HOUSE OF LORDS SESSION 2005–06
**[2006] UKHL 47**

# OPINIONS

## OF THE LORDS OF APPEAL

## FOR JUDGMENT IN THE CAUSE

**Tehrani (AP) (Appellant)**
***v.***
**Secretary of State for the Home Department (Respondent) (Scotland)**

**Appellate Committee**

**Lord Nicholls of Birkenhead**
**Lord Hope of Craighead**
**Lord Scott of Foscote**
**Lord Rodger of Earlsferry**
**Lord Carswell**

**Counsel**

*Appellants*:
Mungo Bovey QC
Simon Collins
(Instructed by Quinn Martin and Langan)

*Respondents*:
Lord Davidson of Glen Clova QC
Ailsa Carmichael
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

*Hearing dates:*
3 and 4 JULY 2006

ON
WEDNESDAY 18 OCTOBER 2006

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

**Tehrani (AP) (Appellant) *v.* Secretary of State for the Home Department (Respondent) (Scotland)**

**[2006] UKHL 47**

**LORD NICHOLLS OF BIRKENHEAD**

My Lords,

1. Legislation operating throughout the United Kingdom sometimes makes provision for appeals to appellate tribunals which, like the legislation itself, operate throughout the whole of the United Kingdom. Similarly with legislation operating throughout Great Britain. Employment, taxation and immigration are instances. In these fields the primary remedy available to a citizen aggrieved by a departmental decision is to appeal against the decision in accordance with the appeal structure set out in the legislation. In the ordinary course that is the route an aggrieved party should follow.

2. Occasionally a citizen wishes to challenge a decision of a tribunal in respect of which he has no right of appeal. He wishes to apply for judicial review of the tribunal's decision. But to which court should he make his application? If the taxation affairs of a Scottish taxpayer are dealt with by a commissioner sitting in England, should the taxpayer apply to the Court of Session in Edinburgh or the High Court of Justice in London?

3. Take a more complicated example. Take a case where a claimant for asylum is living in Scotland. An adjudicator in Glasgow dismisses his appeal against the Secretary of State's refusal of asylum. The Immigration Appeal Tribunal sitting in London then refuses the claimant permission to appeal. Clearly an application for judicial review of these two decisions should be heard by one court, either by the Court of Session in Scotland or the High Court in England. It would make no sense if the Court of Session were to review the decision of the

adjudicator and the High Court were to review the decision of the Immigration Appeal Tribunal. But which court should this be, and on what principle should the choice be made? These are the questions arising on this appeal.

*The present case: the factual background*

4. The appellant, Mr Behrouz Tehrani, is a citizen of Iran. On 24 March 2001 he flew into London City airport and claimed asylum. He was given temporary admission pending a decision on his application and provided with temporary hotel accommodation in London. He stayed there for a month until the Secretary of State required him to move to Glasgow under the statutory dispersal scheme. On 19 April 2001 Mr Tehrani was allocated accommodation in a local authority flat in Glasgow. Since then he has lived continuously in Glasgow.

5. On 11 May 2001 the Immigration and Nationality Directorate of the Home Office at Croydon refused Mr Tehrani's application. The directorate sent Mr Tehrani a letter setting out the reasons why the Secretary of State was not satisfied Mr Tehrani had established a well-founded fear of persecution. On 16 May an immigration officer of the UK Immigration Service at London City airport gave Mr Tehrani formal notice refusing him leave to enter the United Kingdom. Mr Tehrani was told that directions would be given for his removal on a scheduled flight to Iran upon a date and time to be arranged.

6. Two days later, on 18 May 2001, notice of appeal was given on behalf of Mr Tehrani by his representative, Mr Latif Zamani. At the time Mr Tehrani was unable to speak or read English. The hearing of the appeal by an adjudicator took place some months later, on 5 February 2002, in Durham. Mr Tehrani travelled from Glasgow for the hearing. He was represented by a Mr Sharif who lived in Sheffield. The Durham venue was arranged, it seems, for Mr Sharif's convenience. Mr Sharif had asked for the hearing to be transferred from London to the hearing centre at Leeds. Durham is a satellite of the Leeds' hearing centre. Mr Tehrani was not consulted about these arrangements.

7. On 21 February 2002 the adjudicator dismissed Mr Tehrani's appeal. Mr Tehrani sought leave from the Immigration Appeal Tribunal (the 'IAT') to appeal against the adjudicator's determination. On

22 March 2002 the tribunal, sitting in London, refused leave to appeal. This refusal decision was not susceptible of appeal.

8. In August 2002 Mr Tehrani lodged a petition with the Court of Session seeking reduction of the adjudicator's determination and the IAT's refusal of leave to appeal. On 3 April 2003 the Lord Ordinary (Philip) sustained the Secretary of State's plea to the jurisdiction of the court: 2003 SLT 808. On 27 April 2004 an Extra Division of the Inner House, comprising Lords Kirkwood, Hamilton and Macfadyen, refused a reclaiming motion by Mr Tehrani: 2004 SLT 461. Mr Tehrani has now appealed to your Lordships' House. Whether there is substance in Mr Tehrani's petition is not a matter which has been canvassed before your Lordships or in either of the courts below. The issue is solely one of the jurisdiction of the Court of Session to entertain the petition.

*The legislation*

9. The relevant statutory provisions in force at the material times can be noted shortly. The impugned decisions of the adjudicator and the IAT were made under the Immigration and Asylum Act 1999 ('the 1999 Act'). Section 69 makes provision for appeals to an adjudicator against refusals of leave to enter where removal in consequence of the refusal is said to be contrary to the Refugee Convention. A person who is dissatisfied with an adjudicator's determination may appeal to the IAT with the leave of that tribunal: paragraph 22 of Schedule 4 to the 1999 Act, and rule 18(1) of the Immigration and Asylum Appeals (Procedure) Rules 2000 (SI 2000/2333).

10. The legislation makes provision for further appeals to the 'appropriate appeal court' on a question of law. The identity of the appropriate appeal court depends upon where the determination of the adjudicator was made. If the adjudicator's determination was made in Scotland the appropriate appeal court is the Court of Session. Otherwise the appropriate appeal court is the Court of Appeal: paragraph 23 of Schedule 4 to the 1999 Act.

11. The 1999 Act also makes provision for the existence of the IAT and for the appointment of adjudicators: sections 56 and 57. The IAT and adjudicators sit at such times and in such places as the Lord Chancellor directs. In practice there are a dozen or so main hearing centres throughout the United Kingdom. One of these is Glasgow.

Adjudicators sit from time to time in Glasgow. The IAT sits mainly in London. The venue of these hearings is determined largely by questions of practical convenience, either the administrative convenience of the adjudicator or the IAT or the convenience of the claimant or his lawyers.

12. Since April 2005 the two tier system of appeals to adjudicators and the IAT has been replaced by a single tier body, the Asylum and Immigration Tribunal.

*Previous decisions*

13. Problems similar to those arising in the present case have come before the courts of England and Scotland on several occasions. The jurisprudence has developed and matured. In *Rutherford v Lord Advocate* 1931 SLT 405 a taxpayer living in Scotland was assessed to tax in respect of director's fees paid to him by a company carrying on business in Warwickshire. The assessment was confirmed by general commissioners for the county of Warwick. The tax not having been paid, execution was levied on the taxpayer's furniture in Scotland. The taxpayer applied to the Court of Session to set aside this diligence. Lord Fleming held the Court of Session could not set aside the determination of the commissioners. For that the taxpayer must resort to the English courts. But it was competent for the taxpayer to invoke the 'preventive jurisdiction' to stop the diligence of which he complained: p 408.

14. In the *Forsyth* litigation a Scottish taxpayer appealed against assessments to corporation tax and applied to a special commissioner for postponement of payment. The postponement applications were due to be heard in Glasgow, but for the convenience of the company's lawyers and at their behest the venue was changed to London. The applications were largely unsuccessful. The company then applied to the High Court for judicial review of the special commissioner's postponement decisions. Meanwhile the Crown had issued summonses in the Exchequer Court of the Court of Session seeking payment of the tax due. The Lord Ordinary (Wylie) granted decree in favour of the Crown in both proceedings. The basis of his decision seems to have been that the High Court had no jurisdiction in the matter. The decision of the special commissioner on a Scottish tax case, although sitting for administrative convenience in London, remained subject to the supervisory jurisdiction of the Scottish court. Confusion could result if more than one court had jurisdiction: *Lord Advocate v R W Forsyth Ltd* (1986) 61 TC 1.

15. The Crown then applied to the High Court to strike out the judicial review proceedings. Macpherson J was not persuaded the English court lacked jurisdiction. But he stayed the judicial review proceedings on the ground that as a matter of commonsense and convenience all activity in the case should be in Scotland: *R v Commissioner for the Special Purposes of the Income Tax Acts, Ex p R W Forsyth Ltd* [1987] 1 All ER 1035.

16. *Sokha v Secretary of State for the Home Department* 1992 SLT 1049 was an immigration case. The petitioner had entered and remained in England illegally. He was later detained in prison in England under the authority of an immigration officer. The petitioner then initiated proceedings in the Court of Session for judicial review of the decision to detain him in prison. He did so in the belief he had a better prospect of obtaining conditional release from a Scottish court than an English court. The Lord Ordinary (Prosser) dismissed the petition. The Secretary of State accepted that the Scottish court had jurisdiction. But the judge held the Scottish courts were a wholly inappropriate forum, and the English courts the obvious and natural forum, for any scrutiny of the decisions to detain the petitioner and keep him in detention.

