the rule.

69. The reference to "refugee" in Art 1F(b) does at first sight poses a real difficulty. However, again we find ourselves in agreement with the judgment of the justices of the Australian High Court in *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7 (7 March 2002). Gleeson, CJ, albeit dealing with the issue in the context of how the Convention operates within Australian law, noted at paragraph 5 that to read Art 1F(b) literally, so it can only apply to someone already found to be a refugee, would involve an internal inconsistency, since:

> "Art 1F is expressed as an exception. If it is satisfied, the provisions of the Convention are said not to apply to the person in question. If the provisions of the Convention do not apply to the person, the person cannot be entitled to protection under the Convention".

70. We note that in *ex parte Adimi* [1999] Imm AR 560 at 566 Simon Brown LJ held, no doubt for similar reasons, that the reference in Art 31(1) to refugees included "presumptive refugees".

71. He concluded that the "preferable solution is to read the reference to admission...as a refugee' as a reference to putative admission as a refugee". We do not see that the New Zealand case of *Re SK* - said to have implicitly decided that inclusion should always come first – assists very much at all. It simply does not address the issue. The same can be said about the judgment in *O v Immigration Appeal Tribunal* [1995] Imm AR 494. However, if indeed the New Zealand position is inclusion first, we would prefer the position set out by the Australian High Court.

72. We recognise that UNHCR has long urged that inclusion should normally be considered first. However, as use of the word "normally" makes clear, UNHCR's position has not been that exclusion can never be considered first. As regards the primary decision-making stage, we would agree with their analysis that normally exclusion issues will only come to light in the course of assessment of a claim under Art 1A(2). However, once it becomes clear that a claim raises a definite issue about serious criminality, it seems to us that different considerations have already kicked in and the use of the adverb "normally" simply confuses things. It erroneously suggests that inclusion should come first even when exclusion subject matter has been plainly identified. All that is necessary to operate the inclusion and exclusion clauses of the Refugee Convention holistically is to bear in mind that there are two types of cases: ones that raise issues of serious criminality and ones that do not.

73. We would accept, however, that if in assessment of refugee claims generally it would be wrong for decision-makers to adopt an "exclusion culture". If exclusion were to be considered first as a matter of routine, there would be a risk of criminalising refugees. If the first substantive question an asylum-seeker is asked is not " What do you fear?" but "Have you committed a serious crime?" he might well lose confidence his asylum claim was going to be considered fairly. But we fail to see that dealing with exclusion issues first - once it is manifest that serious criminality is an issue - involves any kind of stereotyping as such. The "criminalising" argument at best goes to the need to avoid dealing with exclusion first when serious criminality is not involved.

74. Does the evident need for a holistic approach to refugee determination dictate that inclusion should be dealt with before exclusion? We think not. As we have already noted, it is essential when examining any type of refugee claim to consider the particular circumstances in the round and not to examine any issue in isolation.

However that is really a point about what facts one takes into account. It is not a point about what one must legally decide bearing in mind the full picture. There seems nothing wrong in principle with deciding in respect of any case where serious criminality is involved to apply Art 1F criteria first, so long as when doing so sight is not lost of the individual's particular circumstances.

75. That brings us to the argument that it is only by dealing with inclusion first that one can ensure proper distinction between prosecution and persecution. In favour of this argument it is also sometimes asserted that dealing with inclusion first can avoid having to deal with exclusion issues which are "inherently complex".

76. It is a valid point to make that certain claims potentially excludable under Art 1F might not qualify under the Inclusion Clauses anyway. And in cases in which the evidence about serious criminality is quite unclear, it may serve little or no purpose to broach the exclusion issues at all, particularly as they can be complex. But if the evidence is sufficiently clear that there is an issue of serious criminality, then an adjudicator is obliged by the mandatory terms of Art 1F to decide whether an appellant is excluded: it is not enough simply to say that in any event he does not qualify under Art 1A(2). Moreover, we cannot see that dealing with exclusion first distorts proper consideration of the prosecution versus persecution issue. Both issues have to do with criminality, but they stand to be determined according to quite distinct legal criteria. Certain differences are readily apparent. Under Art 1F the focus is on the past: whether the person has committed excludable crimes or acts. Under Art 1A(2) (even though past experiences may be relevant) the focus is by contrast on current risk: whether the claimant faces a real risk of persecution rather than simple prosecution. Furthermore, the concept of prosecution as developed by case law for use in certain Art 1A(2) cases covers a much broader spectrum of crimes and acts than those proscribed by Art 1F. There may be cases where the crime involved is not sufficiently serious to bring it within Art 1F confines. And even when the crime concerned is also one falling under Art 1F, its relevance under Art 1A(2) has to be considered by reference to a much wider range of factors than those relevant under Art 1F. The issue of the proportionality of punishment, for example, is not at all relevant under Art 1F, except possibly in relation to the issue of expiation. Ultimately, therefore, the only sustainable point this type of argument yields in favour of inclusion first is that the decision-maker must ensure that he makes consistent findings of fact in relation to any criminality issues, whether they arise under Art 1A(2), Art 1F or both.

77. At a general level, UNHCR's concerns about the problems which can arise in the case of family members of an excluded person are entirely valid. In principle, the sins of the father are not to be visited on the sons. But resolving the issue of whether or not family members who are not themselves implicated in excludable acts should get refugee status simply requires not applying to such cases the logic of determining claims by dependants in line with those of the principal family member. Avoiding in this way negative application wholly preserves the principle of family unity and also accords with the common-sense need to consider the claims of such dependants separately. Disapplying the normal approach to dependants is far preferable to turning matters on their head and letting the situation of family dependants dictate how refugee law should apply to persons who apply in their own right.

78.That brings us to the last argument we have noted in favour of inclusion first, which was that since adjudicators need to address Article 3 issues anyway, it makes sense for them to deal with inclusion first. We recognise that persons who are caught by the provisions of Art 1F can form one of the limited exceptions to the general rule set out in *Kacaj* [2002] Imm AR 213 that asylum claims and Art 3 claims stand or fall together. It is perfectly clear from leading cases in Strasbourg, *Chahal v UK* (1997) 23 EHRR 413 in particular, that even a terrorist excluded from the Refugee

Convention may be able to succeed in an Art 3 claim if he can show his return would expose him to a real risk of treatment contrary to Art 3. It is a consequence of having acquired a human rights jurisdiction, therefore, that asylum cases involving serious criminality have also to be examined under Article 3.

79. But that does not necessarily mean in our view that inclusion issues should be addressed first or at all. It does mean that in cases where exclusion is dealt with first and a claimant is found to be excluded, an adjudicator must go on to address the issue of Art 3 risk on its own. He will when examining Art 3 issues cover some of the same type of ground as he would under Art 1A(2), but there is nothing wrong with him not addressing Art 1A(2) issues as such. Dealing with a common or overlapping subject matter does not require an adjudicator to apply two sets of legal criteria to it when only one is called for. If one says of a war criminal that, without considering Art 1A(2) he is excluded from the Refugee Convention by the terms of Art 1F(a) but nevertheless qualifies under Art 3 of the ECHR by virtue of the nature of the harm likely to befall him upon return, what is the legal error in that? Nothing is said about the Inclusion Clauses as such, that is all. What is said about the ill treatment concerned may or may not have amounted to persecution under the Refugee Convention, but that has simply become an academic question. No distortion of the relevant legal concepts has occurred. No injustice has been done to the claimant.

80. It may be asked, given that a claimant who is excluded under the 1951 Convention can nevertheless succeed under the Human Rights Convention, why is it necessary for an adjudicator to deal with the Refugee Convention at all? One part of the answer is that he is required to decide the appeal on the grounds brought. Another is that from the point of view of the international community and the integrity of the Refugee Convention, it is highly desirable that in such a case the host asylum state has made crystal clear that such a person is not a refugee. Currently in the UK significant differences in status flow from a person being recognised as a refugee and someone only considered to be an Art 3 risk. The former possesses a number of civil, political, social and economic rights guaranteed by Arts 2- 30 of the Refugee Convention; there is also currently a policy to grant him indefinite leave to remain (previously it was limited leave to remain). The latter may in certain circumstances possess nothing more than a guarantee of non-removal for so long as his return would place him at Art 3 risk.

81. Although we have concluded that exclusion first is a legally correct approach in appropriate cases, we are bound to say we were not persuaded of such by the logic of Mrs Grey's principal argument in favour of this position. She contended that this was deducible from the fact that, following the case of *T* and s. 34 of the Anti-terrorism, Crime and Security Act 2001, it was an error of law, when considering whether an act or crime fell within Art 1F, to consider the gravity of the persecution a claimant might face upon return. However, that seems to us to simply confuse the issue. All one is doing when assessing the gravity or severity of acts or crimes in the context of Art 1F is deciding whether they are thereby excludable. One is not saying that those who have committed them face (more or less grave) persecution. Nor is one laying down anything about the order in which inclusion and exclusion issues are to be dealt with. For similar reasons we see no merit in the argument that s. 34 of the Anti-terrorism, Crime and Security Act 2001 effectively requires the exclusion first approach as enjoined by s. 33 of the Special Immigration Appeals Commission (SIAC) cases to apply outside the special context of national security cases.

82. Having concluded that to deal with exclusion first is not an error of law, it remains to clarify when it is appropriate to deal with exclusion issues and in what order.

83. We consider that adjudicators should first deal with the issue of exclusion whenever the claim discloses an obvious issue of serious criminality. We emphasise that the issue must be one that is obvious, since, if there is no clear evidence of serious criminality, there is then too great a danger of being unnecessarily diverted away from examination under the Inclusion Clauses.

84. In attempting to give guidance we would distinguish between the hearing stage and the determination stage.

85. So far as the hearing stage is concerned, whilst there would be nothing wrong in a case raising an obvious issue of serious criminality with requiring the parties to confine their examination and submissions to exclusion issues, that would only be appropriate in cases where the evidence strongly pointed to the appellant falling within the terms of Art 1F. Much will depend at what stage the adjudicator forms a view that the evidence strongly points to exclusion. If for example it emerges during the appellant's oral testimony that in fact he participated in violent actions against unarmed civilians, there would be nothing wrong with the adjudicator then confining the parties to submissions relating to the exclusion issues.

86. If the exclusion issues are not obvious or manifest and the evidence does not strongly point to exclusion, then the hearing should proceed in the normal way, covering examination and submissions on both inclusion and exclusion issues.

87. So far as the determination itself is concerned, so long as there is an obvious exclusion issue, the adjudicator should address this first.

88. The question next arises, when is it appropriate for an adjudicator, having dealt with exclusion issues first, to go on for "belt and braces" reasons to consider the inclusion issues? Obviously, if he does so, it follows from all we have said that he should approach the issues in a structured way which clearly separates their treatment. To approach the issues in an unstructured way may well mean his decision falls between two stools dealing with neither issue satisfactorily.

89. The main argument advanced in favour of the "belt and braces" approach is that it is in general desirable in the interests of avoiding unnecessary remittal for an adjudicator to decide all potentially relevant issues. However, we do not see that that statistically limited concern should take precedence over the need to ensure just, timely and efficient disposal of appeals. There is no sound basis for requiring a "belt and braces" approach in all exclusion cases.

90. Obviously if an adjudicator, having considered the exclusion issues first, concludes that Art 1F does not apply, he must go on to consider the case under the Inclusion Clauses in the normal way.

91. What should he do, however, if he decides Art 1F does apply? In our view he need only go on to consider the appellant's position under the Inclusion Clauses if he considers that his decision under Art 1F is problematic or turns on a narrow factual or legal point concerning, for example, whether the appellant concerned is in fact an active or a willing member of an armed struggle organisation or whether his crime is properly to be classed as non-political. In such circumstances, there are sound reasons for a saving approach. But we would emphasise that in our view it should only be used when the factual or legal issues are considered in that particular case to be finely balanced.

Treatment of the Exclusion Clauses

92. If the adjudicator considers there is an issue under the Exclusion Clauses, he should identify which sub-paragraph applies. There are two main reasons for this. First the parties are entitled to know the precise exclusionary basis (es) on which the appellant has been excluded, be it 1F(a), (b) or (c). To say simply (as the adjudicator did in this case) that he is excluded under Art 1F leaves quite unclear whether it is because he is considered simply as a serious common criminal or as a war criminal or as someone who has offended the principles and purposes of the United Nations. Given that the terms of Art 1F allow for odd bedfellows, those who fall within its terms are entitled not to be unnecessarily associated with the perpetrators of the most heinous crimes of all. The second reason has to do with the scope of Art 1F. The wording of Art 1F makes clear that an appellant must be excluded even if caught by only one of the three sub-paragraphs. Hence to say simply that an appellant does not fall under one or two sub-paragraphs, as the Tribunal did in *Amberber* (00TH01570) in respect of Art 1F(a), will not suffice.

93. An adjudicator should also make clear that when the issue is exclusion the evidential burden of proving that an appellant comes within one or more of the Exclusion Clauses rests on the Secretary of State. We adopt in this regard what was said by the Tribunal in *Thayabaran* (12250):

"It appears to us that the use of the phrase "there are serious reasons for considering that" in Art 1F relates to the state of the evidence on the issue in question. The phraseology makes it difficult to speak of a burden of proof. Clearly, however, the exclusion clause cannot be brought into play unless there is some evidence of the alleged crime and of K's nature. If there is not such evidence, it must follow the claimant is not excluded by Art 1F, and the result would be that in an appeal contested on this point, the claimant would win and the Secretary of State would lose. We have tentatively reached the conclusion that it follows that the Secretary of State bears at least an evidential burden on this issue".

94. We did consider whether there was also a legal burden of proof on the Secretary of State. Given that in an examination under the Exclusion Clauses there is much that is akin to a criminal examination, such an approach could be said, by analogy, to ensure that there is a presumption of innocence. But by the same token an examination under the Refugee Convention is not a criminal examination and its purpose is not as such to establish an appellant's guilt or innocence, although assessment must be made of whether acts or crimes have been committed. It would be obvious to any subsequent prosecution process that was brought against the appellant (whether in the country of origin, the country of asylum or before an international court) that what an adjudicator had found within the context of a refugee determination was neither binding nor necessarily conclusive of whether the appellant had committed an offence for their purposes. We consider, therefore, that the decision of the Tribunal in the case of Thayabaran remains good law.

95. As regards the standard of proof, we find ourselves entirely in agreement with Mrs Grey's submissions. In isolation one could state, as did the Canadian Federal Court in *Ramirez v Canada* [1992] 2 FC 306 at 311-313, that the phrase implied something less than proof on either a criminal standard of beyond reasonable doubt or a civil standard of balance of probabilities. However, in accordance with the approach of the Court of Appeal in *Karanakan* [2002] 3 All ER 449, rigid application of the civil approach to "standard of proof" has to give way in any event to a more rounded approach taking into account the possibility that doubtful events may have taken place. Thus there is no need to go beyond the words of Art 1F, i.e. "...serious reasons for considering..."

96. In assessing whether the act or crime committed by the appellant is sufficiently severe to bring an appellant within the Exclusion Clauses an adjudicator should not conduct any type of balancing exercise or proportionality test between this act or crime and the extent of the risk the appellant faces of persecution. In this regard it is important to note that paragraph 156 of the 1979 UNHCR Handbook no longer represents a correct understanding of the law. In the case of T their lordships held per Lord Mustill that:

> "The gravity of the offence is relevant to the question of whether it is "serious" for the purposes of Art 1F (b). But the crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned".

97. In *Mukhtiar Singh* (SC 4/99, para 46(c), unreported) the Special Immigration Appeals Commission also held that no principle of proportionality or balancing fell to be applied under Art 1F (c). The conclusion in these cases was in accord with that expressed earlier by the Canadian case of *Ramirez*. Furthermore the position in the UK is now the subject of statutory regulation. Section 34 of the Anti-Terrorism, Crime and Security Act 2001 states:

> "(1) Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals, national security & c) shall not be taken to require consideration of the gravity of –
>
> (a) events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or
>
> (b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply".

98. One of the most difficult issues arising under the Exclusion Clauses is that of terrorism. It is plainly wrong to equate automatically the serious criminality which the Exclusion Clauses exist to proscribe with terrorism. As the Tribunal said in *Thayabaran*:

> "The question is not whether the appellant can be characterised as a terrorist, but rather whether the words of the exemption clause apply to him".

99. Yet it is equally clear from the judgment of the House of Lords in T that increasingly many of the acts and crimes proscribed by the Exclusion Clauses are seen under a number of treaties cataloguing international crimes as terrorist in nature.

100. Precisely how to balance these considerations is no easy matter. On a general level we consider that until such time as we have an accepted international definition of terrorism and one which clearly matches up with definitions contained within sub-clauses of Art 1F, it remains important to note material differences between Art 1F offences and terrorist offences. Categories within Art 1F(a), e.g. war crimes, will not always qualify as terrorist crimes. Art 1F(b) proscribes serious crimes which may have no terrorist element (e.g. "common" serious crimes such as murder and robbery). Furthermore, whilst it is clear from the Special Immigration Appeals Commission decision in *Mukhtiar Singh v SSHS* SC 4/99, para 68 (p.47 transcript) that terrorism can be taken to be "contrary to the purposes and principles of the UN" within the meaning of Art 1F (c), that remains a matter of continuing controversy within and outside the EU. Thus it remains crucial not to equate Art 1F with a simple anti-terrorism clause. Regular use of the concept of terrorism as a tool for identifying crimes contrary to Art 1F must await definitive codification by the international community.

101. At the same time, it may be obvious in a particular case that active involvement in crimes which have been or can properly be described as acts of terrorism will be serious enough to fall within Art 1F(b).

102. In certain cases raising Art 1F issues, an adjudicator will be confronted with someone who has acted on his own, having committed, for example, an ordinary serious crime such as murder. However, in many cases involving exclusion issues an adjudicator will be faced with evidence that an individual is a member of an organisation committed to armed struggle or the use of violence as a means to achieve its political goals. To take typical examples, the appellant may have been a member of the PKK in Turkey, the LTTE in Sri Lanka, the FLN or GIA in Algeria or, as in the instant case, the CPN (Maoist) in Nepal. Or he may be linked to a multi-national organisation vowing armed struggle such as Al-Qaeda. How relevant is it that that sometimes armed struggle organisations abandon violent methods or enter into peace agreements which result in the cessation of violent struggle? In contrast with the adjudicator's task under the Inclusion Clauses where the test is one of current risk, under the Exclusion Clauses what is required in an historic inquiry. Hence the fact that since the appellant left his country of origin his organisation no longer pursues armed struggle, will not be relevant to whether he did commit proscribed acts or crimes before he left. Nor will it be relevant that, as the Tribunal noted in Thayabaran, an appellant has become a reformed character.

103. But in such cases the question arises, is mere membership at the time of the commission of acts or crimes proscribed by Art 1F enough to entitle an adjudicator to conclude an appellant is excluded under this provision?

104. The Tribunal has consistently stated that mere membership of such organisations is not enough to bring an appellant within the Exclusion Clauses: see for example, *Amirthalingam* (11560, March 1994), *Nanthakumar* (11619 Dec 1994), *Arulendran* (11827 Feb 1997). In the light of previous case law and the further materials now before us, we would highlight two further principles that should be borne in mind when considering complicity.

105. One is that it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of Art 1F. If the organisation is one or has become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary. We agree in this regard with the formulation given to this issue by UNHCR in their post September 11, 2001 document, Addressing Security Concerns without Undermining refugee Protection: UNHCR's Perspective, at paragraph 18:

> " Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. In asylum procedures, a rebuttable presumption of individual liability could be introduced to handle such cases. Drawing up lists of international terrorist organisations at the international level would facilitate the application of this procedural device since such certification at the international level would carry considerable weight in contrast to lists established by one country alone. The position of the individual in the organisation concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would, however, need to be taken into account".

106. That complicity in this type of case should be sufficient to bring an appellant within the Exclusion Clauses is necessary in order to adequately reflect the realities of

modern-day terrorism. The terrorist acts of key operatives are often possible only by virtue of the infrastructure of support provided by other members who themselves undertake no violent actions. As the US Court of Appeals, Ninth Circuit noted in *McMullen v INS* 685F 2d 1312 (9th Cir 1981) at 599:

> "We interpret both the Convention and the [A]ct to permit deportation of individuals who commit serious, non-political crimes, and we have concluded that this includes terrorist acts against ordinary citizens. We refuse to interpret these documents to apply only to those who actually "pulled the trigger", because we believe that this interpretation is too narrow. In our judgment, the only reasonable interpretation of the exception is that it encompasses those who provide the latter with the physical, logistical support that enables modern, terrorist groups to operate".

107. Likewise the Tribunal noted in *Ozer* (10922, May 1994) when considering the appeal of a person who had voluntarily joined and supported Dev Sol which, with reference to objective country materials on Turkey was described as then being an illegal party dedicated to violence,

> "...then it is no use his asserting that he does not support its policy or methods. If he does not endorse a central policy of the party he should not be a member of it: in any event his membership and contribution to the life of the party is indirect support for its violent acts".

108. The other principle to be borne in mind is that whilst complicity may arise indirectly, it remains essential in all cases to establish that the appellant has been a voluntary member of such an organisation who fully understands its aims, methods and activities, including any plans it has made to carry out acts contrary to Art 1F. Thus for example it would be wrong to regard the mere fact that an appellant has provided a safe house for LTTE combatants as sufficient evidence that he has committed an excludable offence. If, however, he has transported explosives for LTTE combatants in circumstances where he must have known what they were to be used for, there may well be a serious IF issue.