17. The case of *R (Majead) v Immigration Appeal Tribunal* [2003] EWCA Civ 615 (1 April 2003) was another immigration case. The claimant arrived at Dover and claimed asylum. The Secretary of State refused the claim. Mr Majead was then 'dispersed' to Scotland. Unlike the present case, where Mr Tehrani's appeal was heard by an adjudicator in England, Mr Majead's appeal was heard by an adjudicator in Scotland. Mr Majead's application for leave to appeal to the IAT was dismissed by the IAT sitting in London. Jackson J refused Mr Majead permission to apply for judicial review, on jurisdictional grounds. His decision was upheld by the Court of Appeal: [2003] EWCA Civ 615. Brooke LJ said Parliament has made clear its wish that the courts of Scotland should have ultimate responsibility in relation to appeals to the IAT from adjudicators in Scotland. Without deciding the point he noted that in a 'real emergency' the High Court might exercise jurisdiction over IAT decisions relating to appeals from adjudicators in Scotland but that would have to be a 'very exceptional case': paragraphs 10 and 13.

18. The next case, chronologically, is the present case. The Lord Ordinary held that the supervisory jurisdiction of the Court of Session did not extend to a review of the decisions of the adjudicator or the IAT. Both of them had sat outside Scotland, and therefore any judgment of the court could not be enforced against them: 2003 SLT 808. In the

Inner House the Extra Division upheld the Lord Ordinary's decision but their reasoning was different. Lord Kirkwood delivered the opinion of the court. The Extra Division rejected the contention that the Scottish and English courts have concurrent jurisdiction in applications for judicial review over adjudicators sitting in either country and the IAT sitting in London, but expressed full agreement with the approach of the Court of Appeal in the *Majead* case: 2004 SLT 461, paras 24 and 27.

19. On the same day, 27 April 2004, the Extra Division applied the same reasoning in two other cases when holding that the Court of Session had supervisory jurisdiction where the adjudicator had sat in Scotland but the IAT sitting in London had refused permission to appeal: *Struk v Secretary of State for the Home Department* 2004 SLT 468 and *Mfumu v Secretary of State for the Home Department* (unreported) 27 April 2004.

20. Finally, in *Shah v Immigration Appeal Tribunal* [2004] EWCA Civ 1665, 22 November 2004, the Court of Appeal clarified, and amplified, the reasoning in the *Majead* decision. Sedley LJ said the jurisdiction of the English and Scottish courts is concurrent but should be exercised, save in very exceptional circumstances, by the supervisory court of the jurisdiction in which the adjudicator sat: paragraph 8. Carnwath LJ agreed. He observed that the English court has jurisdiction to review a decision of the IAT, sitting as it does in London yards away from the Royal Courts of Justice and hundreds of miles away from the Scottish border, but other than in exceptional circumstances practice and comity demand the English courts should give way to the Scottish courts where the adjudicator's decision was made in Scotland: paragraph 27.

*Discussion*

21. Broadly stated, under the common law the superior courts of a country have jurisdiction (legal power) to review the decisions of inferior courts and tribunals and other governmental and public bodies exercising powers conferred by the laws of that country. The superior courts are charged with the task of seeing that these inferior courts and tribunals and others carry out their duties and that in making their decisions they do not exceed or abuse their powers. In the ordinary course decisions falling to be reviewed in this way will be made within the jurisdiction (the territorial reach) of the superior court by inferior courts or tribunals or others present within this jurisdiction.

22. This general principle must be handled circumspectly where the issue concerns the jurisdiction (legal powers) of courts of the constituent parts of the United Kingdom. The different parts of the United Kingdom cannot be treated as foreign countries when the decision sought to be reviewed was made by a tribunal or minister exercising powers under laws applicable throughout the United Kingdom. In the present case that is the position. The adjudicator and the IAT were implementing laws, and exercising powers, applicable nationwide. The adjudicator and the IAT are United Kingdom tribunals. In *Executors of Soutar v James Murray & Co Ltd* [2002] IRLR 22, 23, para 8, Lord Johnston said the border between England and Scotland is of no relevance to the jurisdiction of employment tribunals; their jurisdiction is national. The same is true of adjudicators and the IAT.

23. The present case goes further. A notable feature of the 1999 Act is the two-tier structure of adjudicators and the IAT. Even in the absence of this two-tier structure the supervisory jurisdiction of the courts of the constituent parts of the United Kingdom could hardly depend definitively upon the particular place where, as a matter of convenience, the decision of the tribunal under review was made. But self-evidently, given this two-tier feature, it is impossible to apply the approach that in asylum cases the legal powers of judicial review of the Court of Session and the High Court are governed rigidly by the place within the United Kingdom where an adjudicator or the IAT respectively chose to make the decision under review. As already noted, that approach would make no sense. It would make no sense because adjudicators and the IAT often sit in different parts of the United Kingdom when dealing successively with the same case. When they do so it would be absurd if an application for judicial review of the adjudicator's decision had to be made to the courts of one part of the United Kingdom and an application for judicial review of the IAT's decision in the same case had to be made to the courts of another part of the United Kingdom. Identification of the appropriate court to review the two decisions in a single case must be capable of operating better than this.

24. To my mind the nationwide nature of the legislation and the two-tier appeal structure of adjudicators and the IAT point to the conclusion that, in the same way as adjudicators and the IAT have jurisdiction (legal power) throughout the United Kingdom, so the superior courts of the constituent parts of the United Kingdom have jurisdiction to review decisions of adjudicators and the IAT wherever made. Once it is recognised that adjudicators and the IAT are properly to be characterised as United Kingdom tribunals, there can be no occasion for attempting to confine the supervisory jurisdiction of the courts of England or Scotland

by rigid rules or, even less, by rules whose bounds are vague. In respect of decisions of these tribunals the Court of Session and the High Court have concurrent jurisdiction. Decisions of the Court of Session and the High Court made in exercise of this concurrent jurisdiction are binding throughout the United Kingdom.

25. The existence of jurisdiction is one matter, the exercise of the jurisdiction is another. In the ordinary course the courts of England and Scotland apply the common law *Spiliada* principle of 'appropriateness' in deciding whether to exercise jurisdiction where the courts of more than one country have jurisdiction in respect of a claim: see *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. A court will decline to exercise jurisdiction if there is available an alternative forum more appropriate for deciding the dispute in question. In the present context Parliament has itself indicated, in the 1999 Act, the basis on which the courts of Scotland or England have jurisdiction in respect of appeals. As noted above, the determining factor is where the adjudicator made his decision. The place where the IAT made its decision is of no consequence. In my view this legislative indication of which court is the appropriate appellate court should normally be applied by the courts by analogy on applications for judicial review of decisions of adjudicators or the IAT. Save in exceptional circumstances the venue of the adjudicator's decision should be determinative of the 'appropriate forum' test. In the result therefore I agree with the views expressed by the Court of Appeal in *Shah v Immigration Appeal Tribunal* [2004] EWCA Civ 1665.

*The outcome*

26. In the present case the adjudicator made his decision in England. But in this case there are, unquestionably, exceptional circumstances. In April 2002, when Mr Tehrani consulted Scottish solicitors after the adverse decision of the IAT, he was still in time to make an application to the High Court for permission to apply for judicial review. Instead his solicitors instructed counsel to draft a petition for judicial review in the Court of Session, seeking reduction of the decisions of the adjudicator and the IAT. A petition was duly drafted and lodged in the Court of Session.

27. That was, at the time, an unexceptionable course. Mr Tehrani was living in Scotland, and his solicitors had previously been instructed in successful judicial reviews of decisions of adjudicators sitting in

England to which no plea to the jurisdiction of the Court of Session had been taken by the Secretary of State. By the time the plea was taken by the Secretary of State in the present case it was too late for Mr Tehrani to apply of right to the High Court for permission to apply for judicial review. The three month time limit had by then expired. In these circumstances it would be unconscionable if Mr Tehrani were now to be deprived of a remedy on jurisdictional grounds. I would allow this appeal accordingly. The Court of Session should exercise its jurisdiction in this case. The procedural history makes this an exceptional case for which the appropriate forum is the Court of Session.

28. For completeness I add, in agreement with my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry, that Part III of the Civil Jurisdiction and Judgments Act 1982 does not assist Mr Tehrani on the question of jurisdiction. Judicial review of tribunals is excluded from the scope of Schedule 8 by paragraph 12 of Schedule 9. Moreover, for the reasons cogently explained by Lord Rodger of Earlsferry, the argument based on the 1982 Act misses the jurisdictional point in issue in the present case.

**LORD HOPE OF CRAIGHEAD**

My Lords,

29. The appellant, Behrouz Tehrani, is a citizen of Iran who seeks asylum in the United Kingdom. He left Iran on 18 March 2001 and entered the United Kingdom on 24 March 2001. He applied for asylum on the same day and was given temporary admission pending determination of his application. He was provided with hotel accommodation in London. On 19 April 2001 he was allocated accommodation in Glasgow. He has resided in Glasgow continuously since that date. On 11 May 2001 the respondent refused his application. By a determination dated 21 February 2002 his appeal against that refusal was dismissed by an adjudicator. He then sought leave to appeal to the Immigration Appeal Tribunal. By a determination dated 22 March 2002 his application for leave was refused by the tribunal.