109. We would also observe that international criminal law and international humanitarian law, which in our view should be the principal sources of reference in dealing with such issues as complicity, adopt similar although more detailed criteria in respect of those who for the purpose of facilitating an international crime aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission (see Art 25 of the International Criminal Court Statute and Art 7(1) of the ICTY Statute as analysed in the case of *Tadic* Case No.IT-94-1-T, 7 May 1997). Of course such reference will need to bear in mind the lower standard of proof applicable in Exclusion Clause cases.

110. However, as the passage just cited from UNHCR highlights, even when complicity is established the assessment under Art 1F must take into account not only evidence about the status and level of the person in the organisation and factors such as duress and self-defence against superior orders as well as the availability of a moral choice; it must also encompass evidence about the nature of the organisation and the nature of the society in which it operates. Such evidence will need to include the extent to which the organisation is fragmented.

111. Observing as we do that in certain past Tribunal cases, *Karthirpillai* (12250) being an unhappy example, adjudicators and the Tribunal have not always taken a contextual approach, we think it useful to consider cases along a continuum.

112. On the one end of the continuum, let us postulate an organisation that has very significant support amongst the population and has developed political aims and objectives covering political, social, economic and cultural issues. Its long-term aims

embrace a parliamentary, democratic mode of government and safeguarding of basic human rights. But it has in a limited way or for a limited period created an armed struggle wing in response to atrocities committed by a dictatorial government. In such a case an adjudicator should be extremely slow to conclude that an appellant's mere membership of such an organisation raises any real issue under Art 1F, unless there is evidence that the armed actions of this organisation are not in fact proportionate acts which qualify as "non-political crimes" within Art 1F(b) and, if they are not, that he has played a leading or actively facilitative role in the commission of acts or crimes undertaken by the armed struggle wing.

113. At the other end of this continuum, let us postulate an organisation which has little or no political agenda or which, if it did originally have genuine political aims and objectives, has increasingly come to focus on terrorism as a modus operandi. Its recruitment policy, its structure and strategy has become almost entirely devoted to the execution of terrorist acts which are seen as a way of winning the war against the enemy, even if the chosen targets are primarily civilian. Let us further suppose that the type of government such an organisation promotes is authoritarian in character and abhors the identification by international human rights law of certain fundamental human rights. In the case of such an organisation, any individual who has knowingly joined such an organisation will have difficulty in establishing he or she is not complicit in the acts of such an organisation.

114. In operating this continuum, we agree with Mrs Grey that, so long as it is informed by reference to international criminal law and international humanitarian law developments, useful guidance has been furnished by several Canadian cases, Ramirez in particular, where the test is formulated as a two-fold one of assessing firstly, whether an individual occupies a leadership role or other position of authority in the organisation; and secondly, whether the organisation's principal or dominant purpose has come to be one of the commission of acts contrary to Art 1F.

Application of these principles to the particular circumstances of the case.

115. As we have already intimated, the adjudicator's principal findings of fact were inadequate and in parts contradictory. For that reason we see no real alternative to remitting the case to be heard by a different adjudicator. A remittal will also ensure that consideration of the evidence takes account of the letter from the British High Commission in Nepal alleging that the newspaper article is not authentic. That may have a significant bearing on assessment of credibility.

116. However, in order to illustrate the principal points made earlier, it is appropriate for us to set out various other respects in which the adjudicator failed to approach this case properly.

117. It is apparent that in this case the adjudicator raised the issue of the Exclusion Clauses of his own motion. The Secretary of State had not raised this issue, nor had the grounds of appeal anticipated that it would be raised at the hearing. Given however that the Reasons for Refusal did plainly identify what we have earlier described as obvious Art 1F subject matter (the appellant's membership of an illegal organisation dedicated to armed struggle), we think that the adjudicator was entitled to assume that both parties would have given some thought to the potential Art 1F implications of the appeal.

118. Even so, he was clearly wrong, once he had decided Art 1F issues were raised, not to have at least discussed with the parties whether in the circumstances they, the appellant in particular, had had sufficient opportunity to consider exclusion issues.

Procedural fairness dictated that he should have done so. Whether in this case he should have granted anything more than a very short adjournment, we doubt very much, because of the fact that it had been raised in substance if not expressly in the Secretary of State's refusal letter.

119. Having decided Art IF was in issue, the adjudicator should also have raised with the parties which sub-clause(s) he considered relevant. The Secretary of State should of course have identified the exclusion issues earlier, but, given that he had failed to do so, it was incumbent on the adjudicator, having decided to deal with the issue himself, to specify whether one or more sub-clause of Arts 1F(a), (b) or (c) were engaged. He failed to do this.

120. Despite deciding Art 1F was involved the adjudicator failed to give any indication as to what he saw as the relevant burden and standard of proof. We have set out what we consider these are at paragraphs 84-86. Nevertheless, although it was remiss of him not to have specified these, we are not persuaded that this failing on its own would have been fatal to his determination, had he gone on to effectively apply the correct burden and standard.

121. Nor did the adjudicator indicate his recognition that, being clauses whose effect was to exclude someone who otherwise might be viewed as facing a real risk of persecution, such clauses called for a restrictive interpretation. Certainly there was no exceptional circumstance in the case he was dealing with to warrant not applying such a restrictive approach.

122. Notwithstanding such failings in the adjudicator's treatment of this case, Mr Braid has urged us to find that in practice the adjudicator had properly dealt with both the inclusion and exclusion clause issues. He had in effect adopted a "belt and braces" approach.

123. As we clarified earlier, there may be cases where it is safest for an adjudicator to adopt a "belt and braces" approach. And we would accept that the adjudicator in this case did examine both issues. But because he did not differentiate between his treatment of the inclusion and exclusion clause issues and did not furnish any adequate explanation as to why he dealt with them in the way he did, his approach failed to do justice to either set of issues.

.....

151. Summary of Conclusions.

In order to resolve some of the issues in this case it has been necessary to go into detail. Now that we have done that, however, we consider that guidance can be given in relatively short form:

1. Bearing in mind the need to adopt a purposive approach to the interpretation of the Exclusion Clauses, they are to be applied restrictively. In contrast to the focus under Art 1A(2) on current risk, the focus under Art 1F is on past crimes or acts.

2. In any case in which an adjudicator intends to apply the Exclusion Clauses, he should avoid equating Art 1F with a simple anti-terrorism provision. He should make findings about the serious crime or act committed by the claimant and then explain how that fits within a particular sub-category (or particular sub-categories) of Art 1F - 1F(a), IF (b) or 1F(c). As the Tribunal held in *Thayabaran* (12250), he should treat the evidential burden of proving that a claimant is excluded by Art 1F as resting on the Secretary of State. The test specified in Art 1F of "serious reasons for considering" that a barred act had been committed was one requiring a lower standard

of proof than either beyond reasonable doubt or the balance of probabilities. No other wording than "serious reasons for considering" should be introduced.

3. In relation to cases raising issues under Art 1F(b), the principles enunciated by their lordships in the case of T remain valid. However, in deciding whether a person's membership of an organisation amounts to complicity in any crimes or acts proscribed by Art 1F, it is of crucial importance to examine the particular circumstances, taking account not only of factors concerning the individual and his specific role in the organisation but also that organisation's place and role in the society in which it operates. The more an organisation makes terrorist acts its modus operandi, the more difficult it will be for a claimant to show his voluntary membership of it does not amount to complicity.

4. It would be wrong for adjudicators to adopt an "exclusion culture" and go searching in every case for exclusion issues under Art 1F. Pragmatism is called for. However, the Exclusion Clauses are in mandatory terms and where obvious issues arise under them these must be addressed by an adjudicator, even if the Secretary of State has not raised them expressly or by implication in the Reasons for Refusal letter. That may happen prior to the hearing, at the outset of the hearing or during it. This approach is subject only to the need to ensure procedural fairness.

5. It is only necessary to consider exclusion issues in cases obviously involving serious criminality as defined by Arts 1F(a)-(c). However, once the case is identified as one obviously involving serious criminality, there is nothing wrong with an adjudicator dealing with exclusion issues first.

6. So far as the hearing stage is concerned, whilst there would be nothing wrong in a case involving an obvious exclusion issue with requiring the parties to confine their examination and submissions to exclusion issues, that would only be appropriate in cases where the evidence strongly pointed to the appellant falling within the terms of Art 1F. In all other cases, e.g. where exclusion issues albeit relevant are not obvious or manifest, then the hearing should be conducted so as to cover evidence and submissions relating to both exclusion and inclusion issues.

7. So far as the reasons part of the determination itself is concerned, whenever there is an obvious exclusion issue, it should be dealt with first. Not to go straight to the exclusion issues could frustrate the objective set by Rule 30 of the Immigration and Asylum Appeals (Procedure) Rules 2000 of securing the "just, timely and effective disposal of appeals".

8. If, having dealt with exclusion first in the determination an adjudicator decides that Art 1F does not apply, he or she must then go on to deal with the appeal under the Inclusion Clauses in the usual way.

9. If Art 1F is found to apply, adjudicators should only go on in "belt and braces" fashion to consider the Inclusion Clause issues when the decision to exclude is seen to be problematic or to turn on a narrow or finely balanced point.

10. But where an adjudicator (in a post 2 October 2000 appeal) concludes that an appellant falls within the Exclusion Clauses, it will be necessary in any event for him to go on to consider whether the decision to remove the appellant would violate Art 3 of the European Convention on Human Rights. In this regard exclusion cases form one of the very limited exceptions to the rule enunciated in Kacaj that asylum and Article 3 claims stand or fall together.

11. So far as the Secretary of State is concerned, however, different considerations should apply. Even if exclusion issues are addressed first, it is highly desirable in the interests of justice that at all stages of his examination of an asylum claim he adopts a

"belt-and-braces" approach and that he sets out in his Reasons for Refusal his decision on the appellant's position under both the Inclusion and Exclusion Clauses."

Nationality

2.5 *Kadane* [2002] UKIAT 05243 (13 November 2002)

Mr Latter, Mr Rogers JP, Mr Sheward

"2. The background to this appeal can be set out quite shortly. The applicant was born on 9 September 1983 in Shashemem in Ethiopia. He speaks Amhirc. His parents are both of Eritrean origin. They went to live in Ethiopia when they were young adults and never returned. In his witness statement the applicant says that he considers himself to be Ethiopian and has no connection with Eritrea. He has never been there and he has no living relatives there. In his evidence to the Adjudicator he said that he thought his father was aged 50 to 55 and his mother 45 to 50 but he did know their dates of birth. He continued to live in Shashemem until he left Ethiopia travelling by air to the United Kingdom on 8 November 2000.

3. According to the applicant until the war between Ethiopia and Eritrea started in 1998, his father had been a successful businessman importing and exporting cars. In August 1999 the Ethiopian army/police came to his home looking for his father. He was taken away and the applicant has not seen him since. His mother made efforts to try and find out what had happened to him but to no avail. The applicant used to see the police and army searching for Eritrean families during the night. They would take one family member first and then later take another. In July 2000 the police returned saying that they had come to take everyone away. The applicant escaped through the back door and out of the garden. He does not know what happened to his mother but assumes that she was taken along with his younger brother and sister. The applicant went to hide in the home of an Ethiopian school friend. With the help of his family he was able to make arrangements to leave Ethiopia.

4. The applicant does not have a passport. He says that he considers himself to be Ethiopian but the Ethiopian authorities would not now recognise him as such because he has Eritrean parents. If he was returned to Eritrea he would be forced to undertake military service. He had never been to Eritrea and had no connection with it. He says that he could not get an Eritrean passport because he would not be able to prove that he was an Eritrean. He has no witnesses to support such a claim.

.....

11. There were two appeals before the Adjudicator. The first was on asylum grounds under Section 69(1) and the second on human rights grounds under Section 65. There was no appeal against the removal directions. By reason of the provisions of Section 59(4) and Section 67 there can only be an appeal objecting to the country to which the applicant would be removed in accordance with the directions if a different country is specified by him. The removal directions have been made for Eritrea on the basis that the Secretary of State understands that the government of Eritrea would be prepared to accept him as an Eritrean national on the basis of the information provided about his family background: see paragraphs 3 and 11 of the reasons for refusal letter dated 5 February 2002.

12. The initial issue to be considered in assessing the claim under the refugee Convention is the applicant's citizenship or nationality. The Convention is founded

on the principle that national protection when it is available takes precedence over international protection. An applicant for asylum is normally expected to look to his own state for protection. Where an applicant has dual or even multiple nationality he must show that he is unable to look to each of the countries of which he is a national for protection before he is entitled to international protection. This principle is clear from the wording of Article 1A(2). It is only where an applicant cannot look to his country or countries of nationality for protection that he is entitled to look to the international community. For the sake of completeness the Tribunal note that this is not an absolute principle as the Convention recognises that there may be circumstances in which an applicant is unwilling to avail himself of the protection of his country or countries of nationality.

13. It is therefore essential when there is a dispute about nationality for that issue to be resolved before an asylum claim can properly be assessed. It is by reference to the country or countries of nationality that an applicant's claim must be assessed. It is only if there is no country of nationality that a claim is assessed by reference to the country of habitual residence.

14. Although the Adjudicator took the view that the applicant was effectively stateless, the Tribunal are satisfied that he was not in fact stateless. There is no doubt that he is an Ethiopian citizen. There is no evidence to show that he has been formally deprived of citizenship. However, the Adjudicator did go on to assess the applicant's claim in relation to Ethiopia on the basis that it had been his country of habitual residence. For the reasons which he gave and with which the Tribunal agree, the Adjudicator was satisfied that the applicant would be at risk of persecution were he to be returned to Ethiopia.

15. In substance the Secretary of State contends that the applicant is also a citizen of Eritrea and that he is not entitled to asylum unless he also shows that he would be at risk of persecution in Eritrea and is unable to look to the Eritrean authorities for protection. The applicant accepts that he is of Eritrean ethnic origin but says that he is not a citizen of Eritrea. It may be open to him to apply for citizenship but he has made it clear that he does not wish to do so. Enquiries have been made on his behalf by his representatives. The results of this enquiry are set out at A124. Ms Jessop, his representative, was advised by the Eritrean Embassy that there were two possibilities. If the applicant could get witnesses in the United Kingdom who he knew in Ethiopia and who could be trusted by the Embassy to show that they were Eritreans and to witness that his parents were Eritreans, then they would consider an application. If that was not possible then if he could find a relative in Eritrea who would provide statements they would consider an application for Eritrean documentation to enter the country. Ms Jessop was advised that many Ethiopians wanted to use the opportunity to come to Eritrea and they were very strict but once they had proved that they were Eritrean they could obtain a passport although the Embassy not yet started issuing them.

16. Ms Sigley points to paragraph 5.69 of the CIPU report. This records that the rules governing eligibility for Eritrean nationality are contained in the Eritrean Nationality Proclamation number 21/1992. People are Eritrean by birth if they are born in Eritrea or where born abroad if their father or mother is of Eritrean origin, which is defined as meaning any person resident in Eritrea in 1933. The proclamation goes on to contain provisions for the acquisition of Eritrean nationality by naturalisation. The applicant was not born in Eritrea. He was born in Ethiopia. The evidence before the Adjudicator was that the applicant's parents were indeed born in Eritrea but even taking his father's age as 55 and his mother as 50, they were certainly not resident in Eritrea in 1933. As it is the Secretary of State who asserts that the applicant is Eritrean, the onus is on him to establish that. On the basis of the evidence before us, we are not satisfied that the applicant is entitled to Eritrean citizenship still less that

he is now an Eritrean citizen. The Tribunal was referred to *Bradshaw*. In that case it was held that before a person could be regarded as stateless there must have been an application made for citizenship of those countries with which the person was most closely connected and those applications must have been refused. That principle makes obvious sense in the context of that case. The issue before the court was whether a person could be said be stateless within the terms of the definition of the Convention on the Status of Stateless Persons (1954) which provided that a stateless person meant a person who is not considered as a national by any state under the operation of its law. It is clear why the court took the view that someone could not be regarded as stateless if they failed to make an application to a state which might consider an applicant to be its national. However, the applicant in this appeal does not assert that he is stateless. He asserts that he is a citizen of Ethiopia whereas the Secretary of State says that he is also a citizen of Eritrea. It may be and the Tribunal would not wish to express a final view on it that there could be circumstances in which the Secretary of State could rely on this principle that it is reasonable to expect an application to be made for citizenship to a country where there is clear prima facie evidence that citizenship would be acknowledged. The position in our view is rather different when the evidence shows at best a possibility and certainly not a probability of a grant of Eritrean citizenship and where the applicant is saying he does not wish to return to Eritrea for good reason even though the reasons may not amount to a well founded fear of persecution or treatment contrary to the Human Rights Act.

17. The Tribunal will therefore proceed on the basis that it is not shown that the applicant is a citizen of Eritrea. We must consider the effect in this appeal of the fact that the removal directions are for Eritrea. It is conceded by Mrs Webber both in her skeleton argument and her oral submissions that there was no adequate evidential basis for the Adjudicator's finding that the applicant would be at risk of persecution in Eritrea. However, to return the applicant to Eritrea would be to return him to a country of which he is not a national or a citizen. On the basis of the evidence before us, the Tribunal are not satisfied that the government of Eritrea would be prepared to accept the applicant as an Eritrean citizen. This by itself does not mean that the Secretary of State would not be entitled to return the applicant to Eritrea. The United Kingdom's obligation under the Convention is not to return a refugee to the frontiers of territories where his life or freedom would be threatened for a Convention reason. This includes an obligation not to return a refugee to a country from which he might be returned to a country where he would face persecution without a proper consideration of his claim under the Convention.

18. It would therefore be permissible for the United Kingdom to return the applicant to Eritrea provided he is not at risk of persecution in Eritrea and provided he is not returned to Ethiopia by the Eritrean authorities. It is not contended that the applicant would be at risk of persecution in Eritrea. It was argued that there was a risk that the Eritrean authorities would return him to Ethiopia. Reliance is placed on documents on A4-5. However the Tribunal do not accept this contention. The concern expressed in this evidence is that those of Ethiopian ethnic origin might be returned by the Eritreans to Ethiopia. The Tribunal do not find there is any reasonable degree of likelihood on the evidence before us that if the applicant is accepted as an Eritrean citizen because of his Eritrean background that he would then be returned to Ethiopia.

19. However, this is speculation as we are not satisfied that the applicant would be accepted into Eritrea as an Eritrean citizen. The practical situation seems to us to be that he is not likely to be allowed into Eritrea in the first place. If the Secretary of State is relying in effect on a safe third country removal, he must of course produce evidence that he has the statutory power to remove the applicant to the proposed third country. His powers are set out in paragraph 8(1)(c) of Schedule 2 of the 1971 Act. The Tribunal are not satisfied that Eritrea is a country of which the applicant is a

national or a citizen. He did not embark from Eritrea for the United Kingdom. He does not hold an Eritrean passport or a document of identity. The only remaining ground is whether Eritrea is a country or territory to which there is reason to believe that he will be admitted. Looking at the evidence as a whole we do not believe that there is reason to believe that he will be admitted. If he fell within the rules governing eligibility for Eritrean nationality in paragraph 5.69, there probably would be reason to believe that he would be admitted but on the evidence before us he does not fall within that category. As the power to remove to Eritrea is not proved, the issue of a third country removal does not arise.

20. Parliament has provided a specific procedure for certifying removals to third countries where the removal is to take place without a consideration of the merits of the asylum appeal. It cannot have been Parliament's intention that by the use of removal directions under Section 69(1) or (5) that third country appeals could be dealt with without the matter being certified within the provisions of Sections 11 and 12. The Tribunal are not suggesting that the Secretary of State is seeking any such circumvention in the present appeal as the removal directions are made to Eritrea on the basis that the applicant is or is entitled to Eritrean citizenship. If in any particular appeal it is to be argued that a third country is safe and removal there will not be a refoulment that issue must be clearly identified in the decision letter so that a party has a proper opportunity of dealing with the issue.

21. A number of difficulties relating in particular to removal directions have arisen because of the way section 69 of the 1999 Act has been drafted. An asylum appeal can only be made following the one of the immigration decisions identified in S69(1)-(5). It is important not to be side-tracked in an asylum appeal into considering the technical validity of the immigration decision when the real issue is whether an applicant is entitled to be recognised as a refugee. This is assessed by reference to Article 1A(2) of the Convention. If the Secretary of State asserts that the removal of a refugee (i.e. someone who has shown that he falls within Article 1A(2)) will not be a breach of the Convention under articles 32 or 33, the onus lies on the Secretary of State to establish this. If he seeks to make a third country removal without consideration of the merits of the claim under Section 11 or 12 of the 1999 Act, he must follow the procedure set out in those sections.

22. In conclusion, in the view of the Tribunal, the applicant's claim for asylum is entitled to succeed on the basis that he is a citizen of Ethiopia who has a well-founded fear of persecution on return. It is not shown that he is a citizen of Eritrea and so he is not able to look to the Eritrean authorities for protection. The Secretary of State has not sought to establish that he is entitled to return the applicant to Eritrea under either the provisions of Articles 32 or 33 nor has he sought to establish that Eritrea is a safe third country within the provisions of Section 12 of the 1999 Act."

SECTION THREE: APPEAL RIGHTS

Withdrawal of Home Office decision

3.1 *Nori* [2002] UKIAT 01887 (11 June 2002)

His Honour Mr Justice Collins (President), Mr Mather

"2. When the appeal was lodged the error was accepted and the Secretary of State agreed that the matter should be reconsidered on the basis of the statement which the appellant had provided. The matter first came before an adjudicator in May 2001 and it was then adjourned for the purpose of the claim being reconsidered.