30. In August 2002 the appellant presented a petition for judicial review by the Court of Session of the determinations of the adjudicator

and the Immigration Appeal Tribunal. The first order was granted on 22 August 2002. The respondent took a preliminary plea of no jurisdiction. This was on the ground that the hearings before the adjudicator and the Immigration Appeal Tribunal took place, and their determinations were made, in England. On 15 January 2003 this plea was debated at a First Hearing before the Lord Ordinary, Lord Philip. On 3 April 2003 the Lord Ordinary sustained the plea of no jurisdiction and dismissed the petition. On 27 April 2004 an Extra Division (Lords Kirkwood, Hamilton and Macfadyen) refused a reclaiming motion against the Lord Ordinary's interlocutor. The appellant now appeals to your Lordships' House.

*Background*

31. This case raises a novel and important issue about the territorial extent of the supervisory jurisdiction of the Court of Session in cases where the jurisdiction is sought to be exercised over a person or body whose decisions affect persons in Scotland but which carries out its work throughout Great Britain or, as the case may be, throughout the United Kingdom. The legislation with which we are concerned in this case extends throughout the United Kingdom, as it extends to Northern Ireland: see section 170(6) of the Immigration and Asylum Act 1999 ("the 1999 Act"). So, in the interests of brevity, I shall refer to such a person or body simply as a United Kingdom body.

32. It is not in doubt that a decision by a United Kingdom body which affects persons in Scotland and is made in Scotland is subject to the supervisory jurisdiction of the Court of Session. The question which arises in this case is whether the supervisory jurisdiction is available where the United Kingdom body makes a decision affecting persons in Scotland but that decision is made in England. If that question is answered in the affirmative, a further question arises. This is how the issue of jurisdiction is to be resolved where, because the decision was made there, it can also be judicially reviewed in England. These questions have not had to be considered hitherto, because it was not the respondent's practice to challenge the jurisdiction of the Court of Session in cases where determinations affecting asylum-seekers in Scotland were made by adjudicators or by the Immigration Appeal Tribunal sitting in England. It was not until the issue of jurisdiction was raised by Lord Hamilton in May 2002 during the course of a First Hearing in an unreported case, that he began to take this plea.

33. Two other applications for judicial review by asylum seekers were reported to the Inner House by the Lord Ordinary under Rule of Court 34.1. On the joint motion of the parties they were heard by the Extra Division together with this case: *Struk v Secretary of State for the Home Department* 2004 SLT 468 and *Mfumu v Secretary of State for the Home Department* (unreported) 27 April 2004. They were cases where the adjudicator's determination was made in Glasgow where the petitioners were resident, but the Immigration Appeal Tribunal's determination was made in England. The respondent did not take a plea of no jurisdiction in those cases. It was admitted on his behalf by the Advocate General that the Court of Session's supervisory jurisdiction extended to the Immigration Appeal Tribunal's refusal of leave to appeal against the determination of an adjudicator sitting in Scotland: *Struk*, 2004 SLT 468, 470K-L. The Extra Division was satisfied that the Court of Session was entitled to exercise its supervisory jurisdiction over a determination of the Immigration Appeal Tribunal made in England refusing leave to appeal against a determination of an adjudicator sitting in Scotland, even though the petitioner did not seek judicial review of the determination by the adjudicator: *Struk*, p 471B-C.

34. The Advocate General did not suggest that the concession that was made in *Struk* and *Mfumu* was mistaken or that those cases had been wrongly decided. It should however be noted that the Lord Ordinary was told by counsel for the Advocate General in *Struk* that the respondent's position was that where the determination of the adjudicator was made in Scotland an application to the Immigration Appeal Tribunal should be treated as taking place in Scotland also: 2004 SLT 468, 470E-F. This resort to fiction was a necessary consequence of the respondent's basic argument, which is that the question whether a decision is subject to the supervisory jurisdiction of the Court of Session has to be resolved by looking to the place where the decision was made.

35. Mr Bovey QC for the appellant submitted that the Court of Session had concurrent jurisdiction with the High Court in England over the determinations which were made by the adjudicator and the Immigration Appeal Tribunal in this case. He said that this was the position at common law. He then submitted that, if this was not so, the Court of Session had jurisdiction by virtue of sections 20 and 46 of and rule 1 of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"). Section 46(1) provides that for the purposes of the Act the seat of the Crown as determined by that section shall be treated as its domicile. Rule 1 of Schedule 8 provides that, subject to the following rules of that Schedule, persons shall be sued in the courts for the place where they are domiciled. It should be noted that the question

whether the Court of Session had jurisdiction under the statute was not dealt with either by the Lord Ordinary or by the Extra Division, as it was not in dispute before them that the provisions of that Act did not apply to the review of decisions of tribunals: 2004 SLT 461, 463D-E.

36. In my opinion the question whether the Court of Session has jurisdiction always has to be considered in the first instance with reference to what is provided for by Part III of the 1982 Act. On the one hand there is the code of jurisdictional rules in Schedule 8 on which Mr Bovey relies. On the other hand there is the exclusion from Schedule 8 of the proceedings listed in Schedule 9 whose jurisdictional rules are continued in existence by section 21(1). The code of jurisdictional rules in Schedule 8 replaces the common law where these rules apply. The proceedings listed in Schedule 9 continue to be regulated by the common law in so far as they are not subject to rules provided for by statute. I propose therefore to consider into which Schedule this case falls, and to what effect, before examining the issues raised by Mr Bovey's submission that jurisdiction in this case is regulated by the common law.

*The 1982 Act*

37. The background to the Scottish provisions of the 1982 Act is to be found in the Report of the Scottish Committee on Jurisdiction and Enforcement, whose chairman was the Hon Lord Maxwell, which was published in June 1980 ("the Maxwell Committee"). That report has, of course, to be read together with the Brussels Conventions, including the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the 1971 Protocol annexed to that Convention which the 1982 Act was designed to implement: see the relevant definitions in section 1(1) of the 1982 Act. For convenience of reference the 1968 Convention, as amended, is set out in Schedule 1 to the 1982 Act: see section 1(2)(a). Article 1 provides that the Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal, but that it shall not extend to, among other things, administrative matters.

38. The Maxwell Committee was of the opinion that the opportunity should be taken to codify the rules of jurisdiction in civil proceedings for Scotland. In para 10.10 of their Report the Committee summarised the principal features of the rules whose adoption they recommended for the purposes of this exercise. Among these features were the following:

"(1) These Rules would be applied by the Scottish courts, with certain exceptions referred to below, wherever the Convention does not apply, whether because the subject-matter of the dispute is excluded from the Convention or because the defender is not domiciled in another Contracting State.

(2) The Rules would in effect supersede the Scottish common law rules of jurisdiction in civil proceedings and the statutory provisions of a general character relating to such proceedings (for example, section 6 of the Sheriffs Courts (Scotland) Act 1907 as amended and the Law Reform (Jurisdiction on Delict)(Scotland) Act 1971…."

39. As has already been mentioned, among the matters which fall outside the scope of the Convention are what it describes in article 1 as "administrative matters". In paras 13.200 – 13.201 of their Report the Maxwell Committee set out their recommendations with regard to the matters of this kind:

"13.200 We also think it appropriate that the same rules of jurisdiction should apply to administrative matters as to other civil actions. Under our present law, unlike that of most contracting states, no distinction is normally drawn between proceedings involving administrative authorities and other civil proceedings, and the same rules of jurisdiction apply. We therefore recommend that the rules proposed in this chapter should apply, both the rules derived from the convention and the additional rules not derived from the convention. The additional rules should apply even though the defender is domiciled in another contracting state: see 13.198.

13.201 In this context it is important to note that:-

…

(b) these rules of jurisdiction are only intended to supersede existing common law rules of jurisdiction and statutory provisions of a *general* character. Thus statutory rules conferring jurisdiction in respect of specific administrative matters will not be superseded."

40. The provisions of the 1982 Act relating to Scotland are set out in Part III of the Act. Section 20(1) provides that, subject to Council Regulation (EC) No 44/2001 of 22 December 2000, to Parts I and II and

to the following provisions of Part III, Schedule 8 has effect to determine in what circumstances a person may be sued in civil proceedings in the Court of Session or in a sheriff court. It is common ground that Part II of the Act, which allocates jurisdiction within the United Kingdom where the subject matter of the proceedings is within the scope of the Regulation, does not apply to this case. The Regulation does not extend to administrative matters, and proceedings on appeal from, or for review of, decisions of tribunals are excluded from the rules for allocation set out in Schedule 4 by para 4 of Schedule 5 read together with section 17(1) of the 1982 Act.

41. Rule 1 of Schedule 8 to the 1982 Act provides that, subject to the following rules of that Schedule, persons shall be sued in the courts for the place where they are domiciled. Mr Bovey submits that applications to the supervisory jurisdiction of the Court of Session are civil proceedings for the purposes of the 1982 Act. So rule 1, read together with section 46(1) and section 46(3)(a) of the 1982 Act, applies to this case. Section 46(1) provides:

> "For the purposes of this Act the seat of the Crown (as determined by this section) shall be treated as its domicile."

Section 46(3)(a) provides that the Crown in right of Her Majesty's government in the United Kingdom has its seat in every part of, and in every place in, the United Kingdom.

42. If Part III of the 1982 Act had stopped there, the answer to the question of jurisdiction in this case would have been provided by the provisions on which Mr Bovey relies. I have no difficulty in accepting, as a general proposition, that proceedings which are brought in the Court of Session for the exercise of its supervisory jurisdiction are civil proceedings within the meaning of section 20(1) of the 1982 Act. Prior to 30 April 1985, when the procedure under rule 260B of the Rules of the Court of Session 1965 (now Chapter 58 of the Rules of the Court of Session 1994) was brought into effect by Act of Sederunt (Rules of Court Amendment No 2) (Judicial Review) 1985 (SI 1985/500), the procedure that was adopted in proceedings of this kind were indistinguishable from that used for civil proceedings generally.

43. *Brown v Hamilton District Council* 1983 SC (HL) 1 and *Stevenson v Midlothian District Council* 1983 SC (HL) 50, for example, in which Lord Fraser of Tullybelton's comments on the need for reform of the procedure are to be found at pp 49 and 59 respectively, were both cases in which the supervisory jurisdiction was being invoked against a local authority. No one would have doubted at that time that these cases, of which many other examples can be given, fell within the description of civil proceedings. In each of these two cases the local authorities were called defenders. The conclusions in the summons that were served on them included, in *Brown's* case, conclusions for declarator, implement and damages and, in *Stevenson's* case, conclusions for declarator, reduction and interdict. Orders to this effect are all orders that the court now has power to make under rule 58.4 of the 1994 Rules. The fact that rule 58.3(1) provides that an application to the supervisory jurisdiction of the Court of Session must be made by petition for judicial review does not alter the fact that they are civil proceedings within the meaning of section 20(1) of the 1982 Act. In *West v Secretary of State for Scotland* 1992 SC 385 it was observed that, since rule 260B of the Rules of Court 1965 was introduced by Act of Sederunt without any further enabling power having been conferred on the court by general legislation, it was a procedural amendment only which did not and could not alter in any respect the substantive law.

44. But Part III of the 1982 Act did not stop there. Section 21(1), which is headed "Continuance of certain existing jurisdictions", provides:

> "Schedule 8 does not affect –
>
> (a) the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds;
>
> (b) without prejudice to the foregoing generality, the jurisdiction of any court in respect of any matter mentioned in Schedule 9.

Schedule 9, which is headed "Proceedings excluded from Schedule 8", contains a list of proceedings of various descriptions which includes the following:

> "12. Appeals from or review of decisions of tribunals."

Section 50 provides that, unless the context otherwise requires, "tribunal" means a tribunal of any description other than a court of law. In my opinion any person or body exercising functions of a judicial character, other than a court of law, falls within this description. It is plain that the Immigration Appeal Tribunal is a "tribunal" within the ordinary meaning of that word. I would hold that its ordinary meaning includes an adjudicator exercising functions under the 1999 Act.

45. What then is the effect of the 1982 Act as regards appeals from or review of decisions of tribunals? In my opinion the answer to the question whether the Court of Session has jurisdiction in such proceedings must be found in the statutory rules, if any, which identify the court which has jurisdiction in respect of appeals from or the review of decisions of the particular tribunal or, if there are no such rules, in the common law. Para 13.201(b) of the Report of the Maxwell Committee suggests that it was the fact that such proceedings are normally the subject of statutory rules that led to the decision to include appeals from or review of decisions of tribunals in Schedule 9. But the wording which Schedule 9 uses to describe proceedings of that kind is unqualified. It does not restrict this exclusion from Schedule 8 to proceedings by way of appeal or review that are provided for by statute.

46. Mr Bovey said that, as the process now known as judicial review was not part of the law of Scotland in 1982, it was not within the scope of the word "review" in paragraph 12. He referred to the observation by the Lord Chancellor, Lord Lyndhurst, in *Campbell v Brown* (1829) 3 W & S 441, 448, quoted in *West v Secretary of State for Scotland* 1992 SC 385, 396, that jurisdiction was given to the Court of Session, not to review the presbytery's judgment on its merits, but to take care to keep the court of presbytery within the line of its duty and conform to the provisions of the Act of Parliament. But the Lord Chancellor's words should not be taken out of their context. The word "review" in paragraph 12 of Schedule 9 must be taken to mean something different from the word "appeal". Its ordinary meaning includes proceedings by way of judicial review, irrespective of whether a jurisdiction in respect of such proceedings is conferred by statute.

47. Provision is made in Part III of Schedule 4 to the 1999 Act for appeals from an adjudicator to the Immigration Appeal Tribunal and, in its turn, from the Immigration Appeal Tribunal to what para 23(1) refers to as "the appropriate appeal court". Para 23(3) of the Schedule provides:

" 'Appropriate appeal court' means –

(a) if the appeal is from the determination of an adjudicator made in Scotland, the Court of Session; and

(b) in any other case, the Court of Appeal."

The exclusion of appeals from tribunals from Schedule 8 to the 1982 Act enables effect to be given to the rules relating to appeals laid down by the statute. This means that the Court of Session has jurisdiction if the appeal is from the determination of an adjudicator made in Scotland. In any other case it does not. But the 1999 Act makes no provision for the judicial review of determinations by an adjudicator or by the Immigration Appeal Tribunal. It leaves this to the common law. So it is to the common law that one must go to discover the rules which identify the circumstances in which proceedings for the judicial review of determinations by these tribunals may be brought in the Court of Session.

*The common law*

48. I take as my starting point the purpose for which the supervisory jurisdiction of the Court of Session may be exercised. It is to ensure that the person or body to which a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or other instrument does not exceed or abuse that jurisdiction, power or authority or fail to do what it requires: see *West v Secretary of State for Scotland* 1992 SC 385, 412-413. But, for the reasons that I have already explained, it is only where the Court of Session is being asked in the exercise of its supervisory jurisdiction to review the decision of a tribunal within the meaning of paragraph 12 of Schedule 9 to the 1982 Act that the question arises whether it has jurisdiction to do so at common law. In all other cases of judicial review the rules that regulate its jurisdiction are those set out in Schedule 8 to the 1982 Act.

49. Where tribunals exercise a jurisdiction that is given to them by statute, it is to the statute under which that jurisdiction is exercised that one must look to see whether the supervisory jurisdiction of the Court of Session is available. The supervisory jurisdiction has its origins in the principle that, where an excess or abuse of the power or jurisdiction conferred in a decision-maker is alleged, the Court of Session in the exercise of its function as the supreme court has power to correct it: *West*, p 395. For that jurisdiction to be exercised however there must be

some connection between Scotland, within which the functions of the Court of Session as the supreme court are exercised, and the power or jurisdiction conferred on the decision-maker. As a general rule the Court of Session has power to intervene where the excess or abuse of power gives rise to a wrong done or a harm suffered in Scotland. But it can only do so in the case of a statutory tribunal which exercises its functions in Scotland or whose proceedings are governed by Scots law. Rule 2(m) of Schedule 8 to the 1982 Act, which provides that a person may be sued in the Court of Session in proceedings concerning an arbitration which is conducted in Scotland or in which the procedure is governed by Scots law, gives effect to the same principle. A decision that is taken outside Scotland under the law of another part of the United Kingdom is not subject to the supervisory jurisdiction of the Court of Session just because the effects of its decision are felt within Scotland.

50. The part of the United Kingdom within which a tribunal is constituted will normally determine the system of law in accordance with which the tribunal is required to operate. In the present case however the appellate authorities for which provision was made in Part IV of the 1999 Act (now replaced by the unified appeal system provided for by section 26 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004) exercised a jurisdiction that extended to all parts of the United Kingdom. They were designed to enable the United Kingdom to fulfil its obligations under the 1951 Convention relating to the Status of Refugees, irrespective of the place within the United Kingdom that the asylum seeker happened to be for the time being. The decisions which they were required to make had implications throughout the United Kingdom. Decisions to grant or to refuse leave to enter or to remain are made with reference to the United Kingdom as a whole, not to part of it.

51. No rules were laid down by the statute to regulate the place where, or the system of law by reference to which, the appellate authorities were to perform their functions. The places where they exercised their functions during the relevant period appear to have been those where it was most convenient for them to be exercised. The normal administrative practice of the Immigration Appellate Authority was to assign an appeal by an asylum seeker to an adjudicator at the hearing centre nearest to his address as stated on the notice of appeal. One of the hearing centres for this purpose was located in Glasgow. The hearing before the adjudicator in the appellant's case took place in Durham to suit the convenience of the appellant's solicitor. A letter that was sent to the appellant in Glasgow on 21 February 2002 by the Immigration Appellate Authority told him that any application for leave

to appeal to the Immigration Appeal Tribunal was to be submitted to the Secretary to the Immigration Tribunal at an address in Loughborough. The letter that was sent to him in Glasgow on 28 March 2002 informing him that leave to appeal had been refused was sent from an address of the Immigration Appeal Tribunal in London. This was the address to which, according to a notice at the foot of the letter, any further correspondence to the tribunal was to be sent. This appears also to be the place where all applications for leave to appeal were dealt with by the tribunal, irrespective of the place where the determination by the adjudicator was made.