3. The Secretary of State did nothing and eventually the case came before Mr Macleman, an adjudicator, on 7 November 2001. Mr Macleman considered what steps he could take in order to avoid contravening the decision of the Court of Appeal in *Mwanza* and eventually he made the following direction:

> 'The respondent is to file and serve at or prior to next hearing after offering the appellant an opportunity to be interviewed if so advised, a note of reasons for maintaining refusal of the asylum clam on the merits. Failing which consideration may be given to proceeding in terms of rule 33.'

4. Yet again, nothing was done by the Secretary of State and in due course the appeal came before Mr Kimnell on 11 February 2002. In the meantime, the Home Office Immigration and Nationality Directorate had written to the respondent's solicitors on 17 January 2002 in these terms.:

> 'I refer to the Secretary of State's decision of 30 November 2000 in which your client was advised that his application for asylum had been refused under paragraphs 336 and 340 of HC 395 (as amended). The reason for refusal was failure to attend an interview on 22 November 2000 and failure to make out his claim that he qualified for asylum. This letter is to inform you that in light of the contents of your letter dated 22 November 2000 we are withdrawing the decision of 30 November 2000 to refuse asylum. We will take a fresh decision on your client's asylum claim after an interview has been conducted. Please be assured that the decision previously taken will be completely disregarded and will form no basis for the fresh decision. If your client has appealed against the decision of 30 November 2000 that appeal remains valid but your client will have the opportunity to amend the grounds of appeal or withdrawn the appeal in the light of that fresh decision. I am sorry for any confusion created by our administrative error and for any inconvenience this may have caused.'

5. That letter is remarkable in a number of respects. First, it seems that the author was unaware whether an appeal had been lodged or not. It must have been obvious that an appeal had been lodged otherwise the appellant would not be requiring any further consideration. In any event, it strikes us as somewhat extraordinary that someone writing on behalf of the Home Office appears not to know what the Home Office should have known, namely that an appeal had been brought. Secondly, it is also extraordinary that the Secretary of State took so long to deal with an administrative error which had been drawn to his attention some fourteen months earlier and it would seem before he had reached the formal decision which has led to this appeal.

6. We must, however consider the effect of that letter. The adjudicator refers to it in paragraph 6 of his determination. He observes as follows:

> 'At the hearing on 11 February 2002 I was told that the appellant has still not been allocated an interview. The earliest date that could be expected would be six weeks hence. I was asked to accept that this represented progress.'

7. Pausing there, we would observe that we would suppose that it did in the light of the length of time that had elapsed, but if the Secretary of State really regards it as progress to be able to have an interview, getting on for twelve months after he had originally indicated that he accepted that he would have to reconsider the matter, we are surprised. That hardly strikes us as being progress. This is, we regret, yet another example of Home Office incompetence and delay, creating an obstacle to the proper and speedy consideration of a claim. This is not the fault of the Appellate Authority, it is entirely the fault of the Secretary of State in totally failing to deal with a claim with any proper degree of expedition and when he was directed (whether or not that direction was lawful matters not for these purposes) by the adjudicator to carry out this exercise.

8. Returning to the determination, paragraph 6 continues:

> 'There is a letter on file from the Home Office Immigration and Nationality Directorate dated 17 January 2002 indicating that the decision under paragraph 340 to refuse asylum has been withdrawn. The decision to refuse leave to enter, however, which is the decision under appeal, is not mentioned in that letter.'

9. That is erroneous inasmuch as the letter which we have already quoted refers not only to the decision under paragraph 340, but also to the decision under paragraph 336. It is true that it purports to leave the refusal of leave to enter in existence but for reasons which we shall shortly indicate, that as a matter of law is in our judgment not correct.

10. The adjudicator then went on to allow the appeal, having regard to the failure by the Secretary of State to comply with the directions under rule 33 and the Secretary of State now appeals to us against that decision.

11. The refusal of leave to enter is dated 1 January 2001. It reads as follows:

> 'You have applied for asylum in the United Kingdom. The Secretary of State has decided to refuse your application for the reasons set out in the attached notice. You have not sought entry under any other provision of the Immigration Rules. I therefore refuse you leave to enter the United Kingdom.'

12. Then there is a reference to removal directions which states: 'I have given/ propose to give [neither is crossed out] directions for your removal by a scheduled service at a time and date to be notified to Iraq.' It goes on to indicate that the appellant has a right to appeal on asylum grounds and then there is reference to the attached section 74 notice, i.e. the one-stop notice which requires that any other grounds are set out in that notice and the other grounds set out were based on human rights.

13. The attached notice giving reasons is headed 'The Reason for Refusal Letter' which is in fact dated 30 November 2000. It refuses the application for asylum and goes on to state, in paragraph 4:

> 'Furthermore, the Secretary of State has given careful consideration to whether you should be allowed to enter the United Kingdom under our obligations under the Human Rights Convention for the Protection of Human

> Rights and Fundamental Freedoms but he is not satisfied on the information available that you qualify under any of the Articles.'

14. It goes on to require the recipient, Mr Nori, to state any reasons for staying in the United Kingdom which had not been previously disclosed and indicates that those must be included in the one-stop notice. There is then reference to the National Asylum Support Service and the effect on that if an appeal is brought.

15. The appeal right is contained in section 69 of the 1999 Act. That states, by subsection 1:

> 'A person who is refused leave to enter the United Kingdom under the 1971 Act may appeal against the refusal to an adjudicator on the ground that his removal in consequence of the refusal would be contrary to the Convention.'

16. The decision refusing leave to enter is the decision which gives the rights of appeal and section 69(1) deals with the asylum claim. There is also a right of appeal given by section 65 which reads by subsection 1:

> 'A person who alleges that an authority has in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom acted in breach of his human rights may appeal to an adjudicator against that decision.'

17. But, as section 65 makes clear, there has to be a decision in order for there to be an appeal under that section. The decision in this case is the decision to refuse leave to enter. That decision, as the notice makes plain, is based upon the refusal of asylum, the reasons for that being that an application for asylum is a ground under the Rules for enabling leave to enter to be given. That was what was being considered by the Secretary of State. That was the application that was being made by the applicant and that was what the Secretary of State relied on to refuse leave to enter. He did not purport in the notice, nor would it have been right to have done so, to refuse leave to enter on any other grounds than refusal of asylum.

18. That being so, we see that by the letter of 17 January 2002, the decision to refuse asylum has been withdrawn. Once the decision to refuse asylum has been withdrawn, there can be no lawful basis upon which refusal of leave to enter can be based since this asylum claim remains undecided. It is the refusal of leave to enter that gives rise in due course to the power to remove.

19. Once the asylum decision has been withdrawn, it becomes clear that there is nothing left against which an appeal either under Section 69 or under Section 65 can be brought. It is quite impossible to maintain the refusal of leave to enter in being once the asylum decision has been withdrawn. It is not only illogical but unlawful to regard the refusal of leave to enter as still being extant. Indeed, if the Secretary of State endeavoured to act upon the refusal of leave to enter, it seems to us an application for judicial review would be bound to succeed, and since our jurisdiction depends upon a decision being contrary to law, in our view that would be the position.

20. In those circumstances, there was nothing left for the adjudicator to decide. There was no appeal which could properly be continued before him. Once the decision on which the appeal was based had been withdrawn, no appeal could proceed. In those circumstances, the adjudicator's purported decision on that appeal is in our view a nullity. Once he had had that letter drawn to his attention he should have recognised the consequences and should have declined to hear the matter any further. The Secretary of State will, in his own good time, now consider the matter on its merits. If he decides to grant asylum or to accept that he cannot remove Mr Nori on other grounds, it may be that no further action will be taken by Mr Nori. He may of course,

if asylum is refused, decide that he would wish to appeal against that refusal even though it may be in due course he is not to be removed, but that is a matter for the future. If the Secretary of State decides on the merits that he will refuse the application, and therefore will issue a fresh decision to refuse leave to enter, then Mr Nori will have his appeal rights based on that decision.

21. Accordingly, the adjudicator should not have considered the appeal at all. His decision was contrary to law and we must allow the appeal. Our judgment makes plain that we are allowing the appeal simply to dispose of the adjudicator's determination. That has gone. Gone with it is any appeal. The Secretary of State must now reconsider his decision on the merits, which is what, we understand, he intends to do. It is as if he had never made any decision and the whole matter starts afresh. In those circumstances it is unnecessary for us to go into the rights and wrong of the decision that was actually made. All we would observe is that in our judgment it is not right for an adjudicator ever to make use of rule 33 and to decide an asylum claim in favour of an applicant without considering at all the merits of that claim.

22. Asylum is a status which should not be granted to punish the Secretary of State for failing to do what he ought to have done. It should be considered on its merits. It may be that if the Secretary of State fails to carry out any investigation himself or to reach any conclusion himself, the adjudicator will have to make his decision on the basis of uncontroverted evidence from the appellant or without permitting the Secretary of State, if he has failed to comply with directions, to put in any material himself.

23. That is as far as he can go. What he should not do, as we say, is to decide that an appellant is a refugee without considering at all any claim that has been put forward to that effect merely to punish the Secretary of State for failing to comply with directions. Beyond that we should not and do not go in the circumstances on this case. Accordingly for the reasons we have given, we allow this appeal but that has the effect which we have indicated earlier.

23. We should add this in connection with the letter of 17 January 2002. We understand that the paragraph that we have referred to which states that the appeal remains valid if an appeal has been brought is commonly to be found in letters such as this. It is in our view wrong in law. We hope that we shall never see it in any such letter again."

Human Rights Appeals in Variation Cases

3.2 *Carless* [2002] UKIAT 05757 (13 December 2002)

Mr Ockelton (Deputy President), Mr Latter, Mr Fox

"2. The papers before us do not set out the Appellant's immigration history in full, but we understand from his statement that he has been, or claims to have been, in the United Kingdom for nine or ten years. In 2001 or thereabouts, he applied for further leave to remain as a student and he was refused a variation of his then existing leave on that basis. The notice which, as we have said, is dated 2nd July 2001, sets out the reasons for the refusal to vary leave and indicates that unless the Appellant chooses to appeal under s 61, he is required to leave the United Kingdom ten working days after the receipt of the notice. It is common ground before us that if the Appellant failed to

leave the United Kingdom at the end of that period he would have been liable to the consequences of his having committed a criminal offence.

3. The Appellant did appeal and in his notice of appeal he gave notice of matters which were perhaps more properly to be included in his statement of additional grounds submitted in response to the One Stop Notice which he had been sent with the notice of decision.

4. In the course of the documents which form the appeal bundle, the Appellant had therefore raised not only formal grounds of appeal against the decision as a matter of immigration law, but specifically also raised Articles 5, 8, 10, 13 and 14 of the European Convention on Human Rights and indicated also that he was a long-term resident of the United Kingdom.

5. Mr Hourigan, who appeared before the Adjudicator, asked the Adjudicator to take the human rights into account in making his decision. The determination itself, however, contains no consideration of the Appellant's human rights. The conclusions are simply that, because the Appellant did not contest the refusal as correct under the Immigration Rules, the appeal fell to be dismissed. The crucial paragraph of the Adjudicator's determination in so far as human rights are concerned is as follows:

> "8. The Appellant's fears of a return to Jamaica have not yet arisen as no removal directions have been given by the Secretary of State. If and when such directions are given the Secretary of State will have to consider the Appellant's response and until a primary decision has been made by the executive there is nothing for me judicially to consider. The human rights grounds raised by the Appellant do not impact on the appeal which is before me."

6. As will have been apparent to the parties in the course of today's hearing, we have a considerable amount of sympathy with that reasoning. We have, however, decided that it is not correct and that the human rights of the Appellant should have been considered by the Adjudicator.

7. The basis of the Adjudicator's jurisdiction and our jurisdiction on human rights is that in s 65 of the 1999 Act which, so far as relevant, reads as follows:

> "65(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an Adjudicator against that decision."

As the Adjudicator in this case noted, the decision so far made by the Secretary of State is not a decision to remove the Appellant to Jamaica: it is a decision that, insofar as he remains in the United Kingdom, he does so without leave.

8. Both parties before us emphasised that the decision refusing to vary the Appellant's leave was a decision relating to his entitlement to enter or remain in the United Kingdom. There can, we think, be no argument about that. It follows that the Appellant has a right of appeal under s 65. But the grounds of appeal have to be that the authority has acted in breach of his human rights. It is not entirely easy to see from the words of s 65 alone that in making the decision which is currently under appeal, the Secretary of State has acted in breach of the Appellant's human rights.

9. It is clear to us that a reading of s 65 by itself does not require the possible consequences of the present refusal to be considered by an Adjudicator. It is also clear that a person who claims that his removal to a particular place would breach his human rights does not thereby acquire any entitlement to remain in some other particular place. His entitlement remains simply an entitlement not to be removed in a way which would breach his human rights. Further, (whatever may be the Secretary

of State's practice) a person who establishes that his removal would breach his human rights is not thereby entitled to something which the United Kingdom Government calls "leave to remain in the United Kingdom". Again, he merely is entitled not to be removed in breach of his human rights.

10. On the other hand, Mr Blundell has indicated on behalf of the Secretary of State that the Secretary of State does not seek to have s 65 interpreted in a restrictive way. Secondly, the One Stop procedure, which is contained in sections 73-77 of the 1999 Act, is intended, as we understand it, to enable Adjudicators and the Tribunal to consider the situation of an Appellant in full in one set of proceedings. It would therefore be surprising if, in a case such as the present where the Appellant has done all that he was required to do in raising all relevant human rights at the time when the One Stop Notice was served, he was then not allowed to rely on them in his subsequent proceedings.

11. There is a third reason which we must take into account. Section 7(1)(b) of the Human Rights Act 1998 was not cited to us, but we are clearly subject to it. So far as relevant, it reads as follows:

> "A person who claims that a public authority has acted or proposes to act in a way which is made unlawful by s 6(1) may (b) rely on the Convention right or rights concerned in any legal proceedings but only if he is or would be a victim of the unlawful act."

12. It is right to say, as the Adjudicator said, that there have as yet been no removal directions issued. But, as we have also indicated, the notice of decision which the Appellant received contained an indication that he was required to leave the United Kingdom unless he appealed. It appears to us that the refusal to vary leave carries a clear indication that the Secretary of State proposes to act against the individual in question with a view to removal if he does not leave. For those reasons, we have concluded that the Adjudicator should have considered the claimed human rights substantively.

13. Mr Blundell has conceded that the Appellant's removal cannot be effected without the issuance of a further notice of intention to remove and that, subject to any certification under s 73(5), that further notice of intention to remove would carry a right of appeal. It is therefore not by any means clear that the process which we find that the Act requires is in all cases likely to be efficient. But it is clear that it will give an Appellant a proper opportunity to argue his human rights on occasions when he has properly raised them."

Impact of Partial Certification on Non-certified Tribunal Appeal

3.3 *Oukaci* [2002] UKIAT 05820 (20 December 2002)

Mr Barnes, Mr Chalkley, Mrs Jordon

"1. The Appellant is a citizen of Algeria who was born on 21 December 1970. He arrived in the United Kingdom on 23 May 2000 travelling on a forged French ID card and failed to inform the Immigration Officer on arrival that his papers were invalid. He did not at that point claim asylum but did so two days later on 25 May 2000. It is also right to say that in his asylum claim he made no claim that he had been tortured in Algeria. The Secretary of State considered the asylum claim and refused it for the reasons which are contained in a letter dated 30 March 2001.

2. His claim was, put simply, that he had deserted from the armed forces partly by reason of fears as to his own safety and partly by reason of what he saw happen to wounded prisoners who, he says, were shot by officers.

3. The basis of his fear of return is that he is being sought as a deserter and will be so dealt with by the authorities on his return. The Secretary of State certified the claim in the refusal letter in the following terms:-

> "9. In the light of all the evidence available to him the Secretary of State has concluded that you have not established a well-founded fear of persecution and that you do not qualify for asylum. Your application is therefore refused under paragraph 336 of HC 395 as amended and has been recorded as determined on 30 March 2001. In addition the Secretary of State certifies that your claim is one to which paragraph 9(3)(b) of Schedule 4 to the 1999 Act applies owing to your failure to declare to the immigration on arrival that your travel documents were not valid and that your claim is one to which paragraph 9(7) does not apply because you have adduced no evidence relating to torture. This means that if you choose to exercise your right of appeal it will be subject to the accelerated appeal procedure.
>
> 10. Furthermore the Secretary of State has given careful consideration to whether you should be allowed to remain in the United Kingdom as a result of our obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms but he is not satisfied on the information available that you qualify under any of the Articles."

4. On 5 April 2001 the Secretary of State issued formal removal directions to Algeria against the Appellant as an illegal entrant after refusal of his asylum application. With that document and the refusal letter was served a One-Stop Notice which contains certain printed notices to the recipient which include the following:-

> "If you make a valid appeal and submit additional grounds, arguments provided in support of those grounds will be considered. If the decision is maintained in the light of those arguments you will be told why."

5. The Appellant did appeal on both asylum and human rights grounds but there is nothing to show that there was any further communication from the Secretary of State dealing with the human rights claims, as might have been foreshadowed in the passage which we have quoted above. Up to the point of the issue of the notice of removal the documentation refers only to an asylum claim with the exception of paragraph 10 in the Reasons for Refusal Letter.

6. When the appeal came before an Adjudicator, Miss S I Bayne, on 13 June 2002 she dismissed the Appellant's appeal on both asylum and human rights grounds having made an adverse finding of credibility. She also upheld the certification in the following terms at paragraph 35 of her determination:-

> "The Secretary of State was correct to certify this case. The Appellant accepts that he arrived using false travel documentation and that he failed to declare this fact to the Immigration Officer on arrival. Furthermore, he has adduced no evidence relating to torture. I uphold the certificate in this case."

7. The first issue with which we are necessarily concerned is the effect of the certification and its being upheld by the Adjudicator. We considered the effect of the judgments in the Court of Appeal in *Zenovics v Secretary of State for the Home Department [2002]* EWCA Civ 273. It was quite clear that the effect of certification in the way in which it appeared in the Reasons for Refusal Letter was at least that the asylum claim was certified but we wondered whether it might also be argued that the certification, by reason of the last sentence in paragraph 9, could be said to be

intended to apply to both claims since it was under the Convention neutral paragraph 9(3)(b) of Schedule 4 to the 1999 Act as opposed to certification either under paragraph 9(4) or 9(5) of that Schedule each of which have reference to a specific Convention, as was the case in *Zenovics*.

8. Mr Blundell for the Secretary of State, however, informed us that he accepted from the positioning of the certificate in the refusal letter immediately following the statement that the Appellant did not qualify for asylum, and by reason of the use of the word "furthermore" at the commencement of paragraph 10, that he could not successfully argue before us that the certification related to both claims under the two Conventions. He accepted that it related only to the asylum claim. That leaves the situation that we have before us a valid appeal with leave against the Adjudicator's determination in respect of the human rights claim which had also been made, and which was restricted to Article 3 for the purposes of the appeal before her.

9. It was Mr Blundell's submission that as a result of the effect of the judgments of *Zenovics* on procedural grounds, that there was an impossible situation which had arisen in relation to the Adjudicator's findings. It was his submission that because there had been no attempt to seek judicial review of the asylum decision, so that all remedies in relation to the asylum claim made were now exhausted, it must follow that the findings of the Adjudicator in that respect could not be challenged and would become binding either on us or on any subsequent Adjudicator dealing with the human rights claim in respect of which we did have jurisdiction. He based this submission on the fact that it was analogous to the position arising where there was a subsequent human rights claim, which followed the final disposal of an earlier asylum claim made at a time when the Human Rights Act 1998 was not in force. This relates back to what we may term the Pardeepan situation where it was accepted by the Secretary of State that in circumstances where an appeal on asylum grounds arising from a decision made prior to 2 October 2000, and thus excluding any consideration of human rights grounds, was not made by the Adjudicator or the Tribunal on a final basis until after 1 October 2000, the unsuccessful Appellant would nevertheless still retain a right to raise a separate human rights claim under the legislation which had then come into force.

10. The position which arose in those circumstances was the subject of consideration in the starred Tribunal decision of *Devaseelan* [2002] UK IAT 000702. It laid down that in the Pardeepan situation the approach of the second Adjudicator in the human rights appeal should be to regard the findings of fact made in the asylum claim as the starting point in the adjudication of the human rights claim.

11. At paragraph 41 of that determination it was said that if before the second Adjudicator the Appellant relied on facts not materially different from those put to the first Adjudicator, and proposed to support the claim by what was in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated. It was accepted, however, that there might be occasional circumstances where the facts of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made.

12. It seems to us that in the present case the *Devaseelan* approach is not applicable because we are not dealing with a separate human rights claim made after all appeals in the asylum claim have been exhausted. What has happened here is that by reason of procedural provisions the Appellant is restricted in his appeal only to human rights issues. Nevertheless he is appealing against the findings of fact which were made by the Adjudicator in relation to his decision on the human rights claim. The fact that those findings of fact are identical to those which also guided the Adjudicator's

decision in the asylum claim is neither here nor there. It does not prevent this Tribunal, or indeed any Adjudicator to whom this appeal may be remitted in relation to the human rights claim, from reconsidering the whole basis of the claim as though the appeal were being heard afresh for the first time. All that the Adjudicator cannot do is then make a finding that the obligations of the United Kingdom under the Refugee Convention will be breached by return of the Appellant since he has no jurisdiction to make any finding in relation to a claim under that Convention by reason of the upholding of the certification. That, however, is simply a procedural issue affecting jurisdiction. The whole question of the factual findings as it affects both claims, however, remains very much a live issue arising out of the same appeal process.

13. For these reasons we are satisfied that Mr Blundell's submission is wrong and that the Appellant is not precluded from challenging the findings of the Adjudicator which led to the dismissal of both limbs of his claim in the present proceedings before us.

Having reached that point in the hearing there was a certain consensus between both advocates. It was Mr Jackson's submission that the adverse credibility findings were flawed for the reason of the challenges set out in the grounds of appeal. We do not find it necessary to go into these in detail because Mr Blundell concurred in that view. We, too, are of the view that the adverse credibility findings are flawed and that the determination as respects such appeal as is before us is fundamentally unsafe and cannot stand.

15. We have considered briefly the background evidence upon which the Appellant seeks to rely. If he is credible in his claims then we cannot categorise his claim as being unarguable and bound to fail. It is therefore important that proper and sound credibility findings be made.

16. It was Mr Jackson's submission to us that the proper course was for this appeal to be remitted for hearing afresh before another Adjudicator.

At that point Mr Blundell did not seek to oppose that remittal but subject only to the arguments which he had heard and put unsuccessfully before us.

18. We are of the same view as to the appropriateness and necessity of remittal. The appeal could not proceed before us today. In any event it is undesirable that an appellate tribunal should become the primary finders of fact by reason of errors on the part of an adjudicator. We accordingly allow this appeal to the extent that it is remitted for hearing afresh before an Adjudicator other than Miss S I Bayne. We direct, of course, that the fresh hearing is restricted to the human rights claim and does not relate to the asylum claim which has been certified."

Removal Directions

3.4 *Asif Khan* [2002] UKIAT 04412 (26 September 2002)

Mr Ockelton (Deputy President), Mr Fox, Mr Batiste

"2. The heart of the Appellant's claim is that he is a refugee from Afghanistan. He gave to the Secretary of State a circumstantial description of his past. It was that history that he repeated before the Adjudicator. Neither the Secretary of State nor the Adjudicator believed that his story was the truth. Neither the Secretary of State nor the Adjudicator believed that the Appellant is from Afghanistan.

3. In the course of refusing his claim, the Secretary of State wrote this, at paragraph 15 of the letter of refusal:

> "As a result of your obvious lack of knowledge about the area that you claim to have lived in, the Secretary of State has concluded that you are not from Nengahgar. This in turn has given the Secretary of State cause to doubt that you are, in fact, an Afghan as claimed. The Secretary of State has therefore considered all the available evidence presented in your asylum claim, but has concluded that you are not genuinely of Afghan nationality."

And then at paragraph 20:

> "The Secretary of State is not satisfied that you are an Afghan and has refused your claim for asylum and your human rights claim on the basis that you are not from Afghanistan. Directions will be given for your removal to Afghanistan, as this is the country of which you claim to be a national. This is being done solely in order to enable you to appeal to an Adjudicator and enable to decision to refuse your claim for asylum to be reviewed. If you appeal against the refusal of your claim for asylum and the Special Adjudicator also concludes that you are not from Afghanistan, we will seek to establish your true nationality."

4. The Appellant did appeal, as we have said. The Adjudicator concluded as follows:

> "I note the arguments put by Mr Kumi on the Appellant's behalf - they were ably put but they do not persuade me that there is any truth to this Appellant's story. Having weighed the evidence, I am not persuaded that this Appellant is from Afghanistan. His knowledge of the country was very limited and I am not persuaded that he was a credible witness."

Later, the Adjudicator wrote as follows:

> "The onus lies on the Appellant to persuade me that it is reasonably likely that he is a refugee within the definition given in Article 1A of the Refugee Convention. He has failed to do so because he has not persuaded me either that it is reasonably likely that he comes from Afghanistan or that it is reasonably likely that he would come to any harm if he was returned there."

And later, the Adjudicator emphasises his position as regards to the Appellant's nationality when he says that another issue "of course is academic as he does not come from Afghanistan".

5. The Adjudicator went on to consider whether, in those circumstances, the Secretary of State's notice of decision that the Appellant should be removed to Afghanistan was valid and he concluded that, (although the matter was not strictly speaking for him) as a result of his decision, the notice would not be regarded as valid.

6. Before us, Mr Kumi has raised three principal matters. The first is that the Adjudicator's determination was defective in that it failed to identify the Appellant's nationality. The second is that, in any event, the notice of decision to remove to Afghanistan is invalid and cannot be acted upon because the Appellant is not from Afghanistan, which appears to be what the Adjudicator decided. The third is that the notice of removal is unlawful because of the terms in which the Secretary of State indicated that he was giving that notice (those terms are the ones we have set out in paragraph 20 of the letter of refusal). We deal with each of those points in turn.

7. First, nationality. Mr Kumi submitted that it was the Adjudicator's task to assess the Appellant's nationality. He acknowledged that no country of nationality for the Appellant had been offered, other than Afghanistan. He acknowledged also that the burden of proof of nationality was on the Appellant and that it was not for either the

Adjudicator or for the Secretary of State to establish the Appellant's nationality. Mr Kumi referred us to the decision of the Tribunal in *Tikhonov*, [1998] INLR 737. In that case, the Tribunal, constituted by the then President and two legal members, decided that "It was not possible to decide an asylum claim without identifying the country or countries of nationality of the claimant, or alternatively concluding that the claimant was stateless. The burden of proving such nationality or statelessness was upon the claimant and the identification of the relevant country or countries had to be decided on the evidence".

8. *Tikhonov*, however, was a case in which the basic facts of the Claimant's history were not in serious doubt. He was a person who, in terms both of ancestry and in terms of the changing politics of Eastern Europe, was of doubtful nationality. In order to assess his claim under Article 1A(2) of the Refugee Convention, it was evidently necessary to determine his country of nationality from the available options. In those circumstances, the Tribunal felt able to take the view that an Adjudicator should always decide which of the nationalities was relevant for the purposes of the claim. We have some doubts whether the rule in Tikhonov is expressed too widely. It does appear to us that if an Appellant's claim is of such a nature that it gives no rise to a well-founded fear of persecution whatever his nationality, it cannot in principle be right to say that it cannot be assessed without determining his nationality. But that is perhaps not of immediate relevance to the present appeal.
9. So far as the present appeal is concerned, the position is that the Adjudicator had precisely two choices on the evidence before him. He had the opportunity of deciding that the Appellant was from Afghanistan as he said: and he had the opportunity of rejecting the Appellant's account, in which case there was no alternative country of nationality that he could properly offer. We do not accept Mr Kumi's submission that, in those circumstances, an Adjudicator is obliged to find a country of nationality for the Appellant. If the Appellant offers only one country and is not believed in his account, the determination that he does not come from that country is entirely adequate as a determination of his nationality for the purposes of the appeal which the Appellant is raising. For those reasons, so far as the question of nationality is concerned, we regard the determination as entirely appropriate. We have to say that had it been suggested to us that the Adjudicator erred in the reasoning he brought to the determination of nationality, we should have said that there was no merit at all in any such argument. It is quite clear that the Adjudicator dealt with this issue with the greatest of care.

10. Secondly, then, is the question of whether, given that the Appellant is found by the Adjudicator not be of Afghan nationality, it is right that the removal directions are invalid. Removal directions of an illegal entrant are made under paragraphs 8 and 9 of Schedule 2 to the 1971 Act. We do not need to set them out in full. As is well known, they provide that removal directions of an illegal entrant may be made, broadly speaking, to a country or territory which falls into one of four categories. They are set out in sub-paragraph 8(1)(c). They are a country of which he is a national or citizen, or a country or territory in which he has obtained a passport or other document of identity, or a country or territory in which he embarks for the United Kingdom, or a country or territory to which there is reason to believe that he will be admitted. In the present case, it has not been suggested that any category other than the first is applicable. There can be a notice of removal to a country of which he is a national or citizen.

11. The centrepiece of Mr Kumi's argument on this point is that, given that the Appellant has been found by the Adjudicator not to be a national or citizen of Afghanistan, the removal directions must be void: and that, as we understand it, was the Adjudicator's view as well. The issue of whether the removal directions are or are

not void cannot be considered by us in isolation from the Appellant's rights of appeal. It is only if the Appellant has a valid appeal against a notice that an Adjudicator or the Tribunal can determine the validity of the notice. It is common ground between the parties in this appeal that the validity of the directions for removal is capable of being questioned by an Appellant under s66 of the 1999 Act, the relevant parts of which are as follows:

> "66. Validity of directions for removal:
>
> (1) This section applies if directions are given for a person's removal from the United Kingdom
>
> (a) on the ground that he is an illegal entrant;...
>
> (2) That person may appeal to an Adjudicator against the directions on the ground that on the facts of his case there was in law no power to give them on the ground on which they were given.
>
> (3) This section does not entitle a person to appeal while he is in the United Kingdom unless he is appealing under s65 or 69(5)."

12. The present case is one in which the Appellant is appealing under s 69(5), so he has a right of appeal under s 66 while he is in the United Kingdom and that right of appeal is limited. It is an appeal against the directions on the ground that, on the facts of his case, there was in law no power to give them on the ground on which they were given. We emphasise that the right of appeal under s 66 is limited because the general right of appeal to an Adjudicator under paragraph 21(1) of Schedule 4 to the 1999 Act is on the basis that a decision was not in accordance with the law, but the next succeeding sub-paragraph of that paragraph makes it clear that the general right of appeal on that ground is subject to any limitation on the rights of appeal. Such a limitation is to be found in s 66(2).

13. The Appellant then has or had or might have had a right of appeal against the directions for removal on the ground that they directed removal to a country of which he was not, as found by the Adjudicator, a national. Mr Kumi suggests that, under those circumstances, the removal directions are invalid. Afghanistan is, following the Adjudicator's decision, not a country authorised by paragraphs 8 and 9 of Schedule 2 as a destination for the Appellant's removal. Again, though, it seems to us that the question must be determined in the context of an actual appeal. In fact, there was no appeal under s 66 before the Adjudicator, as he recognised. Indeed, it is difficult to see how there could be because, so far as the appeal to the Adjudicator is concerned, the Appellant's claim was that he was from Afghanistan.

14. We firmly take the view that an Appellant cannot be heard to claim, for the purposes of his asylum appeal, that he comes from a particular country and, in the same proceedings, for the purposes of s 66, that he does not come from that country. That should be sufficient to deal with any case in which, in the same appeal, an Appellant claims that he is from a particular country but, if the Adjudicator does not believe that, then he claims for the purposes of an appeal under s 66 that he is not from that country. To do so is simply an abuse and we will not tolerate it. It follows that an appeal under s 66, based on the falseness of the information given for the purposes of any other grounds of appeal in the same appeal, will not succeed.

15. We pause, in passing, to note the case of *Zecaj* [2002] UKIAT 00232, to which we have been referred. That was a case in which there was no inconsistency in what the Appellant had said. He was a Kosovan who had been, by only one of a series of errors which the Secretary of State had made in his case, issued with notice of removal to Albania. He had always said he was Kosovan and one of the things that he said on his appeal was that the directions for his removal were invalid as they were

for Albania. The Tribunal's acceptance of that argument does not in any sense undermine what we have said about an Appellant who maintains inconsistent countries of origin for various purposes in his appeal.

16. As we have indicated, the Adjudicator did not formally have before him an appeal under s 66 and the question then arises whether an Appellant, who is found by the Adjudicator not to be from the country which he claims to be from, has a subsequent right of appeal under s 66. Might he say, "Following the Adjudicator's determination which I accept, I appeal against the removal directions on the basis that, as has now been established as a fact, I am not from the country which is mentioned in them"? It would appear at first sight as though he could do so under s 66. If he has not previously raised the issue, then s 66 ought to give him a right of appeal. But we note that by then the decision for his removal, against which he appeals, will be of some age and under Rule 6 of the Immigration and Asylum Appeals (Procedure) Rules 2000, where an Appellant makes an appeal within the United Kingdom, notice of appeal has to be given not later than ten days after the notice of the decision was received. So any such appeal is in practice certain to be out of time and we cannot see that it would generally speaking be right to enable a person to raise a late appeal when the reason for the lateness is that he has previously sought to deceive everybody who has considered his case.

17. It follows from the foregoing that an appeal under s 66 will be unsuccessful it is raised on the basis of inconsistent facts in the principal appeal; and it cannot be raised later because it will be out of time. The effect of s66 must, in our view, be limited to cases such as Zecaj where there has been some factor which does not involve a judgement prejudicial to the Appellant, but simply that in fact there has been an error in the directions given. It follows that we reject Mr Kumi's second principal submission.

18. The third submission was that, given the terms of paragraph 20 of the Respondent's letter of refusal, the Secretary of State was not entitled to give the directions which he did give. We have to say that paragraph 20 does give us pause for thought. The Secretary of State was, in our view, entirely entitled to reject the Appellant's claim to be from Afghanistan, but nevertheless to give removal directions for Afghanistan. The reason for that is that the appropriate course of action for an Appellant would be to appeal under s 66 or s 69, or indeed s 65. The Appellant could no doubt chose whether to say that he was not from Afghanistan or to say that he was from Afghanistan. The tactics of the Appellant's appeal are not a matter for the Secretary of State. In making the removal directions, it appears to us that the Secretary of State was entitled for those purposes to accept what he had been told by the Appellant. In reaching that conclusion we are following the determination of the Tribunal in Ali [2002] UKIAT01437.

19. The difficulty arises in the present case because of the use of the word "solely". As Ms Paddick acknowledged, the use of that word was ill-advised because, if the Adjudicator had concluded that the Appellant was from Afghanistan but not a refugee, he would have been removed in accordance with the removal directions. It follows that the giving of the removal directions was not solely in order to enable an appeal.

20. Reading the paragraph as a whole, it appears to us that the word "solely" properly interpreted applies to the insertion of a particular country in the notice, rather than to the issuing of the notice as a whole. What is being said is that the Secretary of State is giving removal directions, and the removal directions are to Afghanistan. The choice of Afghanistan is done on the basis of the Appellant's story and that is the only reason why that country has been chosen. Following the giving of the directions for removal, the Appellant has an appeal which he has indeed argued.

21. In any event, it appears to us that Mr Kumi's third principal submission is doomed to failure for the reasons that we have already given. He has no general right to assert that the directions for removal are given not in accordance with the law. He has that right only under s 66. The ground on which the directions for removal were given is the ground that the Appellant is an illegal entrant. The directions are for removal to Afghanistan, a country which he cannot in these proceedings be heard to say that he is not from. It follows that whatever may be the merits of Mr Kumi's argument based on paragraph 20, they are not capable of being raised in proceedings before the Adjudicator or before the Tribunal.

22. We are aware that there are many cases where Appellants have claimed to be from a country which the Secretary of State does not believe that they are from and where the Adjudicator shares the Secretary of State's incredulity. For that reason, we briefly summarise our conclusions in this appeal.

23. First, an Adjudicator who considers the evidence properly and concludes that an Appellant is not from the country which he claims to be from is entitled simply to say so. Second, an Appellant who claims to be from one country for the purposes of his asylum appeal is not entitled in the same appeal to claim to be from another country for the purposes of raising a claim under s 66."

3.5 *Hamza* [2002] UKIAT 05185 (11 November 2002) (Starred)

His Honour Mr Justice Collins, Mr Allen, Professor Casson

"1. The Appellant, Ms Jamila Hamza, claimed to have entered the United Kingdom by air from Kenya on 5th September 2000. She attended at the Home Office on 26th September and claimed asylum. Her claim was based on her assertion that she was a citizen of Somalia, born on 2nd February 1976. She then gave an account of her tribulations upon which she relied to establish her asylum claim. She had, in fact, she said, moved from Somalia to Kenya, but that was because of her fears of persecution, or so she alleged.

2. The Secretary of State did not believe that she was from Somalia, and indeed did not believe her account. She admitted in interview that she had entered the country using a false passport provided to her by an agent, that being a Dutch passport which might explain, if it was accepted at face value by the Immigration Officer, how she came to be admitted because she would have been regarded as a national of a country of the European Union.

3. As we say, the Secretary of State did not believe her account and when it was pursued before the Adjudicator, he equally did not believe her. He decided she was not a national of Somalia. Indeed, he went further and decided on the evidence before him, that she positively was a citizen of Kenya. That he decided, as he put it, on the balance of probabilities. That is not directly material so far as this appeal is concerned, because all that is material is that it has been decided that she was not a national of Somalia. What she was doing was putting forward a lying and dishonest claim to try to enable her to remain in this country.

4. When the matter came before the Adjudicator, the question of the possibility of an appeal being made simultaneously under s 66(2) of the 1999 Act was raised. That was based upon the decision of the Tribunal in *Zeqaj* [2002] UKIAT 00232, which was a case where the Home Office, in error, had issued removal directions to a Kosovar to Albania. For reasons which need not concern us, that mistake was persisted in before

the Adjudicator and was still in existence before the Tribunal. The Appellant had, at all times, in that case asserted that he was, as indeed was the truth, a citizen of Kosovo and when the matter came before the Tribunal it was decided that his asylum appeal did not succeed. That was not altogether surprising. When he had left Kosovo it may well be that an asylum claim might have had merit, but the situation in Kosovo had changed radically since then. So the only question was whether the removal directions should stand. The Tribunal recognised that there was, if the appeal were dismissed, at least a theoretical possibility that removal could take place to Albania because the appeal was, of course, against the removal directions on the basis of the asylum claim. That seemed to the Tribunal to be wrong and capable of working an injustice and, in the circumstances, on the facts of that case, it was decided that leave to pursue a s 66(2) appeal should be granted. Mr Deller, who then represented the Secretary of State, as he has in this appeal before us, did not seek to argue against the decision of the Tribunal to permit the s 66(2) appeal to proceed because, in that way, the removal directions were disposed of. Of course it would have been open to the Secretary of State to issue fresh removal directions thereafter to Kosovo, which is what should have been done in the first place.

5. We have referred to *Zeqaj* because it is essential, in our view, to bear in mind that it was a very different case from this case. We are concerned with the circumstances of this case because it is by no means unique. There seems to be something of a culture of people coming to this country claiming they are citizens of a country in which there is trouble and in which it may be feasible to suggest that there is persecution. They spin a tale which fits in with the circumstances in that country and based on that they claim asylum. This case involves Somalia. The same assertions have been made, in the experience of the Tribunal, in connection with Afghanistan, Burundi and sometimes even Sri Lanka and parts of Eastern Europe, and we do not doubt that there are other countries in respect of which similar allegations can be made. It is therefore something of a growing problem.

6. That being so, the Tribunal in a recent determination which is starred *Asif Khan v Secretary of State* [2002] UKIAT 004412 issued a determination which, to a large extent, was intended to deal with this particular sort of situation. In paragraph 14 of that determination, the Tribunal said this:

> "We firmly take the view that an Appellant cannot be heard to claim, for the purposes of his asylum appeal, that he comes from a particular country and, in the same proceedings, for the purposes of s 66, that he does not come from that country. That should be sufficient to deal with any case in which, in the same appeal, an Appellant claims that he is from a particular country but, if the Adjudicator does not believe that, then he claims for the purposes of an appeal under s 66 that he is not from that country. To do so is simply an abuse and we will not tolerate it. It follows that an appeal under s 66, based on the falseness of the information given for the purposes of any other grounds of appeal in the same appeal, will not succeed."

That approach we regard as a very proper one, but we have to consider whether it fits in with the language of the Act because we recognise that as a Tribunal set up under statute, there may be argument about the extent of any inherent jurisdiction that we may have.

7. We turn to the conclusions of the Adjudicator, Mr Varcoe, in the instant case. In paragraph 37, he says this:

> "Now clearly at the time that the directions were set, there were indeed grounds on which the Secretary of State could reasonably have set removal directions for Somalia. Had he chosen instead to set directions to, say, Kenya, I suspect that a representative for the Appellant would have argued that this

was unreasonable since, on the face of the Appellant's claim, this would have been the wrong country. Accordingly, I conclude that since I deliberately did not deal with the nationality as a separate and preliminary issue, it is now open to me to regard an appeal under s 66(2), albeit it relates to an appeal under s 69(5) of the same Act, as being one which I need not consider. In any case, at the hearing Mr Masters, representing the Respondent, did not specifically either consent to such an extension of the grounds of appeal nor did he demur. However, I cannot believe that the intention of Parliament was to allow an Appellant first to put forward a claim for asylum based on a particular country and then, when it is shown that there was no connection between the Appellant and that country, to argue that he should be able to alter the grounds of appeal so that the removal directions should be held to be invalid. It seems to me that s 66 should not be interpreted in that manner. Nor do I believe that the decision in *Zeqaj* requires me to do so."

8. With those observations, we entirely agree. We should go back to consider the precise wording of s 66 to see whether the approach suggested by Mr Varcoe conforms to the proper construction of that section. S 66(2) reads:

> "(2) That person [that is to say a person in respect of whom directions for his removal have been given on the ground that he is an illegal entrant which is the one that matters in the circumstances of this case] may appeal to an Adjudicator against the directions on the ground that on the facts of his case there was, in law, no power to give them on the ground on which they were given.
>
> (3) This section does not entitle a person to appeal while he is in the United Kingdom unless he is appealing under s 65 or s 69(5)."

Now that enables a person, in respect of whom appealable removal directions have been given, to say not only that he is a refugee but also that there was no power to give the directions on the facts of his case. What he is not entitled to do is to blow hot and cold and say "On the facts of my case, I am a national of country A and I cannot be returned to country A because it would be contrary either to the Refugee Convention (s 69(5)) or the Human Rights Convention (s 65). But, if you, the Adjudicator, decide that I am not a national of country A, then the removal directions cannot stand because, on the facts that you have then found, there would be in law no power to give them on the ground on which they were given".

9. In our view, because, like Mr Varcoe, we do not believe that Parliament could have intended an individual to rely on his own fraud to obtain an advantage, s 66(2) must be construed to mean that the facts of his case mean the facts asserted by the Appellant in support of his appeal. That is to say that the Appellant is entitled to appeal under s 66(2) if, and only if, he asserts facts which mean that there was in law no power to give the directions on the ground on which they were given. If he fails to establish those facts, his claim will fail.