52. It cannot be said on these facts that the exercise by the appellate authorities of their functions under the 1999 Act in this case was carried out under a system of law that applied in one part of the United Kingdom only. Furthermore, the appellant was at all relevant times living in Glasgow. So the adverse consequences to him of the decisions that were taken by the appellate authorities in England under a jurisdiction that was exercisable throughout the United Kingdom were liable to be felt by him in Scotland. I would hold that this was a sufficient connection with Scotland to bring their decisions within the supervisory jurisdiction of the Court of Session. But, as the appellate authorities were sitting in England when these decisions were taken, it appears that they were subject also to the concurrent jurisdiction of the High Court in England and Wales. This raises the question whether, as there was a concurrent jurisdiction that was available to be exercised in England and Wales as well as in Scotland, the supervisory jurisdiction of the Court of Session ought to be exercised in this case.

*Declinature of jurisdiction*

53. It is important to appreciate that the exercise by the Court of Session of its supervisory jurisdiction is, in principle, not a discretionary remedy. Every person who complains that he has suffered a wrong because of an excess or abuse of the power or jurisdiction conferred in a decision-maker is entitled to apply to the Court of Session for judicial review under Chapter 58 of the Rules of Court as of right in exactly the same way as he could have done by way of an ordinary action before the Rules of Court were amended in 1985. As has already been noted, that amendment was a procedural amendment only which did not and could not alter in any respect the substantive law.

54. The principle by reference to which the jurisdiction of the Court of Session is exercised was described by Lord Kinnear in *Sim v Robinow* (1892) 19 R 665 in a passage as to which, in *The Abidin Daver* [1984] AC 398, 411, Lord Diplock stated English law and Scots law may now be regarded as indistinguishable: see also *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 474-475, per Lord Goff of Chieveley. Commenting on the defender's plea of forum non conveniens Lord Kinnear said 19 R 665, 668:

> "The general rule was stated by the late Lord President in *Clements v Macaulay*, 4 Macph 593, in the following terms:- 'In cases in which jurisdiction is competently founded a court has not discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. Judex tenetur impertiri judicium suum; and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence.' And therefore the plea [of forum non conveniens] can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

In *Spiliada*, at p 474A-C, Lord Goff recognised that jurisdiction is founded as of right where a party has been served with proceedings in a court where jurisdiction is competently founded. He said that it was proper to regard what he described as the classic statement by Lord Kinnear of forum non conveniens as expressing the principle now applying in both jurisdictions. He added that an earlier statement of the same principle, in similar terms, was to be found in the speech of Lord Sumner in *Société du Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"* 1926 SC (HL) 13, 22.

55. In *Sokha v Secretary of State for the Home Department* 1992 SLT 1049 the petitioner, who was an asylum seeker who had no connection with Scotland apart from the fact that he had consulted a Scottish solicitor, sought judicial review by the Court of Session of the decision by an immigration officer to detain him pending the giving of directions and his possible removal from the United Kingdom. The Home Secretary accepted that the Scottish courts had jurisdiction under section 16 of the 1982 Act because the Home Secretary was domiciled in Scotland as well as in England. But he pleaded forum non

conveniens on the ground that the English courts were the more appropriate forum. The Lord Ordinary, Lord Prosser, sustained the plea and dismissed the petition. The case is of interest in the present context because Lord Prosser accepted that the general rule referred to in *Sim v Robinow* applied to petitions for judicial review in the same way as it does to ordinary actions. At p 1053A he said that Lord Kinnear's formulation of the general rule, and of what was required for a departure from it, remains a correct statement of the law.

56. In my opinion, provided always that the application to the supervisory jurisdiction is competent and the Court of Session has jurisdiction over the exercise of the power that has been given to it by the decision-maker, the court is bound to entertain the application. To put the matter another way, if the petitioner is entitled to a remedy for an abuse of power by the decision-maker such as reduction, damages or interdict, the court must provide the remedy unless the petitioner is barred by mora, taciturnity and acquiescence or is subject to the plea of forum non conveniens. As Lord Prosser said in *Hanlon v Traffic Commissioner* 1988 SLT 802, 806:

> "The fact that a remedy may be described as 'equitable', and the fact that the court is exercising a discretionary and supervisory jurisdiction, does not seem to me to mean that the court should embark upon a balancing of interests where a substantive right has been denied."

57. This feature of the Scottish system of judicial review suggests that it would only be in exceptional circumstances, if at all, that the Court of Session would be entitled to decline to exercise a jurisdiction that it was otherwise bound to exercise. Of course, as Lord President Rodger explained in *King v East Ayrshire Council* 1998 SC 182, 194, the court is not bound to reduce a decision reached by an administrative body even where it is satisfied that they erred in law in reaching their decision. In that sense the supervisory jurisdiction of the Court of Session is discretionary. But I do not think that the mere fact that it has a supervisory jurisdiction which it shares with courts in other parts of the United Kingdom provides the Court of Session with a discretion as to whether or not it should exercise its jurisdiction when a petitioner who can establish that it has jurisdiction to provide him with a remedy calls upon it to do so.

58. In *R v Commissioners for the Special Purposes of the Income Tax Acts, Ex p R W Forsyth Ltd* [1987] 1 All ER 1035 the Crown applied to strike out or to stay proceedings on the ground that the court in England had no jurisdiction over a commissioner sitting in London who was dealing with a purely Scottish matter and that, even if there were jurisdiction in the High Court as well as the Court of Session, it would be right to stay the proceedings in England in the interests of comity. Macpherson J refused the application to strike out. As he put it at p 1038j, it seemed to him that he should beware of ruling that the High Court was wholly without jurisdiction as this might lead to later problems. But he agreed that Scotland was the more appropriate forum and stayed the proceedings. He referred in the course of his discussion of that part of the argument to Lord Diplock's acknowledgment in *The Abidin Daver* [1984] AC 398, 411, of the Scottish legal doctrine of forum non conveniens. Although he did not say so in as many words, he was in effect applying that doctrine when he decided that the proceedings should be stayed.

59. The Advocate General suggested that Macpherson J's decision in that case showed that the critical question, where there was concurrent jurisdiction in both the Court of Session and the High Court, was the place where the originating decision was made. But in my opinion that submission misreads Macpherson J's decision, and it is contradicted by the general rule referred to in *Sim v Robinow.* As the passage from the opinion of Lord Justice Clerk (later Lord President) Inglis in *Clements v Macaulay* (1866) 4 M 583, 593 which Lord Kinnear quoted in *Sim v Robinow* at p 668 explains, if the court has jurisdiction it has no discretion as to whether or not it should exercise it. So the plea of forum non conveniens can never be sustained unless the court is satisfied that there is some other tribunal having competent jurisdiction in which the case may be tried more suitably for the interests of the parties and for the ends of justice.

60. The respondent does not seek to argue that the doctrine of forum conveniens applies to this case. His only plea is that the Court of Session has no jurisdiction. I would hold that the Court of Session has jurisdiction in these proceedings at common law. I respectfully disagree with the Extra Division that the court's supervisory jurisdiction does not extend to the determinations that were made in this case because they were made in England. In my opinion the facts (1) that the petitioner was resident in Scotland at the time when the determinations were made, (2) that their harmful effects were liable to be felt by him in Scotland and (3) that the determinations were made in the exercise of a statutory jurisdiction which extends throughout the United Kingdom, taken

together, indicate that there is a sufficient connection with Scotland for the supervisory jurisdiction to be exercised. I would repel the plea of no jurisdiction.

61. Although the Advocate General did not seek to base his argument on the principle of forum non conveniens, it may be worth adding these comments. Cases where jurisdiction can competently be founded both in England and in Scotland are not at all unusual. The unusual feature of this case is that, while the jurisdiction of the appellate authorities extended throughout the United Kingdom, Parliament provided in para 23(3) of Schedule 4 to the 1999 Act as to how a conflict of jurisdiction within the United Kingdom was to be resolved in the case of an appeal from the Immigration Appeal Tribunal. The statutory rule is that the appropriate court is identified by the place where the determination of the adjudicator was made. The common law principle of forum non conveniens is more flexible. But it shares with the statutory rule the idea that the court where the proceedings should be brought is the court which is "appropriate". Lord Goff drew attention to this point in *Spiliada*, at pp 474E-475C. As he put it at p 474F-G, it is important not to be mislead by the Latin phrase into thinking that the question at issue is one of practical convenience. He pointed out that in *Société du Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"* 1926 SC (HL) 13, 18 Lord Dunedin said that the proper translation of the Latin words, so far as the plea was concerned, was "appropriate".

62. There is clearly much to be said for regarding the statutory rule as the best guide, for the purposes of the plea of forum non conveniens, as to whether in any given case the appropriate forum for judicial review is the Court of Session or the High Court. But it would not be right to treat this as a rule that was inflexible. The question, after all, is where the issue may be tried more suitably for the interests of all the parties and the ends of justice. All other things being equal, it will normally be possible to resolve the issue by reference to the place where the determination of the adjudicator was made rather than the petitioner's place of residence. But in my opinion the facts show that it would not be appropriate to resolve it in that way in this case.