10. Thus, to take the *Zeqaj* case, it was perfectly proper for the Appellant in that case to say "You cannot direct my removal to Albania, because I am, and it is my case that I am, a national of Kosovo, and not of Albania". No question of any deception, no question of any reliance upon his own fraud arose. That being so, we are satisfied that in a case such as the one before us, if the Appellant were to try to run an appeal under s 69(5) or s 65 and an appeal under s 66(2) on different bases, the Adjudicator should require him to state what his case was. If he was not prepared to assert other than he was a national of the country to which removal directions had been set, then the s 66(2) appeal could not succeed. Whatever may in due course be the findings made by the Adjudicator, it would not in those circumstances get off the ground. If that construction of s 66(2) is correct, then it is not proper for a subsequent s 66(2) appeal

to be made opportunistically or leave sought to advance such an appeal. It would not only be an abuse of process, but also it would be contrary to the proper construction of s 66(2), because it would not be an assertion that on the facts of the Appellant's case there was in law no power to give the directions in question.

11. We appreciate that this is perhaps to be regarded as a somewhat narrow construction of the wording of s 66(2), but we believe that it is a construction which is necessary and which is clearly in accordance with the intention of Parliament because, as we repeat, like Mr Varcoe, we cannot conceive that Parliament would have permitted a person to come to this country, to put forward a fraudulent claim to be able to stay here and then if that fraud was detected, to rely upon it to obtain an advantage to enable the removal directions to be set aside. Accordingly, we go further than the Tribunal in *Asif Khan* not because we do not agree with them, but because we take the view that not only would it be an abuse of the process (and the Tribunal may well have, albeit it is a creature of statute, an inherent power to prevent its processes being abused) but also because it is contrary to what we regard as the correct construction of s 66(2).

12. In this case, as we have indicated, Mr Varcoe not only did not believe that the Appellant came from Somalia, but found as a fact that she came from Kenya. Often, the Appellant in these cases does not assert other than that he or she comes from a particular country, and when that is rejected it is not always easy to determine which country he or she in fact is from. It would no doubt be of assistance to the Secretary of State, and generally for the determination of the correct course of action in relation to an individual, if an Adjudicator were able to decide the issue of nationality. Of course, we recognise that it may well be in many cases that there is insufficient information to enable him to do so and we do not for a moment suggest that he should go off at a tangent and try to deal with matters which have not been the subject of any proper evidence. But sometimes, and this case is a good example, it is possible because there are, in reality, only two possible contenders – either the country from which the Appellant alleges he or she came, or some other country which is the obvious candidate. As we say, if an Adjudicator feels able to do that then it would be helpful if he did so, but he must bear in mind that if he is going to make a positive finding against the Appellant, then he must do so not on the asylum standard, but on a higher standard which would be the balance of probabilities. That indeed is the basis upon which this Adjudicator approached his task in that respect."

Encouragement to make use of the One Stop Process

3.6 *Munoz and Fernandez* [2002] UKIAT 02275 (1 July 2002)

Dr Storey, Mr Taylor CBE

"6. We are persuaded therefore that the adjudicator's determination is unsafe and these appeals must be remitted. However, in this case we would express our strong hope that in the end there is no hearing of these appeals before an adjudicator.

7. Our reason is this. The first appellant's appeal has already been remitted once. Following the Tribunal decision in *Pardeepan* (2000] INLR 445 starred, he will have a further human rights appeal in any event. It would seem highly desirable, therefore, for the Secretary of State to consider issuing fresh decisions against both applicants. If those decisions are negative, then at least if and when they then appeal them, the

hearing of both appeals before the adjudicator will be genuinely one-stop. Unless the Secretary of State adopts the course we urge, it is possible there could be a further appeal before an adjudicator dealing with the first appellant's asylum appeal and the second appellant's asylum and human rights appeal followed by a possible later appeal on the first appellant's human rights appeal. That would be extremely undesirable."

Third Country Certification

3.7 Scott Baker J in *R v Secretary of State for the Home Department ex parte Ahmadi* [2002] EWHC 1897 Admin:

"40. Article 8(2) does not come into the present case at this juncture. The sole question is whether the claimants' contention that Article 8(1) is engaged was manifestly unfounded and that the Secretary of State was right so to hold. There is, therefore, at some point a threshold at which damage to a person's mental stability or mental health triggers a breach of Article 8. Was that threshold arguably reached in the present case?

.....

47. So the position is that the doctors agree that she is suffering from post-traumatic stress disorder. There is some disagreement about whether she is suffering from a current major depressive disorder -- albeit the symptoms were mild at the time of the examination -- and it is agreed that her symptoms will get worse if she is removed to Germany. The prognosis, according to Dr. Turner, is that she is better here than in Germany.

48. As I read the medical evidence, there was substantial, albeit not complete, agreement between Dr. Turner and Dr. O'Brien. Whether the difference is merely of emphasis or of greater significance is something that would emerge on oral evidence being taken. Where the Secretary of State is faced with conflicting evidence from reputable doctors and there is no obvious reason why the evidence of one should be preferred to the other, it seems to me that any decision that the human rights claim is manifestly unfounded can only proceed on the basis of the medical evidence most favourable to the claimant. On the other hand, the Secretary of State is entitled to supplement one medical opinion with material from another when that other material covers different aspects of the case.

.....

52. Again, there are matters that would no doubt become clearer with oral evidence but, based on Dr. Craig's report, in my judgment the Secretary of State is not justified in concluding that an Article 8 claim was manifestly unfounded. In my judgment, one has to look at this family as a whole, which means that the mental health or condition of one member may have relevance to that of another."

Duty to Give Reasons

3.8 *Klajic* [2002] UKIAT 03452 (5 August 2002)

Mr Freeman, Mrs Cross de Chavannes, Mr Thursby

"3. If the decision on asylum were to be upheld, it could only be supported by the paragraph headed 'Conclusion': the next, 'Human Rights Issues' refers back to it on article 3. Both refer, without quoting or giving any details, to submissions and a 'skeleton argument' filed by counsel (variously referred to as Mr and Dr Munir: so far as we know, he does possess this academic title, which it appears to have become fashionable for practising members of the Bar to use). We have to say that this mode of incorporation by reference is wholly unacceptable. While such documents are often quite unsuitably lengthy, their purpose is to help the adjudicator reach his decision, and nothing else. Practitioners should not rely on them as a substitute for dealing with any significant feature of their case in oral argument; and adjudicators should certainly not regard them as a substitute for giving their own reasons.

4. While the level of public interest in individual cases of this kind may not be high, the subject is one of general concern, and the public is entitled to know why the adjudicator has reached the decision he has. So are we: while we are better able than the public to get information as to the material before the adjudicator for ourselves, we ought not to be forced to do that. As has been said before, the basic minimum requirement for any reasoned judicial decision is that it should itself enable an appellate Tribunal to form its own view as to whether the decision was right or wrong. We shall now turn to those reasons the adjudicator did give."

Adjudicator Changing Mind in between Hearing and Determination of Appeal

3.9 *Kaur* [2002] UKIAT 03668 (13 August 2002)

Mr Batiste, Mr James, Mr Lloyd JP

"4. Leave to appeal was granted only in order to further evaluate the claim made in the grounds of appeal that the Adjudicator said that the end of the hearing that she allowed the appeal, but made no mention of this in her determination when she dismissed the appeal.

5. As was held in *ex parte Mohammed Bashir* [2002] Imm AR 1, an Adjudicator has not finished his task within the statutory framework until his written determination has been promulgated. It is therefore open for him to change his mind until that time. However it is axiomatic that natural justice requires a fair hearing. An Adjudicator might wish to indicate a decision at end of the hearing if there is good news to tell to the Appellant. It can also save Court time by obviating the need for unnecessary oral submissions. However, the benefits of prompt communication of the result at the hearing are far outweighed by the disappointment and legitimate sense of grievance caused by a subsequent and unexplained change of mind. An Adjudicator should not give an indication of the result at the hearing if she has not had the opportunity to consider the papers thoroughly before or during the hearing, or if there is any possible doubt about the outcome. This is particularly relevant when, as is too often the case, there is no Home Office Representative to present a contrary view to that of the Appellant, and the full picture may only emerge later on a detailed examination of the evidence.

6. Moreover, if as a consequence of the Adjudicator indicating a mind to allow the appeal, oral submissions by the Appellant's Representative are thereby limited or precluded, then a subsequent change of mind, without providing the opportunity for

argument, will inevitably undermine the fairness of the proceedings. The proper course, as described in *Bashir* would have been for the Adjudicator to reconvene the hearing, to explain that the original intention to allow the appeal had been called into doubt by further examination of the evidence and why, and to invite the parties to make their submissions. Then a proper and fair conclusion could be reached in the light of the evidence and submissions as a whole.

7. In this present appeal, the Adjudicator was invited to comment. She wrote to the Tribunal on 26 Jun 2002 in the following terms.

> "I recall the hearing and my determination of this appeal. I did remark that I was minded to allow the appeal, and that I would write the determination promptly. Upon the review of the material after the hearing, concerns emerged about whether the Applicant would return to India. I do not believe that any further submissions were required, and as you will note, in the absence of a Home Office presenting Officer, I asked a broad range of questions to both the Sponsor and the Applicant. I did omit to state my preliminary comments in Court in the final determination. This is an oversight on my part. However this was genuinely a case where upon reflection, concerns emerged about the Applicant's intention to return."

8. This letter is helpful in that it confirms the point raised in the grounds of appeal that the Adjudicator did indicate during the hearing that she was minded to allow the appeal. It does not state when in the hearing this comment was made or whether it had the effect of curtailing or eliminating oral submissions on behalf of the Appellant. However the grounds of appeal assert that the Appellant's Representative limited his submissions in the light of the Adjudicator's comment about allowing the appeal and we accept that.

9. In these circumstances, there has been unfairness to the Appellant in that the Adjudicator's decision was reached without affording his Representative a fair chance to influence the decision by submissions. Whatever the prospects of success, the requirements of fairness require that he should have been afforded the chance. The determination is therefore unsound and cannot stand."

Appeals for Upgrading: Section 69(3) Immigration and Asylum Act 1999

3.10 *Diriye* [2002] UKIAT 04402 (6 September 2002)

Mr Ockelton (Deputy President), Mr Fox, Mr Batiste

"2. The Appellant claimed asylum following his illegal entry. On 21st January 2002 he was served with notice of removal of an illegal entrant to Somalia, although it is right to say at that stage that the Respondent apparently had some doubts about the Appellant's nationality. The Appellant appealed on asylum grounds to an Adjudicator and so it was that Mrs Nichols came to hear his appeal on 9th May. The proceedings before her began with the Appellant giving evidence relating to his nationality. The Presenting Officer was evidently very quickly persuaded that the Appellant was of the nationality he claimed. She then sought a brief adjournment to enable her to take further instructions and shortly thereafter was able to tell the Adjudicator that she accepted the Appellant's nationality as Somali and that, as a result, because of the situation in Somalia, proposed to grant the Appellant exceptional leave to remain for a period of twelve months. She then submitted to the Adjudicator that, as a result, the

appeal must be treated as abandoned under s 58(9) of the 1999 Act (which we shall set out shortly). The Adjudicator accepted that submission and treated the appeal as abandoned.

3. The application for leave to appeal to the Tribunal was made at a time when there had still been no formal written notice of the grant of leave promised by the Presenting Officer before the Adjudicator. The principal ground is that the Presenting Officer's undertaking to the Adjudicator was not itself a grant of leave and so could not cause the appeal to be abandoned under the provision to which the Adjudicator referred.

4. In fact, as the matter comes before us, there has been a grant of leave for one year and so, today, the position is that the Appellant has leave until 31st May 2003. In the circumstances, Ms Paddick has argued that whatever the position correctly was before the Adjudicator the Appellant's appeal is abandoned now.

5. Section 58(9) of the 1999 Act is as follows:

> "A pending appeal under any provision of this part other than s 69(3) is to be treated as abandoned if the Appellant is granted leave to enter or remain in the United Kingdom."

6. It appears that the Appellant's appeal was "pending" when it came before the Adjudicator. When leave was granted, it would appear that, under the provisions of s 58(9), it fell to be "treated as abandoned". That would be the most obvious reading of the effect of s 58(9). Ms Webber describes that reading with, we think it is right to say, derogatory overtones, as a "literal reading".

7. Ms Webber suggests that to treat an asylum appeal in general as necessarily abandoned by the subsequent grant of leave is not appropriate. She submits that it is contrary to the intention of the international Conventions and, in particular, contrary to the way they were interpreted in *Saad, Diriye and Osorio v Secretary of State for the Home Department* [2002] INLR 34. She submits that the underlying ratio of that decision is that every asylum appeal under s 8 of the 1993 Act essentially asks the same question. Whether the appeal is against refusal of leave to enter, refusal to vary leave, a decision to deport or a decision to give directions for removal of an illegal entrant, the question posed by the asylum grounds is, Is the Appellant a refugee at the present time? It was indeed the principal issue before the Court of Appeal in those cases whether the appeal under s 8(2) of the 1993 Act should be treated differently, and the Court of Appeal decided that it should not: because, in essence, the question is the same. Applying that reasoning, Ms Webber points out that if the Appellant begins an appeal under some other subsection of s 69 and then is granted leave but wishes to persist in an asylum appeal, there is no purpose in treating the first appeal as abandoned and giving a new right of appeal under s 69(3). It would be, she says, more economical and it would be entirely in line with the Court of Appeal's decision in *Saad, Diriye and Osorio* if the old appeal were converted into an appeal under s 69(3).

8. Despite Ms Webber's best endeavours, we find ourselves unable to read s 58(9) in that way. There are, in our view, two principal objections and we take the opportunity of apologising if our reading of the statute appears literal. In our view, we have little other way of reading the statute unless we are shown that the literal reading conflicts with some other principle and, for reasons that we shall give, we have not been shown that.

9. The first reason is that s 69 clearly treats the various types of appealable decision as separate. A refusal of leave to enter, a decision to vary or to refuse to vary, or, under certain circumstances, to grant leave, a decision to make a deportation order or to refuse to revoke one, and a decision giving removal directions, each separately

give rise to a right of appeal to an Adjudicator. In each case, there is an immigration decision notified in accordance with the Notices Regulations. In each case there would be a notice of appeal against that decision commencing an appeal which in due course might be heard by an Adjudicator or the Tribunal. We are unable to fit into that scheme Ms Webber's suggestion that where leave to remain is granted, an appeal which was expressly founded on the absence of such leave is converted into an appeal against a later decision granting leave.

10. The second reason is that s 58(9) is in the terms in which it is. We see no basis for reading it as though the exception was not of s 69(3) but of s 69. It appears to us that if Ms Webber were right the position would be that a pending appeal would not be abandoned if it were an asylum appeal of any sort, because if it were an asylum appeal at all then it would continue under the guise of a s 69(3) appeal. That, it appears to us, cannot be right.

11. So far as concerns Ms Webber's suggestion that any other interpretation of s 58(9) would conflict with principles of human rights or international law, we regret to say that we have been unable to identify precisely what principles are referred to. Ms Webber pointed out that in *Saad* at paragraph 11 the Master of the Rolls points out that "Public international law requires that signatories to the Convention must implement it in a matter which is reasonably efficacious." Ms Webber also asserted that reasonable efficaciousness implies a degree of promptness. We would not dissent from either of those submissions, but if the Appellant's appeal under s 69(5) is abandoned there is no doubt that he has a right of appeal now under s 69(3). Indeed, we are told that he has already exercised that right of appeal. If the decision in *Saad, Diriye and Osorio* applies to his appeal under s 69(3) he has a right to establish that he is to be regarded as a refugee and that the limited grant of leave to him is inappropriate. We are unable to see that allowing him to raise those grounds in a new appeal under s 69(3) is in conflict with any principle of international law.

12. It is right to say, of course, that allowing an individual to raise the same grounds of appeal against a new decision, having got to a certain stage in the old appeal, is extremely uneconomical. Ms Paddick has come very close to admitting that. But that is not the point. The system may be unwieldy but we cannot see that it is in any sense illegal.

13. There is one further matter to which we should refer in this context, which is this. As we have said the decision in *Saad* and others is founded, as we see it, on the principle that the question for the Appellate Authorities under all the parts of s 8 of the 1993 Act is the same question. We have asked Ms Webber in the course of her submissions whether she is able to say why s 69(3) is treated differently for the purposes of treating an appeal as abandoned. We did not understand Ms Webber to give any persuasive answer. It seems to us that it may be that the reason for that is that the question under s 69(3) is, in truth, a different question from that which is raised under other sub-sections of s 69. That is not in any sense to doubt the authority of *Saad and others*, but that was, of course, a decision on different statutory provisions.

14. It follows that we do not accept Ms Webber's suggestion that the appeal under s 69(5) has become, in the present case, an appeal under s 69(3). If the Appellant wishes to raise an appeal under s 69(3) or to pursue it, it appears to us that he is at liberty to do so.

15. We return then to the specific question of the status of the present appeal. We accept Ms Paddick's submission that the grant of leave on 31st May 2002 caused the appeal under s 69(5) to be abandoned and, because we do not accept Ms Webber's suggestion of automatic conversion to a s 69(3) appeal, the appeal to the Tribunal is abandoned.

16. Nevertheless, we must say something about the procedure before the Adjudicator. Section 58(9) is, in some senses, of penal effect. Although the context of the abandonment imposed by that section is that the Appellant has been granted leave, the effect is that his present endeavours in pursuing his appeal are wasted. He must, as we have already indicated, begin again. It follows that an Adjudicator should not apply the provisions of s 58(9) unless confident that the conditions of that sub-section have occurred. The condition is "If the Appellant is granted leave to enter or remain in the United Kingdom". A promise is not a grant. A grant of leave to remain is, because of the provisions of s 69(3), appealable: it follows that the grant must be in writing and must be otherwise in accordance with the Notices Regulations. Until there has been a grant, the appeal is not abandoned. Although the appeal is now abandoned because the grant has now been made in writing, it was not abandoned at the time that the Adjudicator made her decision and she should not have treated it as abandoned. As Ms Webber has acknowledged, however, that view does not assist her because of the subsequent grant of leave.

17. What then should an Adjudicator do if, during the course of a hearing, a Presenting Officer indicates that he or she proposes to grant leave? First, it is clear from what we have said that the proposal to grant leave does not ipso facto cause the appeal to be abandoned. In many cases, it will be appropriate for the Adjudicator to adjourn the hearing in order for the grant to be made and to cause it to be brought back for mention in an appropriate period of time. We are told by Ms Paddick that the Appellant is sometimes invited to withdraw his appeal. That, it appears to us, is not appropriate. The grant of leave will cause his appeal to be abandoned and no other action is required by the Appellant.

18. It may be that the Appellant chooses not to seek an adjournment or to resist any application made by the Secretary of State. Until leave is granted, the Appellant is at liberty to pursue his appeal. An Appellant who, like the present Appellant, has established his nationality and has been given an indication that, on the basis of his nationality, he will have a limited grant, may nevertheless, until that grant is made, choose to pursue his appeal. He may be confident that he can, quite apart from the grant, persuade the Adjudicator that he is a refugee. Under those circumstances, it appears to us that if the grant has not yet been made, an Adjudicator should be very cautious before granting the adjournment and effectively prohibiting him from pursuing the appeal which he has begun and which has not yet been statutorily concluded by abandonment.

19. But these are in essence all matters which must depend on the way in which the changing situation during a hearing is presented to an Adjudicator. An Adjudicator should not necessarily conclude that the Secretary of State is entitled to an adjournment by promising a grant of leave. Everything will depend on the circumstances of the case and of the competing interests of the parties before the Adjudicator.

20. For the reasons we have given, we consider that the Adjudicator was wrong to treat the appeal as abandoned, but that the appeal is now indisputably abandoned. We understand that the Appellant will now pursue an appeal under s 69(3)."

Failure to Comply with Rules

3.11 *Qojsa* [2002] UKIAT 05673 (6 December 2002)

Mr Mackey, Mr Jeevanjee, Mr Smith

"**Assessment**

11. In respect of the first issue, we are satisfied that Mr Fripp's submission above, has merit.

12. The provisions of Rule 33 state:

> "Rule 33. Failure to comply with Rules
>
> (1) Where the party has failed-
>
> (a) to comply with a direction given under these Rules; or
>
> (b) to comply with a provision of these Rules;
>
> and the appellate authority is satisfied in all the circumstances, including the extent of the failure and any reasons for it, that it is necessary to have regard to the overriding objective in rule 30(2), the appellate authority may dispose of the appeal in accordance with paragraph (2),
>
> (2) The appellate authority may-
>
> (a) in the case of a failure by the appellant, dismiss the appeal or, in the case of a failure by the respondent, allow the appeal, without considering its merits;
>
> (b) Determine the appeal without a hearing in accordance with rule 43; or
>
> In the case of a failure by a party to send any document, evidence or statement of any witness, prohibit that party from relying on that document, evidence or statement at the hearing."

Rule 30(2) is also relevant. It states:

> "30(2) The overriding objective shall be to secure the just, timely and effective disposal of appeals ... (underlining added)."

13. We consider that the requirement for "just" disposal cannot be achieved without consideration of the merits when an international status such as refugee status is to be granted (as explained in our consideration of *Nori* [2002] UKIAT 01887, later in this determination). While the allowance of an appeal under Article 8 of the ECHR may not confer a set of internationally recognised rights it does however normally lead to the grant of exceptional leave to remain from the Secretary of State. That exceptional leave grant brings with it considerable rights and privileges. It is our view that in this situation given the choices available to the Adjudicator under Rule 33(2) that consideration of the merits of the Article 8 claim, even if done on the papers, will obviously deliver a far more "just" determination than merely proceeding without consideration of the merits at all.

14. As we consider the answer to the first issue is "yes", we move on to the second issue. As can be seen, Rule 33(2) offers two alternatives to the appellate authority. In this case the respondent (appellant before us) has failed to respond to directions on three occasions. Rule 33(1)(f) provides that the appeal can be determined without a hearing under that Rule in accordance with Rule 33(2)(b). However, as stated above there is still the requirement to reach a just disposal of the appeal. That, in our view, requires an assessment of the merits, in this situation for the reasons relating to either status or rights and privileges that flow from the determination. We are therefore of the view that a better and more appropriate course to follow by an Adjudicator is to proceed under Rule 41, with particular reference to Rule 41(2), (3) and (4). The evidence and submissions relating to the Article 8 claim by the appellant, particularly

related to his wife's medical condition, were before the Adjudicator thus he had the basis for reaching a conclusion through Article 8(1). As the Secretary of State had failed to comply with directions on three occasions his ability to put up arguments in rebuttal, particularly arguments relating to proportionality under Article 8(2) of the ECHR were not available to him.

15. The Adjudicator unfortunately did not give consideration to the merits of Article 8(1) as we consider could and should have taken place pursuant to Rule 41. We therefore undertake that role ourselves.

16. Before proceeding with that assessment however, we specially consider any possible implications flowing from the determination of the President of this Tribunal in *Nori*. In that case useful observations are made at paragraph 21-23 of the determination. The relevant observations state:

> "21 ... All we would observe is that in our judgment it is not right of an Adjudicator ever to make use of Rule 33 and to decide an asylum claim in favour of an applicant without considering all the merits of that claim.
>
> 22. Asylum is a status that should not be granted to punish the Secretary of State for failing to do what he ought to have done. It should be considered on its merits. It may be that if the Secretary of State fails to carry out any investigation himself or to reach any conclusion himself, the Adjudicator will have to make his decision on the basis of uncontroverted evidence from the appellant or without permitting the Secretary of State, if he has failed to comply with directions, to put any material himself.
>
> 23. That is as far as he can go. What he should not do, as we say, is to decide that an appellant is a refugee without considering at all any claim that has been put forward to that effect merely to punish the Secretary of State for failing to comply with directions. ..."

18. We find these decisions however instructive and for the reasons set out above consider that just disposal of the human rights claim should not be made under Rule 33(2) but that a consideration of the merits pursuant to Rule 41 is appropriate in situations such as that before us. As stated by the President in *Nori*, if the Secretary of State fails to carry out an investigation himself (as has been the case here in relation to the Article 8 claim) the Adjudicator will have to make his decision on the basis of uncontroverted evidence or without permitting the Secretary of State, if he has failed to comply with directions, to put forward material himself. That is exactly the situation we are placed in. We therefore now proceed to consider the Article 8 claim on the evidence presented by the claimant. The Secretary of State having failed to comply with directions has not placed himself in a position to present evidence in rebuttal or, in this situation, to argue proportionality issues."

Second Appeals

3.12 *Naseem Gill* [2002] UKIAT 05235 (12 November 2002)

Mr Rapinet, His Honour Judge Cotran

"4. In Mr Sheikh's submission the Adjudicator had not in fact, in the second hearing, taken the first Adjudicator's determination as the starting point, but had made completely separate findings of her own with regard to the risk upon return. Contrary

to *Devaseelan* and contrary to *Kacaj*. Mr Sheikh points out that the facts of the case that was before the second Adjudicator were identical to those before the first Adjudicator. The Adjudicator was wrong to find that Article 2 would be breached for precisely the same reason, namely the facts were the same. It was submitted that there was no real risk upon return of the appellant. Acts of violence against Christian are random and are certainly not condoned by the Government, and there is an adequacy of protection.

.....

9. Although Mr Sheikh is technically correct in stating that the Adjudicator in the second case has reversed the findings of the Adjudicator in the first case on precisely the same facts, it is certainly arguable that the Adjudicator's findings in the first case with regard to the question of safety upon return, are insufficiently clear and warrant the re-examination of the question of safety upon return by the second Adjudicator considering the human rights claim. At paragraph 17 which we have quoted verbatim, the Adjudicator makes no findings at all with regard to the question of the objective evidence which would lead her to the conclusion that it would not be safe for the respondent to return. It is accepted that the respondent is a Christian and she has presumably accepted that she is a Christian who was involved in Christian charitable work in Pakistan. She finds for reasons which are presumably perfectly valid, and it is not for us to criticise in connection with this appeal, that the appellant lacked credibility as to certain aspects of her claim. She has not actually addressed the question of the return of the appellant to Pakistan within the context of the objective evidence and the findings which she has presumably accepted that the appellant is a Christian involved in Christian charitable work in that country."

SECTION FOUR: PRINCIPLES SURROUNDING EVIDENCE

Post Decision Evidence in Human Rights Cases

4.1 *S&K* [2002] UKIAT 05613 (3 December 2002) (starred)

His Honour Mr Justice Collins (President), Mrs Gleeson, Mr Batiste

"19. Before going further, we should deal with a problem which arises because of the provisions of s.77 (3) and (4) of the Immigration and Asylum Act 1999. These read:-

> "(3) In considering –
>
> (a) any ground mentioned in s.69, or
>
> (b) any question relating to the appellants' rights under Article 3 of the Human Rights Convention
>
> the appellate authority may take into account any evidence which it considers to be relevant to the appeal (including evidence about matters arising after the date on which the decision appealed against was taken).
>
> (4) In considering any other ground, the appellate authority may take into account only evidence –
>
> (a) which was available to the Secretary of State at the time when the decision appealed against was taken; or
>
> (b) which relates to relevant facts at that date".

Those provisions may seem to require that a different approach is taken to Article 3 from the other Articles. This could lead to absurd results. It may be, to give perhaps a somewhat extreme example, that the appellate authority is persuaded that at the time of the Secretary of State's decision there would have been a breach of Article 3. This would mean almost inevitably that there was then a breach of Article 8. At the date of the hearing there had been a fundamental change of circumstances in the country of nationality and so there was no breach of Article 3 or of Article 8. Would the appellate authority be excluded from considering the change of circumstances and thus have to find a breach of Article 8? The absurdity is obvious, and it can work in the opposite direction. We have had put before us a decision of Ouseley J *R (Nyakonya) v I.A.T.* [2002] EWHC 1437 (QB) in which he gave a very wide interpretation of 'evidence' within s.77(4)(b). This is helpful, but still may necessitate in an individual case an examination which may be difficult and involve an element of logic chopping. It also does not easily deal with cases where it is said that family life has been established in the United Kingdom (perhaps because of delays following the decision under appeal) and so Article 8 would be breached by a return.

20. We do not think such refinements are needed. It is the intention of the 1999 Act reflected in ss. 74 to 77 under the heading "'One-stop' procedure" that all issues relevant to return ought to be dealt with at one hearing. It is accepted that the safety of return must be judged at the time of the hearing. That is obviously sensible because otherwise there would be likely to be a flood of fresh claims based on alleged changes of circumstances since the original decision. It reflects, in the asylum context, the decision of the Court of Appeal in *Ravichandran* [1996] Imm A.R. 97 and gives it statutory approval. It was said in Ravichandran that the appellate authority was an extension of the decision-making process. With that observation we must quarrel

since it may seem to suggest that the appellate authority is somehow to be regarded as being part of the administrative process. It is not. It is an independent body hearing an appeal against a decision but bound to test that decision against facts found by it at the date of the hearing. Unless withdrawn, the decision under appeal is to be regarded as being maintained at the date of the hearing.

21. Section 6 of the Human Rights Act 1998 requires the appellate authority as a public authority (see s.6(3)(a)) to act in a way which is compatible with a convention right. This obligation does not apply if "as the result of one or more provisions of primary legislation, the authority could not have acted differently" (s.6(2)(a)). Section 3 of the 1998 Act requires us to read and give effect to legislation so far as possible in a way which is compatible with the Convention rights. To make a determination which upholds a decision to return in breach of human rights could, subject to the impact of primary legislation, breach section 6. It is important to note the language of and relationship between s.77(3) and (4). In s.77(3) a distinction is drawn between a 'ground mentioned in s.69' and a question relating to rights under Article 3. S.77(4) refers to consideration of 'any other ground' not to consideration of other questions arising. The differences in wording must be taken to have been deliberate. We are well aware that the Home Office view was (and the argument has been raised by Mr. Wilken in his skeleton but not developed because of our decision in *Kacaj*) that only Article 3 could be relied on in removal cases. It is therefore not surprising that Parliament should have wanted to leave the matter open, particularly in the light of indications in *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 that Article 6 certainly might be relied on in such cases. Parliament no doubt recognised the absurdities and contradictions of its 'one-stop' policy which would arise otherwise and it is incidentally to be noted that the matter is put beyond doubt in the 2002 Act which has just been passed.

22. In our judgment s.77(4) does not in appeals concerned with potential removals from the United Kingdom prevent consideration of any question relating to an appellant's rights under any Article of the Human Rights Convention as at the date of hearing. Such a question is not a ground within the meaning of s.77(4). The explicit reference to Article 3 in s.77(3)(b) is explained by the concern to put beyond doubt the need to consider Article 3 breaches as at the date of hearing. Since *Chahal v United Kingdom* (1996) 23 E.H.R.R. 415 had made it clear that the United Kingdom was bound to do just that it is not surprising that Parliament should have decided to legislate in such a way as meant no argument could be raised about it. This means that when human rights issues are raised no distinction is drawn between Article 3 and any other Article and so the appellate authority can comply with s.6 of the 1998 Act and effect is given to the 'one-stop' principle."

When Corroboration might be Expected

4.2 *Shanjarfi* [2002] UKIAT 02923 (22 July 2002)

Mr Freeman, Miss Ramsumair JP, Mr Kumar JP

"2 This appellant claimed to fear persecution as the result of a raid on his flat in Teheran on 7 June 2000 by the secret police, in which they had discovered various documents produced by an independent opposition political group to which he belonged; and, in later versions, a computer used to produce and store such material. (He had got the news from colleagues at work, who had been told it by his landlord's

son, and left at once). The adjudicator made his findings of fact at § 16, which Mr Behbahani attacked on a number of grounds: we shall deal with them as we go along.

.....

vi) The appellant's unwillingness to name his friends (see vii) was only a marginal point, though perhaps given more significance than it deserved by the adjudicator. However, on his account it would not have been possible for him to produce copies of the articles, since he said they had been seized by the police. Mr Parker suggested that he could have got them from his friends; but see vii). There is a significant difference between unpublished material of this kind, where it must be a question of fact in the individual case whether it could reasonably be produced; and newspaper articles, which adjudicators are well entitled to assume could normally be produced on request from the paper's own archives, where it is still being published."

CIPU Reports

4.3 *Badzo* [2002] UKIAT 04946 (23 October 2002)

Mr Batiste, Mrs Harris, Mr Smith

"16. The Tribunal has frequently cautioned against giving too much weight to such evidence in these circumstances. The Court of Appeal in *Kilinc* [1999] Imm AR 588 has spelled out a similar message. Mr Waithe was wrong to stigmatise the CIPU report in the grounds of appeal as being self-serving. It offers a balanced, objective and proportionate summary of evidence provided from a wide variety of sources, often with different viewpoints. The quotations are properly cited and can be checked against the references given. Clearly a specific report given by an expert for a specific appeal must be given proper consideration as well. So also must other primary evidence from other respected and independent sources and from international organisations. However the practice of providing large numbers of documents, many out of date, most without the approval of their authors, is unlikely to be of material assistance or to attract significant weight. The scales of justice are not tipped by the volume of paper placed on each side."

Psychiatrist's Reports

4.4 *Appellant AE & Appellant FE* [2002] UKIAT 05237 (Starred)

His Honour Mr Justice Collins (President), Mr Ockelton (Deputy President), Mr Drabu

"7. What led the adjudicator to allow the appeals was the psychiatric condition of the wife. He relied on a report by Dr. Stuart Turner dated 21 November 2000. This was based on an interview "which took place on 17 October 2000 and lasted for about an

hour". Dr. Turner had a copy of the wife's asylum interview and there was an interpreter present. He has considerable expertise in dealing with patients who have suffered reactions to traumatic stress, being a consultant in the Traumatic Stress Clinic which is a national referral centre in the NHS for traumatic stress reactions. He has an impressive curriculum vitae. The adjudicator's comment that he is an acknowledged expert in the field may well be correct.

8. However, his expertise and qualifications do not necessarily mean that his views must be accepted without question. The I.A.A. is accustomed to receiving reports from psychiatrists which indicate that the asylum seeker in question is suffering from depression or PTSD or both. That there should be a large incidence of PTSD in asylum seekers may not perhaps be altogether surprising, although we are bound to comment that what used to be considered a relatively rare condition seems to have become remarkably common. Asylum seekers may be found not to be refugees and in many cases accounts when tested before adjudicators are found to lack credibility. But many who try to come to this country have suffered at least deprivation and poverty and may well have suffered ill-treatment or discrimination which does not amount to persecution or persecution for a Convention reason. They are all desperately anxious not to have to return to their country of origin and may well have spent large sums of money they and their relations can ill afford to get here. It is hardly surprising that they should suffer at least depression so long as their situation is not settled and there is a real chance that they may be refused entry and returned. In this case, Dr. Turner notes that PTSD can be treated effectively but that such treatment may not be effective when the individual feels insecure and there is a risk of return. He suggests that the wife be given exceptional leave to remain so that she can have treatment, but that will not resolve the uncertainty or the risk of eventual return.

9. The adjudicator refers to Dr. Turner's 'long and careful examination'. We are far from persuaded that that is an apt description of an examination which lasted for about an hour and which was not assisted or followed up by a sight of her General Practitioner's notes. Dr. Turner says:

> "She told me that she gets some tablets from her general practitioner but hadn't got these with her".

He examined her in October 2000. The hearing before the adjudicator was in May 2001 and before us was in July 2002. No further medical evidence was forthcoming and in particular no indication was given that any treatment had been sought or provided. Dr. Turner does not seem to have been asked to pursue the matter any further.

10. Doctors generally accept the account given by a patient unless there are good reasons for rejecting it or any material part of it. That is not and is not intended to be a criticism. There is no reason why a doctor should necessarily probe the history or approach his patient's account in a spirit of scepticism. But this does mean that the doctor's conclusions will sometimes be seen to be flawed if it transpires that the account is not credible. That is not the position here, but it illustrates the danger of uncritical reliance on in particular psychiatric reports. In this case, Dr. Turner records that he did ask why she had not disclosed the rape in interview. Her explanation that there was an interpreter present was hardly persuasive since there was an interpreter present when she was being seen by Dr. Turner. Nor does her explanation that her solicitor had told her to tell the truth carry great weight: she must have appreciated the need to tell the truth at all stages. Dr. Turner comments that her mental state was such that it was entirely understandable that she should not have mentioned the rape and added to this were the cultural inhibitions. This reasoning has not been tested. However, she did, it seems, break down when the issue was raised before the

adjudicator (see Paragraph 8 of his determination). The adjudicator accepted that she had been raped and in all the circumstances we do not believe that we should do other than accept that finding.

11. Dr. Turner recommended that she should undergo treatment. He says: -

> "She seems to be on some form of medication, although this was not available to me. It may be that much more could be done to improve her drug treatment regime".

There is no evidence that anything has been done to follow up this recommendation or the alternative psychiatric treatment. It is true that Dr. Turner thinks that there is a need for security in this country, but the refusal of asylum meant that that was not the position and exceptional leave to remain would not provide security since it would only last for a limited period. We are bound to say that we are not impressed by Dr. Turner's report. It is based on a relatively short interview and there has been no attempt to discover what treatment she was receiving. We are not ourselves experts and it might be said that we are not in a position to reject the opinions of those who are. But we are accustomed to seeing a large number of psychiatric reports in these cases and the same conclusions are reached in very many of them. We know that PTSD is something which needs careful diagnosis and detailed consideration of individual cases. We know too that the process of seeking to make a new life in the United Kingdom and the circumstances which triggered that process may well lead to depression or worse if obstacles seem to be arising."

Psychiatrists' Reports

4.5 *Dagir* [2002] UKIAT04148 (4 September 2002)

"7. In the last two sentences, Dr Shehadeh seems to be setting himself up as a "country expert". While his name suggests he may have relevant experience of that part of the world, he does not list it, and should beware of venturing outside his area of professional expertise. He does have not have any specialist psychiatric qualifications: a diagnosis of PTSD is a common feature of cases in this field, but in our view, whether linked with depression or not, it is one which ought to be put forward only by someone with relevant qualifications, validated by a recognized body, in this country the Royal College of Psychiatrists. It is precisely because of the importance of professional expertise, rarely subject to cross-examination in this field, that we need to insist on this."

SECTION 5: APPEALS TO THE IMMIGRATION APPEAL TRIBUNAL

Second Applications to the Tribunal

5.1 *Sher* [2002] UKIAT 04228 (13 September 2002)

Mr Ockelton (Deputy President), Mr Latter

"2. The Appellant's application for leave to appeal presents a problem to which allusion was made in the grant of leave to appeal. There was an application made by the Appellant in person which was refused. The refusal was sent out on 18th October 2001. An application was then made by the Appellant's nominated representative, Immigration Advisory Service. Their application consists of a copy of the form used by the Appellant, with additional grounds. That application was faxed to the Tribunal on 22nd October 2001. That application was misplaced because, given that there had already been a response to an application for leave to appeal, the Tribunal's staff were in doubt about how to process it. However, in due course, it came before the Deputy President, who, in a determination sent to the parties on 30th January 2002, granted leave under Rule 18(7)(b) insofar as he had power to do so.

3. The principal question raised by the second application for leave to appeal is whether such an application can be entertained. In reaching our conclusion on that, we bear in mind the decision of the Special Immigration Appeals Commission *SC/8/2002* raising a similar, though not identical, issue. There, the Special Immigration Appeals Commission decided that where an Appellant is deemed to have abandoned his appeal by leaving the United Kingdom, he may bring a further appeal within the time limited by the Rules. But that situation is, in our view, clearly distinguishable from the present. There were particular difficulties relating to the Appellant's ability to discover the provisions of the Anti-Terrorism, Crime and Security Act 2001 under which he was detained, and the Special Immigration Appeals Commission was also persuaded that if he were not allowed to renew his appeal, he might be regarded as having been effectively prevented from raising the merits of his case before the Commission at all.

4. In the present appeal, there is no suggestion that the relevant law has been difficult to discover, or that the Appellant has not had a proper and full opportunity to put his case before an Adjudicator and to apply for leave to appeal to the Tribunal.

5. Although the matter is not free from doubt, we consider that the Tribunal has no jurisdiction to entertain a second application for leave to appeal (even if it be in time) from a party who has already applied for leave to appeal. It follows that we consider that, the original application having been refused, there is no appeal before us."

Time Limits for Appeal for Oral Determinations

5.2 *Hammond* [2002] UKIAT 04742 (9 October 2002)

Mr Parkes, Mrs Roe, Mrs Morton

"3. Leave to appeal had purportedly been granted on the 11th June 2002. Mr. Scannel made a preliminary submission that there was no appeal before the Tribunal because the grant of leave was, he maintained, a nullity. The application for leave by the Secretary of State had been made outside the time limited by Rule 18 (2) of The Immigration & Asylum Appeals (Procedure) Rules 2000 and the time limit had not been extended by Rule 18 (3). To understand that submission it is necessary to consider what happened before the Adjudicator and when his determination was promulgated and time began to run.

4. The appeal came up for hearing before Mr. Pullig on 16th May 2002. The Respondent, then, of course, the Appellant, was in detention and at the end of the hearing the Adjudicator gave an oral determination allowing the appeal on human rights grounds and Mr. Hammond was then released on bail to return to Court on 30th May. On that date copies of the written determination were handed out, Mr. Scannel would persuade us were promulgated, therefore, and bail was extended. The Appellate Authority file then went to the Loughborough Support Centre where the authority purported to promulgate the appeal on 11th June 2002 altering the date of promulgation upon the copy then served from 30th May to 11th June and sending out with it the usual form of letter which refers, perhaps stangely to service of itself rather than of the determination being deemed to have taken place two days after it was posted and pointing out that any application for leave to appeal to the Tribunal must be submitted to the Support Centre within 10 working days of receipt of the notice.

5. The Secretary of State observed the time limit of which he had been informed in the letter sent to him with the determination. The application for leave to appeal was not, however, received by the Appellate Authority within 10 days after the handing out of the determination on 30th May. The Appellate Authority treated the application for leave as being in time and therefore no extension was made under Rule 18 (3). Mr. Scannel submits that the application was in fact out of time, that the absence of an extension of time was fatal to the grant of leave thus made and there is no appeal before the Tribunal.

6. Miss Cooper refers to Procedure Rule 15 which requires that written notice of the Adjudicator's determination shall be sent to every party and the Appellant's representative (if he has one). It was the date of receipt of the determination sent by post together with the notice, she submits, which is all important that occurred on 11th June 2002. She refers to Procedure Rule 15 (1) which enables clerical mistakes in any determination or notice of determination to be corrected thus drawing a distinction between the determination itself and the notice, the latter being referred to in Rule 15 and sent for the first time on 11th June.

7. We asked Mr. Scannel whether he was maintaining, as appeared to be the case, that the grant of leave was a nullity. He confirmed that this must be so and we therefore invited him to deal with the points that if there had so far been no leave to appeal we could ourselves, if it were a just exercise of judicial discretion, grant leave and he accepted that this was so. We pointed out that it might be argued that the sending of the letter to the Home Office actually within the 10 days as calculated in accordance with the Rules from 30th May but stipulating when time was to run out might have been sufficiently misleading to represent special circumstances which would render it just for the time limit to be extended, and he was constrained to accept that this could be the case.