63. The Advocate General accepts that, until the issue was raised for the first time by Lord Hamilton in May 2002, it had been his practice not to challenge the jurisdiction of the Court of Session in proceedings by petitioners resident in Scotland for judicial review where the decision of the adjudicator was made in England. The appellant was acting in accordance with the usual practice at the time when in April 2002,

following the refusal of his application for leave to appeal, he sought the advice of a Scottish solicitor, and his solicitor was acting in accordance with the usual practice at the time when he advised that proceedings should be brought in the Court of Session regardless of where the adjudicator had sat. The application for judicial review would have been out of time in England when the petition was lodged in the Court of Session in August 2002. But the same objection is not available under the Scottish procedure. In my opinion it would be unfair to deprive the appellant of that advantage at this stage in these circumstances. Otherwise he would be left without a remedy.

*Conclusion*

64. I would allow the appeal and repel the respondent's plea of no jurisdiction. The interlocutors of the Court of Session should be recalled and the appellant's petition remitted to the Lord Ordinary to proceed as accords.

**LORD SCOTT OF FOSCOTE**

My Lords,

65. I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry and am in agreement with them that this appeal should be allowed. The issue to be decided by your Lordships has been expressed as being whether or not the Court of Session has jurisdiction to deal with the appellant's complaint that his application for leave to appeal to the Immigration Appeal Tribunal (the "IAT") from the adjudicator's refusal of his asylum application ought not to have been refused. True it is that the appellant's petition to the Court of Session, presented in August 2002, sought the judicial review by the Court of Session not only of the IAT's refusal of leave to appeal but also of the adjudicator's dismissal of his asylum application. But the avenue for relief, prescribed by the Immigration and Asylum Act 1999 if the adjudicator's dismissal of the asylum application is claimed to be flawed, is an appeal to the IAT and the appellant duly applied for leave to appeal. If his application for judicial review of the IAT's refusal of leave should fail, I find it very difficult to see how he can have any other avenue for relief.

66. When issues are raised as to whether or not a court of law has jurisdiction to deal with a particular matter brought before it, it is necessary to be clear about what is meant by "jurisdiction". In its strict sense the "jurisdiction" of a court refers to the matters that the court is competent to deal with. Courts created by statute are competent to deal with matters that the statute creating them empowered them to deal with. The jurisdiction of these courts may be expressly or impliedly limited by the statute creating them or by rules of court made under statutory authority. Courts whose jurisdiction is not statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court. But whether or not a court has jurisdictional limits (in the strict sense) there are often rules of practice, some produced by long-standing judicial authority, which place limits on the sort of cases that it would be proper for the court to deal with or on the relief that it would be proper for the court to grant. The distinction was referred to by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563. He said:

> "The word 'jurisdiction' and the expression 'the court has no jurisdiction' are used in different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, ie that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

These comments were endorsed by Diplock LJ (as he then was) in *Garthwaite v Garthwaite* [1964] P 356. He referred with approval (at p 387) to what Pickford LJ had said and continued:

> "In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise

> its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances."

67. The doctrine of forum non conveniens is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of forum non conveniens do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of forum non conveniens could never be a bar to the exercise by the other court of its jurisdiction.

68. In the present case, the Secretary of State's plea of no jurisdiction, taken as an objection to the Court of Session hearing the appellant's judicial review application, raises, in my opinion, the same ambiguity as was referred to by Pickford LJ and Diplock LJ in the cases cited. The ground of the objection is that the hearings before the adjudicator and the IAT took place in England but there has been some lack of clarity, in my respectful opinion, as to whether it is said that the Court of Session therefore lacks competence to deal with the application; or whether it is said that the circumstance that the hearings took place in England makes it improper for the Court of Session to entertain the application.

69. If the plea is indeed based on a lack of competence, a lack of jurisdiction in the strict sense, I would, for my part, have no hesitation and find no difficulty in rejecting it. The appellant's complaint about the IAT's refusal of leave to appeal cannot simply be that the IAT exercised its discretion wrongly, but has to be either that the IAT must have misdirected itself in some critical respect so that its decision was legally flawed or that its decision was so unreasonable as to be outside the bracket of discretion within which a decision to refuse leave could lawfully be reached. In short, the appellant's contention must be that in the circumstances of this case the refusal of leave was unlawful.

70. If the refusal of leave to appeal was unlawful, the appellant's application for leave to appeal is still outstanding. The appellant has the right, under the 1999 Act, not to be removed from the United Kingdom

as a failed asylum seeker until his statutory rights of appeal have been exhausted. And, since he is resident in Scotland, he is surely entitled to look to the courts of Scotland for protection against unlawful removal. The Court of Session must, therefore, have jurisdictional competence to review the legality of any directions given by the Home Secretary for the removal of the appellant from Scotland. And it must, in my opinion, follow that the Court of Session has competence, ie jurisdiction in the strict sense, to review the legality of the IAT's refusal to grant the appellant leave to appeal against the adjudicator's decision.

71. The critical issue, therefore, is whether in the circumstances of this case it would not be proper for the Court of Session to exercise its jurisdictional competence in order to review the legality of the IAT's refusal of leave. There are two particular features of this case which, in my opinion, make it impossible to say that it would not be proper for the Court of Session to do so.

72. First, the Court of Session has hitherto exercised its supervisory jurisdiction in cases where determinations affecting asylum seekers in Scotland have been made by adjudicators or by the IAT in England (see paragraph 33 of Lord Hope's opinion). It was, presumably, in reliance on this practice that the solicitor for the appellant commenced the appellant's judicial review application in Scotland. Second, the appellant is now heavily out of time for making a similar judicial review application to the High Court in England. It is possible that in the circumstances of this case the High Court might extend time but the appellant would be at the mercy of the court and could not commence the proceedings as of right.

73. Had it not been for these two features of the case I would have been of the opinion that it would not have been proper for the Court of Session to have exercised jurisdiction.

74. The 1999 Act constitutes United Kingdom law, the law, therefore, of Scotland and the law of England and Wales. The adjudicators whose job it is to deal with asylum applications are United Kingdom officials, who may sit in Scotland or in England and Wales, whichever seems convenient. The IAT is a United Kingdom tribunal which, as I understand it, usually sits in London but which may, and sometimes does, sit in Scotland. In these circumstances rules as to where appeals from the IAT or other challenges to decisions of the IAT should take place are plainly necessary, in order to produce certainty as

to the appropriate forum and to avoid forum non conveniens issues being raised. The 1999 Act said that an appeal from the IAT was to go to the Court of Session if the adjudicator's decision had been made in Scotland and to the Court of Appeal in any other case. Unfortunately, however, no provision was made by the Act for challenges to refusal by the IAT of leave to appeal against adjudicator's decisions. Nevertheless the scheme of the Act, and the high desirability of consistency suggest strongly, in my opinion, that the venue of these challenges, too, should depend upon the place where the decision of the adjudicator had been made. In general, therefore, I would be of opinion that it would not be proper for the Court of Session to exercise its supervisory jurisdiction in cases where the adjudicator's decision had been made in England, and vice versa.

75. However, to apply such a rule to this appellant would not, in view of the two factors that I have mentioned, constitute a just response. I would, therefore, hold, first, that the Court of Session does have jurisdiction, in the strict sense, to review the IAT's refusal of leave to appeal and, second, that in the particular circumstances of this case it would be proper for that jurisdiction to be exercised. I would allow this appeal and make the order suggested by my noble and learned friend Lord Hope of Craighead.

**LORD RODGER OF EARLSFERRY**

My Lords,

76. The appellant, Behrouz Tehrani, arrived at London City Airport on 24 March 2001 and asked for asylum. The immigration officer granted him limited leave to enter. He went to live at first in London, but a few weeks later, under the policy which was current at the time, he was allocated accommodation in Glasgow, where he has been living ever since. On 11 May of the same year, the Home Secretary, who is the respondent in the appeal, rejected his claim for asylum. On 16 May an immigration officer at London City Airport therefore refused Mr Tehrani leave to enter the United Kingdom and gave directions for his removal, at a date and time to be arranged, on a scheduled air service to Iran. Mr Tehrani appealed and the adjudicator treated the appeal as having been brought under section 69(5) of the Immigration and Asylum Act 1999 ("the 1999 Act"). It appears that Mr Tehrani also raised an issue under section 65. On 21 February 2002 the immigration

adjudicator, sitting in Durham, refused his appeal. By virtue of rule 18(1) of the Immigration and Asylum Appeals (Procedure) Rules 2000 (SI 2000/2333), Mr Tehrani required the leave of the Immigration Appeal Tribunal ("the Appeal Tribunal") to appeal to that tribunal. On 28 March 2002 the Vice-Chairman of the Appeal Tribunal, sitting in London, refused him leave to appeal.

77. In about August 2002, ie after the expiry of the three-month time-limit in CPR r 54.5(1) for judicial review proceedings in the High Court in England, Mr Tehrani presented a petition to the Court of Session for judicial review of the decisions of the adjudicator and of the Appeal Tribunal. There is no suggestion that he was forum shopping. On the contrary, it is accepted that, in raising judicial review proceedings in the Court of Session, although the relevant immigration decisions had been taken in England, Mr Tehrani's lawyers were following an established practice for petitioners living in Scotland. The first plea-in-law in the Home Secretary's answers was, however: "The court not having jurisdiction to review the determinations of the adjudicator and Immigration Appeal Tribunal, the petition should be dismissed." The Home Secretary accepts that this was the first case of this kind in which he had taken a plea to the jurisdiction of the Court of Session. The Lord Ordinary (Lord Philip) sustained the plea: 2003 SLT 808. An Extra Division (Lords Kirkwood, Hamilton and Macfadyen) refused Mr Tehrani's reclaiming motion: 2004 SLT 461.

78. Although Mr Tehrani seeks reduction of the adjudicator's decision as well as the decision of the Appeal Tribunal, the real target of his petition is the decision of the Appeal Tribunal. Since Parliament has provided a statutory appeal from the adjudicator's decision in para 22(1) of Schedule 4 to the 1999 Act, judicial review of that decision would be competent only in exceptional circumstances. In this case Mr Tehrani does not aver any exceptional circumstances. Mr Bovey QC said that in practice reduction of the adjudicator's decision tended to be sought in a petition of this kind because experience had shown that the grounds for reducing the Appeal Tribunal's decision to refuse leave to appeal might on occasion demonstrate that the adjudicator's decision was also unlawful and should be reduced. Even assuming, without deciding, that this could be so, in a case like the present the critical determination is that of the Appeal Tribunal. If it is reduced and the tribunal then grants leave to appeal, in principle it should be possible to address any defects in the adjudicator's decision in any substantive appeal hearing. Therefore the essential question in the case is whether the Appeal Tribunal's refusal of leave to appeal can be reviewed by the Court of Session.

79. The first argument advanced by Mr Bovey on behalf of the appellant was based on the common law; the second was based on the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"). It is convenient to start by quickly clearing away the argument based on the 1982 Act which is not only unsound on its own terms but, as I go on to explain, completely misses the point.

80. Put shortly, Mr Bovey contended that the Court of Session has jurisdiction in the present case because Mr Tehrani's petition for judicial review is a "civil proceeding" for the purposes of section 20(1) of the 1982 Act and Schedule 8 has effect to determine in what circumstances a person may be sued in civil proceedings in the Court of Session. Rule 1 of Schedule 8 provides a general rule (subject to exceptions) that persons shall be sued in the courts of the place where they are domiciled. It is common ground that, by reason of section 46(1) and (3)(a), for the purposes of the 1982 Act, the Home Secretary is domiciled throughout the United Kingdom, including Scotland. Therefore, Mr Bovey submitted, by virtue of rule 1 of Schedule 8, the Court of Session has jurisdiction in these proceedings in which the Home Secretary is the respondent.

81. Counsel acknowledged, of course, that, by reason of section 21(1) of the 1982 Act, Schedule 8 does not affect "the jurisdiction of any court in respect of any matter mentioned in Schedule 9." Para 12 of Schedule 9 mentions "Appeals from or review of decisions of tribunals". But Mr Bovey submitted that the term "review" in para 12 does not cover judicial review: so the general rule in para 1 of Schedule 8 applies.

82. Mr Bovey pointed out – rightly – that, before the change in the procedures of the Court of Session in 1985, the expression "judicial review" was not current as a term of art in Scots law. But that is quite different from saying that the legislature did not use the expression "review" to cover the existing remedy by way of action of reduction. In fact, it is not hard to find express provisions in which Parliament had used the term "review" to include review by way of reduction. I need only refer to two instances. Section 112 of the Turnpike Roads (Scotland) Act 1823 (4 Geo 4 c 49) provided that the judgment of the sheriff and certain other officials on various matters was to be "final and conclusive, and shall not be subject to review by advocation or suspension or reduction, or by any process of review whatever...." Reduction is specifically mentioned as a mode of "review". Similarly, under section 30 of the Small Debt (Scotland) Act 1837 (7 Will 4 & 1

Vict c 41) "no decree given by any sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution other than provided by this Act...." As the reference to "any other form of review" shows, for Parliament reduction was just one of a number of forms of review. These examples confirm that, long before 1982, the term "review" was used to refer, inter alia, to the remedy of reduction of a judicial or similar determination. There is nothing in para 12 in Schedule 9 to the 1982 Act to indicate that a narrower meaning was intended: indeed, the reference to "review" would be superfluous if it simply meant "appeal". I am therefore satisfied that, when it came into force, para 12 applied to review of the decision of a tribunal in an action of reduction - the procedure in use in the Court of Session in 1982. It is equally apt to cover the more modern proceedings by way of a petition for judicial review, seeking reduction of the decision of a tribunal such as the Appeal Tribunal. It follows that Schedule 8 does not affect the present proceedings.

83. My Lords, Mr Bovey only embarked on his vain attempt to invoke Schedule 8 to the 1982 Act because the respondent to the petition is the Home Secretary. During the hearing it passed through my mind that it was indeed somewhat surprising that the Home Secretary was the respondent, since, with certain exceptions, the method of convening the Crown as a party to proceedings in the Scottish courts is to be found in the Crown Suits (Scotland) Act 1857 (20 & 21 Vict c44).

84. The Crown Suits Act was not passed to give the Court of Session jurisdiction over the Crown. It had long been accepted that, whether the seat of government was in Edinburgh or London, in an appropriate case the Crown could sue and be sued in the Court of Session. Lord Maclaren dealt with the point in *Somerville v Lord Advocate* (1893) 20 R 1050, 1075:

> "I do not think that it ever was doubted in Scotland that the Crown might be called as a defender in a proper action, either through the officers of state collectively, or through the King's advocate or other officer representing the Crown in the matter of the action; and the reported decision by Balfour which negatives the jurisdiction of the inferior judges also asserts inferentially that His Highness, or his advocate as representing the King, may be convened in the Court of Session in actions and pleas at the instance of any private person."

There is, incidentally, no sign that jurisdiction was asserted on the basis that the Crown was domiciled throughout the United Kingdom, a concept adopted by section 46 of the 1982 Act simply in order to fit the approach of the Act and the underlying Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968. For Scottish common law it is enough that the government of the sovereign, Her Majesty's government, is carried out – now by more than one ministry – throughout the United Kingdom: where appropriate, the Crown can be held responsible for its decisions and acts not only in the Court of Session but, since the Crown Proceedings Act 1947, in the sheriff court too.

85. By the early decades of the 19th century doubts had, however, arisen about the correct form of the instance in cases involving the Crown. In particular, there was doubt as to whether or not the Lord Advocate needed to have a mandate before he could sue or be sued on behalf of the Crown by himself, rather than as one of the Officers of State. The question was discussed in great detail in *King's Advocate v Lord Dunglas* (1836) 15 S 314. Eventually, the Crown Suits (Scotland) Act 1857 was passed to settle this somewhat arid dispute by establishing that the Lord Advocate could always sue or be sued on behalf of the Crown. Section 1 provided that every action or proceeding to be instituted in Scotland on behalf of or against "Her Majesty ... or on the behalf of or against any public department, may be lawfully raised in the name and at the instance of or directed against Her Majesty's Advocate for the time being as acting under this Act." While the Act does not establish that the Court of Session has jurisdiction over the Crown, it presupposes that it does and settles how the Crown is to be convened in proceedings.

86. So from 1857 onwards it would have been clear, for example, that if you wanted to sue the Crown in the Court of Session in respect of some matter for which the Home Secretary was responsible, you would do so by taking proceedings against the Lord Advocate. See, for instance, *Agee v Lord Advocate* 1977 SLT (Notes) 54. In practice, of course, the matter would be handled by the appropriate officials and lawyers dealing with Home Office business. On devolution, when the Lord Advocate became a member of the Scottish Executive, the Crown Suits Act was amended to substitute the Advocate General as the appropriate person to sue in cases involving the United Kingdom Government. See section 125 of, and para 2 of Schedule 8 to, the Scotland Act 1998. So one might have expected the Advocate General, who represented the Home Secretary in the proceedings before the House, actually to have been the respondent to this petition.

87. It appears likely that the practice of making the Home Secretary the respondent in immigration cases goes back to a Court of Session Practice Note: No 1 of 1992, 9 January 1992:

> "1. Practitioners are advised that, where a decision of an adjudicator appointed under section 12 of the Immigration Act 1971 is subject to an application for judicial review in terms of Rule of Court 260B, the adjudicator should not be called as a respondent in the petition but he should receive intimation thereof as a person who may have an interest.
>
> 2. In any such petition, the Home Secretary should be called as respondent."

The intention was plainly to point out to practitioners that the appropriate respondent in the judicial review of a decision of an immigration adjudicator was not the adjudicator but the Home Secretary. This is in line with the decision in *Mackintosh v Arkley* (1868) 6 M (HL) 141 – which might indeed go further and suggest that the adjudicator could not be a person with an interest in a judicial review of his determination. But, in pointing out that the Home Secretary rather than the adjudicator is the appropriate respondent, the Practice Note was not purporting to change the law or to say how the Home Secretary should be called as respondent. Some, at least, of the arguments in the present case would never have seen the light of day if the Advocate General had been called as the respondent on the Home Secretary's behalf under the Crown Suits Act. In my view it would therefore be advisable in future to treat immigration cases in the same way as other cases involving the Home Secretary and to call the Advocate General as the respondent, since that is the method of convening the Crown which is sanctioned by statute for such cases.