8. We asked the parties to withdraw in order that we might give our conclusions as to the preliminary issue raised. We accept what Mr. Scannel pointed out to us that Procedure Rule 46 (2) reflects what actually happened in this case and provides that if any notice or other document is sent or given to a person appearing to the Authority or person sending it to represent that party it shall be deemed to have been sent or

given to that party. It seems to us that written notice of the Adjudicator's determination referred to in Rule 15 must either represent or at least include the determination itself. If it were not so Rule 18 (2) would make no sense because application for leave to appeal would have to be made without the person making it necessarily knowing what was the nature and content of the decision against which leave was sought. Rule 46 (1) is permissive rather than mandatory and it seems to us difficult to maintain that that which is served directly upon a party should be treated as not in fact having been served.

9. We reached the conclusion that the better view was that the application by the Secretary of State was outside the time limit set by Rule 18 (2). Without an extension being granted by the Tribunal it remained out of time and we believe the original grant of leave to have been therefore a nullity. Nevertheless in the circumstances that the Secretary of State followed the instructions in the letter from the Appellate Authority we consider that there are special circumstances which would render it just for the time limit to be extended and upon that application being made by Miss Cooper and Mr. Scannel accepting that he could hardly object and was indeed ready to proceed we extended the time and granted leave. We regard the arguable issues as those identified by the Vice President who earlier purported to grant leave and we adopt and repeat his words in doing so."

Home Office Appeals: *Surendran* guidelines

5.3 *Shafiei* [2002] UKIAT 05409 (25 November 2002)

Mr Drabu

"We find no substance or foundation whatsoever in the contention that the Adjudicator did not apply Surendran guidelines. We deprecate the practice which we have noticed of late where following non-appearance of a Presenting Officer before an Adjudicator who allows an appeal it is alleged that Surendran guidelines have not been followed. There is no evidence in the determination and no indication in the Adjudicator's record of proceedings that he did not consider all the evidence carefully, critically and fairly. The guidelines given in Surendran are to ensure procedural and substantive fairness in proceedings. There has been no unfairness of any kind in the assessment or appraisal of evidence. It would be grossly unfair to remit this appeal for a fresh hearing before an Adjudicator simply to allow the Secretary of State a second opportunity to field a representative. The respondent's application for asylum based upon fear of the Taliban, we note was refused by the Secretary of State at a time when the Taliban were still in power. It was refused because the Secretary of State did not believe the claim. As part of the appellant's claim at the time was also the persecution that he had suffered at the hands of the Mujahadeen as a prominent member of the PDP before Taliban came into power. With the fall of Taliban in October/November 2001 it is not surprising, in the least, that his fear of persecution by those who now had a share in the authority in Afghanistan came to the fore. The basis of his claim has therefore not changed nor have there been any inconsistencies as contended by the appellant in this case. The Adjudicator, as argued by Mr McGowan was perfectly entitled to make the relevant findings and draw the conclusions that he has, giving what we find to be proper and adequate reasons. This is not a case where an Adjudicator has chosen to believe the claimant only because the Secretary of State has not availed of the opportunity to

cross-examine the claimant. Nor is this a case where, as we have already said, there has been a change in the story of the claimant which the Adjudicator has ignored by design or otherwise. The fact that another Adjudicator may have taken a different view of the evidence is of no real consequence as far as we are concerned. We are not prepared to stigmatise the determination of the Adjudicator in this case for a purely speculative reason. Further we find no merit in the argument that because the Adjudicator has not made explicit reference to the objective evidence in his findings that he has considered in this case, it should be inferred that he has not taken account of any such evidence. Having read the determination of the Adjudicator carefully we are satisfied that he has taken full account of all the relevant objective evidence. He has specifically referred to the 2001 CIPU. In paragraph 26 of his determination he has analysed the current power dynamics of Afghanistan. Applying that analysis to the facts of the claimant's case the Adjudicator was entitled to conclude that the removal of the claimant to Afghanistan would be contrary to the UK government's obligations under the 1951 Convention on Refugees. In the light of our conclusions on the 1951 Convention we do not need to consider the validity of the Adjudicator's conclusions on the human rights aspect of the claim.."

Reasons Challenges

5.4 *S&K* [2002] UKIAT 05613 (3 December 2002) (starred)

His Honour Mr Justice Collins (President), Mrs Gleeson, Mr Batiste

"4. We confess to some concern that what is said in Paragraph 29 should be used to justify reasons challenges when every piece of evidence which could bear on the result is not specifically mentioned. Apart from the failure to refer to the two reports, we do not understand the balance of the determination to have been criticised. What we did then and shall do in this case is to summarise the relevant material, to refer to the important reports which give the various different slants and to reach our conclusions. We shall not specify each document which has been put before us. That we do not regard as necessary; the parties know what we have had, have put in detailed written submissions and in oral argument referred to those reports and the passages in them upon which they wish to rely and will be able to decide whether our summary is a proper distillation of the various matters which have been relied on. We are sure that the court did not require us to do more than that. However, we do recognise the need for a comprehensive decision and one which shows we have had regard to all relevant evidence.

5. We note but respectfully are unable to accept the view of the court of the importance of opinion evidence. The tribunal is accustomed to being served with reports of experts. We have to say that many have their own points of view which their reports seek to justify. The whole point of the country reports is to bring together all relevant material. From them, the tribunal will reach its own conclusions about the situation in the country and then will see whether the facts found in relation to the individual before it establish to the required standard a real risk of persecution or of treatment which breaches his or her human rights. Further, the tribunal builds up its own expertise in relation to the limited number of countries from which asylum seekers come. Naturally, an expert's report can assist, but we do not accept that heavy reliance is or should be placed upon such reports. All will depend on the nature of the report and the particular expert. Furthermore, it is rare for such experts to be called to

give evidence or for their views to be tested. We were fortunate in *S* to have had called before us two experts who were truly knowledgeable and who had no particular axes to grind. We have reports from experts in the present case which we shall of course take into account and we will decide what weight should be accorded to their views."

Cross Appeals

5.5

Kulek v Secretary of State for the Home Department [2002] EWCA Civ. 1408 (14 October 2002):

"1. The appellant, Mr Kulek, a citizen of Turkey of Kurdish origin arrived in the United Kingdom on 8 October 2000 and claimed asylum on arrival. On 14 January 2001 the respondent, the Secretary of State, made a decision to refuse to grant him refugee status and to refuse to grant him leave to enter. The appellant appealed to an adjudicator, who allowed his appeal in a determination dated 13 September 2001. The Secretary of State appealed against that decision to the Immigration Appeal Tribunal. The Tribunal allowed the appeal in a determination dated 19 March 2002. The Tribunal refused permission to appeal to this Court.

2. On 26 June 2002 Sedley LJ, on a paper application, granted permission to appeal. In giving his reasons he stated:

> 3. "There is a single live point of law here: is a respondent to a second appeal entitled to re-open the Adjudicator's fact findings without leave to cross appeal".

2. Sedley LJ went on explain that this case raised a procedural issue of general importance in relation to a conflict between two decisions. The first is *R v. The Immigration Appeal Tribunal, ex parte Badrol Bari* [1986] Imm. AR 264, a decision of Russell J sitting in the Divisional Court. The second is *Mohamed Iqbal v. Entry Clearance Officer, Islamabad*, (29 October 1991) a decision of the Immigration Appeal Tribunal. While this case raises that issue, we do not see it as central to the appeal.

THE CONFLICT BETWEEN *BARI* AND *IQBAL*

13. Each of these decisions was made under the regime of the Immigration Act 1971 and the Immigration Appeals (Procedure) Rules 1984. The relevant provision of the 1971 Act provided as follows:

14. " 20(1) Subject to any requirement of 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".

That provision is preserved, essentially unchanged, as paragraph 22(1) of Schedule 4 to the Immigration and Asylum Act 1999.

14. *Bari* involved an appeal to the Immigration Appeal Tribunal by an applicant who had been refused entry clearance as a working holiday maker. The Tribunal held that the applicant's ground of appeal was well founded, but reconsidered findings of the Adjudicator made in favour of the applicant and reversed these, dismissing the appeal

on that basis. The issue was whether, as a matter of procedure, this course had been open to the Tribunal. The nature of the issue, and the finding of Russell J in relation to it, appears from the following passage of his judgment.

15. "Mr Riza concedes, as in my judgment he is really bound to concede, that the Tribunal is entitled to look at the case afresh - as this Tribunal did - and that they are entitled not only to review questions of law but to review issues of fact. The complaint, however, which is developed by Mr Riza is to the effect that the issues of fact on which there is to be a reassessment must be properly before the Tribunal. That, submits Mr Riza, can only happen when the party who is seeking to reverse those findings of fact puts the other side on notice as well as the Tribunal.

Here it is submitted that the respondents to the appeal did not seek leave to appeal the decision of the adjudicator on the point with which the Secretary of State did not agree, the point which was in favour of the applicant. Nor was there at any stage any form of notice of appeal or cross-appeal entered by the respondent. It is not for the Tribunal, submits Mr Riza, of its own motion to review findings of fact upon which no point has been taken by way of notice of cross-appeal or any other notice.

For the Tribunal, Mr Laws has referred me in particular to sections 19 and 20 of the 1971 Act as well as to the Immigration Appeals (Procedure) Rules. I have to say at once that I have searched in vain for any rule which requires a respondent to an appeal of this kind, whether the respondent be the applicant or the Secretary of State, to cross-appeal or serve a contrary notice. There is simply no provision for it in the Rules. Accordingly, I come to the conclusion that the Rules being devoid of any provision for the service of the cross-appeal or cross-notice, there is no obligation upon the Secretary of State in this or in any other case to do that which Mr Riza suggests has to be done."

15. In *Iqbal* the Entry Clearance Officer, Islamabad, had refused the applicant entry clearance to marry a lady in this country. The applicant appealed to the Adjudicator. The Adjudicator found in his favour in relation to the purpose of the marriage but dismissed the appeal on the ground that, at the date of the decision, the parties had not "met" within the meaning of the Immigration Rules. On appeal to the Tribunal it was conceded that this conclusion was unsustainable. The Entry Clearance Officer then sought to challenge the Adjudicator's finding on the purpose of the marriage. The issue arose of whether it was open to him to do so. The Tribunal held that it was not. The Entry Clearance Officer had been required to seek and obtain permission to appeal against the adverse finding if he was to seek to uphold the Adjudicator's decision on that ground. The Tribunal reached this conclusion by construing s.20 of the 1971 Act in the following fashion:

16. "It is noticeable that section 20 is not couched in terms of an appeal by the person against whom the decision is given nor in terms of "an appellant" or "the appellant". It provides for an appeal by "any party" dissatisfied with the determination on the appeal. Dissatisfaction may be partial or total and there is no reason to read the provision as if it did refer only to the party who is the ultimate loser. Indeed, as we have said, there is every reason to construe the framework as providing for the ability to appeal in respect of each issue decided. We therefore disagree with Mr Wilmott when he submits that, under the statutory structure, a party dissatisfied with part of the determination may not appeal if the ultimate result of the appeal is in favour."

16. As to the decision of Russell J in *Bari*, the Tribunal had this to say:

> 17. "With the greatest respect we have to say that if the learned Judge was taking the view that it was always open to the Home Office to resurrect at will issues on which the adjudicator has come to a positive conclusion on evidence given before him, the consequence would be chaotic. It would mean that subject to putting the other party on notice all matters were always subject to a re-run, and that there was no obligation on the Home Office to consider whether a matter was worth fighting before the Tribunal or any power in the Tribunal to declare that they would not listen to such a re-run. In Bari it is not entirely clear as to whether the adjudicator made specific findings on particular requirements of the rule. Secondly, in that case in the grounds of appeal to the Tribunal, the Home Office said generally that it did not agree with the adjudicator's construction of the particular rule. Thirdly, the argument and the learned Judge's comments go to the need for a respondent notice. In our view, there is no question of a 'respondent' seeking leave to appeal, for we read 'appellant' in the Act and the rules as referring to a party dissatisfied with any part of the determination of the adjudicator. While we entirely agree, with respect, with the learned Judge about the lack of any reference to a respondent's notice, it seems to us that the omission can only support the view we have taken."

17. The manner in which the Tribunal purported to distinguish *Bari* was not legitimate. In *Bari* Russell J had been dealing with a contention that the Respondents had been required to seek leave to appeal. The two cases are in conflict. We are in no doubt that Bari was correctly decided and Iqbal was not. The words "determination thereon" in Section 20 (1) of the 1971 Act bear the obvious meaning "determination of the result of the appeal". It is a perversion of language to read the phrase as meaning "determination of any issue arising on the appeal".

18. The statutory provisions that are now in force put the matter beyond doubt. Paragraph 22 of Schedule 4 to the 1999 Act provides:

> 19. "(1) Subject to any requirement of rules made under paragraph 3 as to leave to appeal, any party to an appeal, other than an appeal under section 71, to an adjudicator may, if dissatisfied with his determination, appeal to the Immigration Appeal Tribunal.
>
> (2) The Tribunal may affirm the determination or make any other determination which the adjudicator could have made."

18. The Immigration and Asylum Appeals (Procedure) Rules 2000, introduced pursuant to that Act, include in paragraph 2 the following definition:

19. "Determination' means the decision of the Appellate Authority to allow or dismiss an appeal and the reasons for that decision;".

19. Miss Anderson valiantly sought to argue that "and" had disjunctive effect, so that any individual reason for a decision constituted a " determination", against which an appeal could be brought. We do not agree. Indeed, Miss Anderson conceded that her suggested interpretation could not readily be reconciled with the following requirement of Rule 18(4):

> 20. "An application for leave to appeal shall be made by serving upon the Tribunal the appropriate prescribed form, which shall - identify the alleged errors of fact or law in the adjudicator's determination which would have made a material difference to the outcome, together with all the grounds relied on for the appeal."

CONCLUSIONS

20. The Tribunal was wrong to hold that because there had "been no appeal on behalf of the claimant himself" the principal findings of the Adjudicator in relation to credibility were not before them. While the precise purport of this finding is not clear, we consider that it may have led the Tribunal to adopt an unsound approach to the appeal. What was at issue before the Adjudicator and the Tribunal was the existence of facts giving rise to a well-founded fear of persecution should Mr Kulek be sent back to Turkey. An earlier Tribunal had found such a fear made out in relation to Mr Kulek's brother on the basis, in all probability, of documentary evidence which the Adjudicator wrongly discounted. Had the Adjudicator accepted that evidence, it could well have impacted upon his attitude to Mr Kulek's evidence as a whole. We propose to allow the appeal and remit this case to the Tribunal for reconsideration in the light of this judgment. It will be a matter for the Tribunal whether or not, in the unusual circumstances of this case, to permit Mr Kulek to give oral evidence.

21. When giving leave to appeal, Sedley LJ remarked that it did not follow that if *Bari* was right, every respondent could re-canvas the facts at will. Where an adjudicator has heard oral evidence, and made findings which reflect the credibility of that evidence, the Tribunal will not normally entertain a challenge to those findings. Where a respondent wishes to seek to uphold a determination of an adjudicator on alternative grounds, (and the respondent is normally likely to be the Secretary of State) it seems to us desirable that the rules should make provision for the service of a respondent's notice."

SECTION 6: FACTUAL FINDINGS

Turkey and Separatists

6.1 *Polat* [2002] UKIAT 04332 (20 September 2002)

Dr Storey, Mrs Faux

"16. Essentially the Tribunal is required to take a view about how the authorities would react to returnees with a record of involvement in separatist organisations such as the PKK and HADEP.

17. This Tribunal recognises that in many previous determinations it has taken the view that those with a record of involvement with separatist organisations such as PKK and HADEP would be at risk. We are obviously not bound by findings of fact and it is always necessary to look at the position as it stands at the date of the hearing. We thus have to ask, in the light of the available evidence as to how the authorities deal with returnees, does that evidence show they would routinely ill-treat returnees with a record of involvement in organisations such as the PKK and HADEP, irrespective of the nature and level of their involvement and irrespective of what the record may indicate about the level of risk posed by the claimant from the point of view of the Turkish authorities?

18. There are competing considerations.

19. On the one hand, the objective country materials including the April 2002 issue of the CIPU report at paragraph 5.83 continue to state that ill treatment can be visited upon "suspected separatists". So far as we are aware, this concern stems from a UNHCR letter dated March 1999 stating, inter alia, that: "Obviously the group most likely to be exposed to harassment/prosecution/persecution are Kurds suspected of being connected to or being sympathisers of the PKK.... It is essential to find out if Turkish asylum seekers, if returned, would be at risk of being suspected of connections to or sympathy with the PKK, or have otherwise a political profile". The operational guidance note from the Home Office dated January 2002, albeit stating that the PKK has ceased armed struggle, notes:

> "Currently available information indicates that undocumented returnees are generally not being maltreated while being kept in custody. However, ill-treatment cannot be ruled out in cases where returnees are suspected separatists".

20. The US State Department Report covering 2001 states that despite the end of the war:

> "Security forces continued to target active PKK units as well as those persons they believed supported or sympathised with the PKK, and conducted operations against villages throughout the region [i.e. the four southeastern provinces still under a state of emergency] which yielded ammunitions caches."

21. It is true that the Turkish government has undertaken a number of new initiatives designed to improve its human rights record. However, most of the major country reports continue to tell us that the Turkish authorities still make widespread use of torture and less forms of ill treatment and that human rights abuses are still committed on a significant scale by police and security forces.

22. On the other hand, there are several indications that mistreatment at the point of return is a limited phenomenon.

23. Firstly, 5.82 of the CIPU report for April 2002 records a senior official at the Visa Department, Ministry of Foreign Affairs stating in March 2001 that "the Turkish government now recognised that the overwhelming number of Turkish nationals who had applied for asylum overseas had done so for purely economic reasons. They were of no interest to the Turkish Government, and would not be imprisoned on return".

24. Secondly, statistics such as there are do not indicate that mistreatment of returnees is a serious problem in quantitative terms. So far as statistics on returnees are concerned, the CIPU report rightly approaches these with some caution, given that there are more actual cases of mistreatment than those reported. However, the figures such as they are appear to indicate that in the last ten years, out of 43,704 Turkish nationals returned (7,102 of whom were identified as unsuccessful asylum seekers) there have been only 70 reported cases of mistreatment, the most in any one year being 17 in 1997.

25. Thirdly, whilst it is clear that the Turkish authorities still target suspected separatists, they are plainly aware that the nature of the threat posed by separatist organisations has changed significantly since the PKK ceased armed struggle in 1999. In the course of a statement on 16 April 2002 Deputy Prime Minister Yilmaz said that the fact that the PKK had realised that violence and terrorism were not a solution was a positive development. However, those who were involved in terrorism in the past should, he said, definitely be brought to justice. The passage in the US State Department report covering 2001 recording the security forces continuing to target active PKK units as well as those person they believed supported or sympathised with the PKK plainly deals with the localised situation on the ground in the remaining four provinces in which there is still a state of emergency. In the same paragraph that report notes that the level of violence has remained low since 1999 and that in 2001 there were only 45 armed clashes.

26. Fourthly, the evidence of actions taken against those involved in separatist organisations such as the PKK and HADEP increasingly indicates that the principal risk of persecution is to those who are prominent members. The main focus of police raids and detentions and prosecutions has been against prominent PKK and HADEP officials or supporters.

27. Fifthly, albeit based only on its own dealings with returnees from Iraq, UNHCR has stated that it is satisfied that returnees as a category are not subjected to persecution upon return to Turkey.

28. In seeking to reconcile these different pieces of evidence, we are conscious that some of the reports before us are based on views about risk originally formed at a time when the PKK was still pursuing armed struggle and when the level of armed conflict in the south east of Turkey was high. We consider that the Tribunal determinations in *Aktas* and *Guzel* and *Tasyurdu* more accurately reflect the current situation. Whilst there remains a real risk that persons who are considered to be "suspected separatists" will continue to face ill-treatment at the point of return, it is not reasonably likely that the authorities will include in that category all persons who have a record of involvement in separatist organisations irrespective of the degree and nature of that involvement. Given that the authorities are aware that those linked with separatist organisations no longer pose a serious threat to them as persons likely to engage in armed struggle, it is not reasonably likely they would continue to routinely process returnees so linked as if all of them posed such a serious threat.

29. In such circumstances we consider that whether or not the authorities will ill-treat a returnee with some record of involvement in a separatist organisation must now be dependent on a number of factors, including but not confined to the following nine:

a) the level of the appellant's involvement in that organisation (whether he would be considered as a prominent member or supporter);

b) how long ago the appellant was last arrested or detained;

c) whether the circumstances of the appellant's past arrests and detention (if any) indicate that they did in fact view him as a suspected separatist;

d) whether the appellant was charged or placed on reporting conditions or now faces charges;

e) the degree of ill treatment he received in the past;

f) whether he or she has family connections with a prominent member of a separatist organisation such as the PKK or HADEP;

g) how long a period elapsed between the appellant's last arrest and detention and his departure from Turkey;

h) whether in the period after the appellant's last arrest there is any evidence that he was kept under surveillance or monitored by the authorities.

(i) whether the appellant's home area is in one of the four remaining state of emergency provinces: Diyarbakir, Tunceli, Sirnak and Hakkari.

30. We emphasise that the above list of 9 factors is not intended as an exhaustive list: it does no more than identify certain factors likely to be relevant in deciding whether an appellant will face a real risk of persecution in the particular circumstances of his case. However, we are satisfied that a Turkish appellant of Kurdish origin cannot succeed unless he can show, by reference to factors of this kind, something more than that the authorities will have a record of his involvement in or sympathy for a separatist organisation."

Sri Lanka and Corruption

6.2 *Tharmakulaseelan* [2002] UKIAT 03444

The Tribunal: as reported in *Balakumar* [2002] UKIAT 04301

"We agree and conclude, in the light of the UNHCR observations, that bribery related releases, especially from army custody, would not, in the absence of some special and credible reason, be likely to be treated as escapes, and would not result in the inclusion of the individuals involved on a wanted list. Indeed one can realistically go further than that. The background material shows that bribery is widespread in Sri Lanka, even though the government is trying to control it. The extent of this bribery culture is inevitably speculative but what it can mean is that, even in relatively routine matters, some officials may expect to receive a payment from interested parties - even if they are only being asked to do what they might otherwise ordinarily be expected to do in the course of their work. Thus the mere fact of the payment of a bribe does not in itself imply that the bribe is procuring action, which would not otherwise in time be taken. Nor does it necessarily imply that the person bribed would be willing to take a serious personal risk by for example releasing a suspected terrorist. Payment of a

bribe on a release may mean nothing more than that a person in detention who is no longer of adverse interest to the authorities may be expected to offer a bribe to his custodians to initiate the release procedure. Having said that, each case has to be decided on its own facts. There may be examples where bribery has procured an assisted escape. However in routine cases that would require some clear and plausible explanation, when common sense suggests that the easier and less risky method is by official release with appropriate paperwork."

Kenyan Women

6.3 *Adhiambo* [2002] UKIAT 03536 (7 August 2002)

Mr Moulden, Mr Lloyd JP, Mrs Hurst JP

"5. The Respondent's mother is Luo. Her father is Kikuyu. They separated when she was young. In 1988, when she was 12, her father came to her school and abducted her and her sister. Her maternal grandmother wanted her circumcised. During an early stage of the procedure the Respondent managed to escape. She was taken to a convent where she remained for four years. She trained as a teacher and completed her training in 1997. Before she completed her training she had a relationship with a white Catholic priest as a result which she gave birth to a child. She left the convent.

6. In February 2000 a friend took the Respondent to what turned out to be a meeting of the Mungiki cult. She was told that as a member she would have to be circumcised. The Respondent tried to hide but was found and taken to three or four meetings. She received threatening notes. She went to the police who would not help her.

7. In March 2000 three men came to her home and warned her not to try and escape. Again she complained to the police, but they would not help.

8. The Appellant went to Kitale about 500 km from Nairobi. The family with whom she was staying were harassed and she went back to Nairobi. At the end of November 2000 the Mungiki caught her and took her to a forest where she was told she was going to be circumcised. She managed to run away, and was found by a passing motorist who took her to a house of a friend who looked after her.

9. The Respondent fears forced circumcision (which we will refer to as female genital mutilation - and abbreviate to FGM) at the hands of the Mungiki. She is also afraid of them because of their attitude to white people and those of mixed race. Her son is of mixed race.

10. The Adjudicator found the Respondent to be a credible witness. It is not clear whether the absence of a representative for the Appellant and the lack of cross-examination had any effect on this conclusion. There is no appeal against the positive credibility finding and in circumstances where, on the evidence, the conclusion was open to the Adjudicator, the Appellant must accept what may, in an adversarial system, be another consequence of his repeated failure to provide representation.

.....

22. We find that the Respondent does not belong to a particular social group, as defined in any of the three ways suggested by Miss Fisher. The situation of women in Kenya is very different to that of women in Pakistan. At page 285 of *Shah and Islam* Lord Stein said,

"Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case. On the findings of fact and unchallenged evidence in the present case, the position of women in Pakistan is as follows. Notwithstanding a constitutional guarantee against discrimination on the grounds of sex, a woman's place in society in Pakistan is low. Domestic abuse of women and violence towards women is prevalent in Pakistan. That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state; discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women, who have been forced to leave the matrimonial home or have simply decided to leave. Husbands and others frequently bring charges of adultery against such wives. Faced with such a charge the woman is in a perilous position. Similarly, a woman who makes an accusation of rape is a great risk. Even Pakistan statute law discriminates against such women".

23. On a balanced assessment of the country information before us it is clear that, whilst there are some similarities between Kenya and Pakistan, there are greater differences. The US Department of State report shows serious problems of rape and domestic violence, which are often unreported because of the widespread belief that perpetrators will not be punished. However, Kenya has agreed to be bound by international human rights standards. Police generally regarded domestic violence against women as a family matter not a crime. But, they are being trained in gender issues. A Domestic Violence Bill has been published and there are a number of active women's NGOs. The overall picture does not show that women in Kenya are unprotected by the state to the same extent as Pakistan. It shows that there is real progress in reducing institutionalised discrimination against women, still some toleration of discrimination but very little discrimination which is positively sanctioned by the state. A good example, particularly relevant to this appeal, is that there has been a presidential decree banning FGM. For this purpose we do not accept Miss Fisher's submission that a presidential decree is any way inferior to an Act of Parliament.

24. The evidence does not support a particular social group defined as either "Kikuyu women", or "women who face FGM". There is no evidence to show that Kikuyu women are discriminated against or at any greater risk than women in general. As to women who face FGM whilst the country information shows that it is still widely practised, there is clearly an improvement, exemplified by the presidential decree to which we have referred

25. We find that the Respondent does not belong to a particular social group. She has not established a Convention reason and for this reason her Refugee Convention appeal must fail. However, her Article 3 claim is not dependent on a Convention reason.

26. We agree with the Adjudicator that, in circumstances where she fears ill-treatment at the hands of non-state agents, the authorities will not provide her with a sufficiency of protection. The fact that on two occasions she tried to obtain help from the police is relevant but not conclusive. We need to look at the country conditions. Paragraph 4.32 of the Country Assessment states, quoting an internal police report, that the police force was unable to address crime due to poor management, corruption, a breakdown in discipline and disregard for rules. Members of the security forces continued to commit serious human rights abuses. Whilst, on the one hand, paragraph 5.11 of the same document shows a crackdown against the Mungiki in late 2001, the

other side of the coin is that the police may, as the Respondent experienced, be less likely to want to help her because they consider that she is involved with the Mungiki. Paragraph 5.25 shows that in some rural communities FGM is still practised despite efforts by the government, churches and civic groups to stamp it out.

27. We have given careful consideration to the Adjudicator's findings in relation to internal flight. Paragraph 32 reads, "in considering the option of internal flight, I note that the Mungiki are based for the most part in Nairobi, but I also note that the Appellant has attempted to find a safe place to live some 500 km from her home but has been unsuccessful. I have considered whether return to another area would be unduly harsh and bearing in mind the seriousness of the consequences to the Appellant and the lack of any objective evidence about the safety of other parts of Kenya, I find that he would be unduly harsh." This is not entirely clear but appears to indicate that the Adjudicator was of the opinion that the Respondent was at risk from the Mungiki throughout Kenya. Paragraph 5.29 of the Country Assessment indicates that this may indeed be the case, if they have 3.5 million members. The Adjudicator found that the Respondent had attempted to find a safe haven 500 km from her home in Nairobi but was unsuccessful. Even if the Respondent is not at risk from the Mungiki throughout Kenya, we find that it would be unduly harsh to expect her to relocate. It is for her to establish that it is reasonably likely to be unduly harsh and, even though the Adjudicator appears to have applied an incorrect test, we find, applying the correct test that on the evidence the Respondent has established that it would be unduly harsh to expect her to relocate. She is a single woman who will encounter prejudice because of her mixed race child. It will in any event make her more easily identifiable to the Mungiki.

28. Whilst the Respondent is not at risk of persecution for a Convention reason we uphold the Adjudicator's conclusion that she is at risk of infringement of her Article 3 human rights. The authorities will not provide her with a sufficiency of protection and it would be unduly harsh to expect her to resort to internal flight."

Chechens in Russia

6.4 *Asaev* [2002] UKIAT 03796 (15 August 200)

Dr Storey, Mr Smith JP

"3. The adjudicator accepted that the appellant had a well-founded fear of persecution in Chechnya arising from the fact that he was a pilot of civilian aircraft by profession who had refused to fly planes for Chechen rebels and that the authorities would be unable to protect him against reprisals the rebels would take against him in consequence. However she considered the appellant had a viable internal flight alternative in either Rostov (where he had earlier sent his mother) or Ingushetia. In this regard she noted there was no evidence that Chechen rebels were looking for him or that they were able to infiltrate Russia to seek out Chechens who had refused to join them or that the Russian authorities would share information about an individual's registration with Chechen rebels. Nor was there any evidence that he would be forcibly repatriated just because he was an ethnic Russian from Chechnya. She pointed out that despite being an ethnic Russian in Rostov who had failed to register, the appellant's mother had suffered no problems as a result. She discounted his claimed fear of being persecuted because ordinary Russian would be alarmed by the fact that he was a pilot from Chechnya. As regards the situation in Ingushetia, she

relied on the fact that there were so many Chechens there (170,000 had fled there after September 1999) that the appellant would be amongst fellow-Chechens and at no risk of detection by any Chechen rebels. However, turning to the issue of whether in either of these places the appellant would be at risk of repeated arrests in roundups and would be singled out and beaten, she said:

> "The background reports indicate that security forces do single out persons from the Caucasus for document checks, detention and extortion of bribes, though practice is not totally restricted to Chechens. I do find that the appellant would be at risk of being subjected to extortion in Russia."

4. She then went on to discount difficulties the applicant might face in relation to judicial process, detention in dire prison conditions, employment prospects, language discrimination and racial discrimination. In relation to accommodation difficulties, she accepted the appellant might face real difficulties in Ingushetia, but he would not face the same difficulties in Rostov.

5. Before proceeding to evaluate the particular facts of this appeal we would make four introductory observations, all of which arise chiefly from the objective country materials. The first concerns the current UNHCR position which is reported in the CIPU Russian (Chechnya) Bulletin 01/2002 as follows:

> "...the UNHCR is of the view that, given the ongoing unstable and highly volatile situation in Chechnya and the link between propiska registration and access to basic rights in the rest of the Russian Federation, there is currently no viable internal relocation possibility that would guarantee effective protection to all of those displaced by the Chechen conflict. It states that internal relocation should therefore be considered only as part of a full and fair determination in each asylum claim".

6. Our second observation is that the adjudicator was plainly wrong to conclude that racial discrimination in not a part of everyday life in Russia. That finding was heavily against the weight of the evidence including the CIPU Bulletin 01/2002 which refers to Chechens being likely to experience difficult living conditions and racial discrimination in much of Russia. The US State Department Report of February 2001 notes that:

> "Roma and persons from the Caucasus and Central Asia face widespread societal discrimination, which often is reflected in official attitudes and actions. Police reportedly beat, harassed and solicited bribes from persons with dark skin, or who appeared to be from the Caucasus, Central Asia, or Africa. Discrimination against persons from the Caucasus and Central Asia also increased concurrently with new measures at both the federal and local levels to combat crime. Law enforcement authorities targeted persons with dark complexions for harassment, arrest, and deportation from urban centres, particularly after the August 1999 bombing in Moscow. "

7. A third observation, closely allied to the second, is that the adjudicator's findings on the risk of extortion were clearly based on background materials, in particular the US State Department report of February 2001 which states that:

> "There are credible reports that security forces continue to single out persons from the Caucasus for document checks, detention and extortion of bribes."

8. Our final initial observation is that it is not in dispute that certain areas of Russia are not places where an ethnic Russian from Chechnya can live without facing serious difficulties arising from being unable to register there. These difficulties are well documented in the background country reports. No doubt in the light of these, the

respondent accepted that in this case the only two realistic options open to the appellant were Ingushetia and Rostov.

9. As regards Ingushetia, we do not think that the materials before the adjudicator justified her in concluding that the appellant could live there without undue hardship. She noted very correctly that because of the mass influx of Chechens into that area, the most likely available accommodation would be in makeshift camps. However, the adjudicator seemed to think that although conditions in such camps would be harsh, they would not be unduly so because the appellant had expressed himself ready to put up with harsh conditions. We consider that finding erroneous. In the first place it is reasonable to infer that, if the appellant were returned to live in Ingushetia, he would be at the end of any existing Chechen queue for accommodation. That is significant because in the CIPU Bulletin 01/2002 on Russian Federation (Chechnya) dealing with Chechens outside Chechnya it is stated that of the estimated 150,000 displaced persons remaining in Ingushetia one third were accommodated in tented camps and spontaneous settlements and that those in camps had faced harsh weather and a shortage of food and medicines that has caused considerable concern among human rights organisations.

10. An earlier CIPU report stated that: "some 8,000 people are believed to be living in railway carriages in the region, many of them without sufficient heating and appropriate sanitation facilities, which puts them at risk of contagious diseases....".

11. In the second place, we do not think the appellant's own statement that he could tolerate harsh conditions should properly have been taken by the adjudicator as meaning that conditions would not be unduly harsh in this case. Certainly in assessing hardship it is relevant to consider the physical and mental health of the individual in relation to such factors as age, health and the like. However, there is obviously a minimum standard of subsistence below which no one can be expected to exist. In Ingushetia we also think the appellant would also face additional difficulties of being perceived as of mixed ethnic origin and mixed religious background. In this regard we cannot agree with the adjudicator who appeared to forget this factor in finding that the appellant would in that area be amongst "fellow Chechens".

12. Thus the only real internal relocation option open to this appellant was Rostov. Even assuming the adjudicator was right to entirely discount any continuing risk of the appellant being pursued in Rostov by Chechen rebels, we do not think she was justified in concluding that the appellant would not face very considerable difficulties in living there. On her own findings – findings we consider sustainable - the appellant would be subject to a real risk of extortion. Furthermore, as regards difficulties with registration in Rostov, it may be that this city is note mentioned in the background materials as one where registration difficulties are acute, but we do not think the adjudicator was justified in assuming that just because the appellant's mother had not had difficulties with the registration system, he would not. As Mr Jorro pointed out, the appellant's mother is a pure ethnic Russian as well as an older person. Given that the propiska system is evidently operated quite rigorously throughout Russia, we do not think it justifiable to conclude that the appellant's difficulties in this regard would be any less than those facing others who were visibly Chechen in origin. As regards accommodation, there was no evidence he could live with his mother as she was living with a friend, so that would cause some extra, even if not insuperable, difficulty. In addition he would, as already noted, face a certain level of societal discrimination affecting the areas of employment in particular: the latest April 2002 Country Assessment on Russia noted that people from the Caucasus and Central Asia continue to face "widespread societal discrimination, which is often reflected in official attitudes and actions". In short he in common with others displaced from Chechnya would face considerable difficulties in relocating in Rostov.

13. We doubt that these common difficulties on their own would make it unduly harsh for him to relocate there. However, in assessing the issue of undue hardship it is obviously essential to consider the appellant's individual circumstances as well as those he would share in common with other Chechens. To some extent these do not point in the direction of undue hardship: the appellant is a relatively young man in good health who in Rostov would have some family contact. But in addition to the common and quite considerable difficulties already identified, there would be two specific difficulties facing this appellant. One we have already highlighted, namely his mixed ethnic origin. In our view this would at once deny him full acceptance by fellow-Chechen also displaced and on the other hand make him just as liable as them to widespread societal and official discrimination. The other is something which the adjudicator entirely discounted. It relates to the fact that he is a civilian pilot. She discounted this on the basis that there was no reason why anyone in Russia (outside Chechnya) should come to learn of it. However we think this a somewhat facile conclusion. Russians have suffered terrorist attacks launched against them by Chechen rebels. Security concerns have been widespread. Plainly in the course of different types of contact with the authorities, authorities whom we already know are apt to try and exploit Chechens and other ethnic minorities, the appellant would be required to state his background. Particularly in the wake of the strong Russian reaction to the events of September 11th, it would be naïve in our view to entirely discount the real likelihood that this would create an added ground for suspicion, in-depth scrutiny and harassment of this appellant, since, in the eyes of Russian officials, he could well be perceived as a Chechen rebel harbouring malice aforethought. No doubt, after he made protestations, they would recognise he was in fact opposed to the Chechen rebels, but the likely experience of having frequently to rebut suspicions plainly adds a real dimension to the level of difficulties he would face in Rostov (and indeed elsewhere in Russia).

14. For the above reasons we agree with Mr Jorro that, viewing the difficulties this appellant would face in having to relocate within Russia cumulatively, there was sufficient evidence before the adjudicator to demonstrate that it would be unduly harsh for him to have to relocate."

6.5 *Krayem* [2002] UKIAT 04626 (3 October 2002)

Mr Ockelton (Deputy President), Mr Mackey, Mr Baines JP

"1. The Appellant is a Palestinian, whose country of former habitual residence is Lebanon where he lived in an UNRWA camp ...

.....

7. The question then is what is the Appellant's status today, given that he has failed to establish that his history is what he says it has been? We have been referred by Mr Ferguson in particular to a recent report by E G H Joffé, who has set out his experience and qualifications at the beginning of his letter which, we would emphasise, was written on 12th August 2002 in relation to this Appellant and for this hearing. It is right to say that, despite the author's great experience, he does not appear to have visited any of the UNRWA camps. It is also right to say, on a matter which we shall mention shortly, that he does not appear to have read or to have fully appreciated the CIPU Report issued in April 2002, some time before his letter is dated.

8. The conclusions for the Appellant are set out in the letter in two parts. The first two paragraphs on page 9 of the report relate to what the situation would be for the Appellant if his story of having joined El-Kifah El-Musalaah was the truth. As the Adjudicator concluded that it was not the truth, and as we affirm his assessment, we need say no more about that.

9. The author of the report goes on to set out the position in general as he sees it for Palestinians in UNRWA camps in Lebanon who find themselves now in other countries. It reads as follows:

> "Secondly, Mr Krayem's fear of persecution must also be related to the fact that Palestinians form a group that suffers discrimination as an ethnic group in Lebanon, as this report demonstrates. Palestinians in the camps in Lebanon labour under such restrictive conditions that they breach established human rights conventions. They have to resort to practices normally considered illegal by the Lebanese authorities just to survive, particularly since legal means of survival are barred to them. Palestinians are effectively forbidden to work (although the practice of refusing work permits officially ended in 1991, the reality is that permits are still not issued to Palestinians) – so they have to resort to the parallel economy in order to survive, in addition to the minimal support provided by UNRWA, or find work abroad. Security is non-existent, as the deaths of 2,000 Palestinians in Sabra and Chatila camps in late 1982, in massacres organised by the Lebanese Phalange-Lebanese Forces and tolerated by Israeli forces in Beirut then under the overall command of the current Israeli premier, Ariel Sharon, made clear. The Lebanese authorities provide no protection within the camps and refuse to offer it to Palestinians outside the camps. Indeed, nothing has occurred since 1984 to improve security for Palestinians in the camps, beyond the activities of their own militias, and, in many respects, the situation is even worse today. Mr Krayem would not, therefore, receive adequate and appropriate protection from the state if he is returned to Lebanon, given the attitudes of the Lebanese authorities towards Palestinians.
>
> In these circumstances, it seems to me that Mr Krayem has reasonable grounds to fear that he will face discrimination as a Palestinian and as a member of El-Kifah El-Musalaah – he will have to return to Ain al Helwa camp as he will not be allowed by the Lebanese authorities to settle anywhere else – if he is returned to Lebanon and thus will face persecution."

10. We see in those two paragraphs E G H Joffé's view of the situation of Palestinian refugees, whose former place of habitual residence is Lebanon, as a whole. The comments which he makes are related to the situation of Palestinians in general. He apparently takes the view that every Palestinian has a well-founded fear of persecution in the camps: that is because of the way that the Lebanese authorities treat the Palestinians on their territory.

11. There are three matters in particular that we would note. The first is that although there is an assertion that nothing has occurred since 1984 to improve security and that in many respects the situation is even worse, the position is that the particular events to which reference is made in that paragraph are in the early 1980s. It is not said that there have been massacres similar to that in late 1982, subsequent to that year. No doubt if there had been, they would have been mentioned.

12. Secondly, it is asserted that the Appellant would have to return to the same camp. The CIPU Report, to which we have already referred, suggests, at paragraph 5.72, that that is simply wrong. The paragraph begins as follows:

> "Palestinian refugees in Lebanon are free to relocate from one camp to another (previously they were required to obtain the permission of the Lebanese Ministry of the Interior, but this requirement has now been lifted). They only need to inform UNRWA of their move if they wish to continue claiming UNRWA services in the camp to which they have moved."

As Mr Ferguson points out, moving is not easy and as the CIPU Report goes on to say, there are substantial practical difficulties. But the assertion made by E G H Joffé is in contradiction to what is stated publicly in the CIPU Report and we see no reason to suppose that the more detailed account in the CIPU Report is not accurate.

13. Thirdly, the opinion of the Joffé letter seems to indicate generally that those in the care of the United Nations are in fact all being treated in a way which breaches the International Conventions which are at the heart of the United Nation's constitution. We are entirely unable to accept that view.

14. It might have been that a more moderate report could have shown that a particular individual might be at risk of persecution, but we have dealt with this matter at some length in order to make it clear that the views of E G H Joffé, who wrote the report which is submitted to us, go well beyond what can be accepted as a matter of generality.

15. The present Appellant has failed to establish the history he claims. His case falls to be considered as that of a Palestinian who faces return to Lebanon where he will be living in an UNWRA camp. Conditions are not, to say the least, ideal and no doubt he will face discrimination. But, as a person who has established only those characteristics, he has not shown that he is at risk of persecution for a Convention reason."

Mark Symes

O'Keeffes Solicitors, Soho

12 January 2003