88. For the Court of Session to have jurisdiction, two elements must combine. First, the person against whom, or with reference to whom, decree is sought must be subject to the jurisdiction of the court; secondly, the cause or proceeding must be a fit subject for judicial determination and must not belong to the exclusive jurisdiction of another court. Cf Ae J G Mackay, *The Practice of the Court of Session* (1877) vol 1, pp 165-166. Leaving aside cases which are not fit for judicial determination, a defender or respondent may accordingly take a plea of no jurisdiction on either, or both, of two grounds: that he himself is not subject to the jurisdiction of the Court of Session or that (even if he is subject to its jurisdiction) the Court of Session has no

power to grant the remedy which the pursuer or petitioner seeks, because only some other court can do so. An objection of the second kind is really a plea to the competency of the proceedings: the defender or respondent is saying that, if you simply look at the conclusions of the summons or at the remedies sought in the petition, you can see that the Court of Session has no power to give the pursuer or petitioner what he wants. The substance of the plea is reflected in the older phrase, forum non competens, properly used and understood. As Mackay, *Practice of the Court of Session* vol 1, p 274 and note (b), points out, formerly the plea of forum non competens was sometimes used, inappropriately, as an equivalent to the plea of forum non conveniens. This gave rise to Lord Dunedin's observation that, in that context, "competens" should not be translated as "competent" but as "appropriate": *Société du Gaz de Paris v Société Anonyme de Navigation "Les Armateurs Français"* 1926 SC (HL) 13, 18.

89. An example of the first kind of objection is to be found in *Longworth v Yelverton* (1868) 7 M 707. The pursuer sought reduction of the decree of putting to silence which the defender in that action had obtained in earlier proceedings in the Court of Session and this House. The ground on which reduction was sought was that in the earlier action the Court of Session had not had jurisdiction since, contrary to the false averments which he had made, the defender had been domiciled in Ireland rather than Scotland. In the action of reduction the defender admitted that he was domiciled in Ireland. The First Division dismissed the action on the ground that, even though, in an appropriate case, the Court of Session could grant the remedy which the pursuer sought, it could not do so in a case where the defender was domiciled in Ireland and was not otherwise subject to the jurisdiction of the Court of Session. The decision was followed in *Acutt v Acutt* 1936 SC 386.

90. Here, as I have explained, and as would have been immediately obvious if the Advocate General had been called as the respondent, the Court of Session undoubtedly has jurisdiction over the Crown in respect of the responsibilities of the Home Secretary.

91. Moreover, it is clear that a party in Scotland who has been affected by some decision or act of the Crown can take proceedings against the Crown in the Court of Session, even though the decision was taken or the act occurred in England or abroad. So, for instance, in *Cameron v Lord Advocate* 1952 SC 165 the pursuer, who was domiciled in Scotland, sued the Lord Advocate, as representing the Custodian of Enemy Property in Nigeria, for breach of contract. The Custodian was a

Crown servant. As the Lord Ordinary (Lord Mackay) put it, the Lord Advocate disputed his title to defend. Lord Mackay rejected that argument, holding, at p 169, that the term "public department" in section 1 of the Crown Suits (Scotland) Act included:

> "whatever be the colonial department of the Government of the King at any particular time, covering all that department's mandatories, like the Governor-General and his subordinate officers.... I hold that [the Lord Advocate's] competency and right (and therefore his duty) extends to every case, civil and criminal, which is litigated in the Scottish courts, wherever the locus actus may be, or have been. The question of limits depends solely on the locus fori and on nothing else."

92. Perhaps no more striking example could be found than *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* 1963 SC 410; 1964 SC (HL) 117. A company registered in Scotland sued the Lord Advocate as representing the Crown for declarators that it was entitled to compensation for the damage it had sustained as a result of the destruction of its assets in Burma in March 1942 and that the damage was a sum in excess of £2 million. The British Army had destroyed the company's property, on the orders of the commanding officer in Burma, to prevent it falling into the hands of the Japanese. The Lord Advocate was sued in respect of those orders and acts of the British forces in Burma. In the litigation a multitude of points was debated by a cast of distinguished counsel. Two former Lord Advocates heard the case at different stages. Despite the undoubted vigilance of all concerned, no plea to the jurisdiction of the Court of Session was contemplated. And the two pleas to the competency were not general, but limited to specific points. Ultimately this House allowed a proof before answer.

93. It cannot therefore be doubted that, in an appropriate case, the Court of Session would have the power to judicially review a decision of the Home Secretary which affected a party in Scotland, even though the decision in question had actually been taken in England or elsewhere. For instance, the Home Secretary or a Minister of State might sign an order while flying from London to Belfast or while at home in Scotland. The courts do not inquire into such matters since they do not affect their jurisdiction to review the validity of the order. Wherever the order is made or the decision taken, whether by a minister or by an official, it is a decision of a minister of the Crown who is subject to the jurisdiction of the Court of Session. So, for instance, in *Agee v Lord Advocate* 1977

SLT (Notes) 54 the petitioner sought suspension of a deportation order which the Home Secretary had signed in London, a declarator that the order was funditus null and interdict against the Chief Constable from arresting him and from removing him forcibly from the jurisdiction of the court. Leaving aside the particular form of procedure which the petitioner had adopted, a declarator of nullity would undoubtedly have been a competent remedy if the Home Secretary's order had been null. In fact the Lord Ordinary (Lord Kincraig) dismissed the petition, which was manifestly irrelevant.

94. In the present case, of course, the principal decision which the Court of Session is asked to review is not a decision of the Crown but a decision of the Appeal Tribunal sitting in London. The Crown is called as respondent because it may have an interest to uphold that decision: *Mackintosh v Arkley* (1868) 6 M (HL) 141. By taking his plea of no jurisdiction, the Home Secretary is saying that, even though, as a minister of the Crown, he is subject to the jurisdiction of the Court of Session, the court does not have any power to reduce the decision of the Appeal Tribunal because it is a decision of a tribunal in England. In other words, he takes a plea of forum non competens, to the effect that in the present petition Mr Tehrani is seeking a remedy which the Court of Session has no power to grant him. It is because this is the true nature of the Home Secretary's plea that, as I mentioned at the outset, the appellant's argument on the 1982 Act misses the point.

95. In relation to the scope of the Court of Session's power of judicial review, the House was referred to the well-known statements in cases such as *Moss' Empires Ltd v Assessor for Glasgow* 1917 SC (HL) 1, 11 per Lord Shaw of Dunfermline, and *Brown v Hamilton District Council* 1983 SC (HL) 1, 42 per Lord Fraser of Tullybelton. I did not derive any assistance from them, however, since there is nothing to suggest that their Lordships had in mind the territorial extent of the court's powers. At the hearing, both counsel said that they had been unable to identify any case in which the Court of Session had reviewed a decision of a foreign court or tribunal. And indeed counsel did not cite any decision where the point had been addressed specifically.

96. In fact there is at least one very old case, *Eliot v Riddel* (1663) M 13505, where the Court of Session reduced a decision of an English court. The pursuer had wadset, or mortgaged, his lands to the defender in respect of a sum of money which he owed the defender. The wadset contained an irritancy clause under which the pursuer would lose his right of reversion to the lands if the sum in question was not paid

precisely at the due term. Eventually, the defender obtained a "declarator" from "the English Judges" that the sum had not been paid. The pursuer sought reduction of that decree on the ground that he had been unable to appear on the date appointed by the English court because he was lying bedfast "and it were against reason, that the defender by his calamity, should be under such disadvantage, the lands being near double worth the money." The Court of Session held that the action was relevant, in respect of the pursuer's illness at the time and because of the exorbitant advantage that the defender would obtain if the decree should stand. The decision is perhaps interesting because it shows how the Court of Session felt able to exercise its power of reduction in a case where, in the court's view, the English decree threatened to cause injustice to the pursuer in relation to the wadset of his lands in Scotland. But the short report does not suggest that the competency, as opposed to the relevancy, of the proceedings was challenged. The case appears to be nothing more than an isolated example of the Court of Session claiming a jurisdiction to set aside a decree of an English court. At most, the reasoning might seem to have justified the court in interdicting the defender from enforcing the irritancy pending a review by the English court of the English decree.

97. That was how Lord Fleming considered that the Court of Session might have proceeded in *Rutherford v Lord Advocate* 1931 SLT 405. The complainer, who lived and worked in Galashiels, sought suspension of a notice of poinding which was designed to enable the Inland Revenue to recover a sum allegedly due by way of income tax on fees paid to him by a company in Warwickshire. The assessment had been confirmed by the General Commissioners for that county and was therefore final under the Income Tax Act 1918. Lord Fleming held that, before he could suspend the poinding, the complainer would have to get rid of the Commissioners' determination. His Lordship said, at pp 407-408:

> "If the alleged illegality concerns merely the execution of the diligence, this court can deal with that matter, and can deal with it in the course of a process of suspension. But where it is alleged that the diligence is illegal because it proceeds upon invalid warrants granted by General Commissioners in England, then it appears to me that the English courts alone have jurisdiction to determine the question whether the warrants are invalid and to set them aside if found to be so, and to authorise the General Commissioners to take such steps as may be necessary to give redress to the parties."

Lord Fleming clearly considered that the Court of Session had no power to suspend or reduce the determination of the General Commissioners, who were, of course, appointed for, and operated in, a particular division in England. But he was careful to add, at p 408:

> "I think it was competent for the complainer to invo ke the preventive jurisdiction of this court in order to stop the diligence of which he complained, but for the reasons I have indicated I think that the real questions between the parties can only be determined in the English courts."

98. Lord Fleming was undoubtedly displaying what would be the modern judicial reaction to the suggestion that the Court of Session could judicially review a decree of an English tribunal or court. That attitude is surely encapsulated in the crisp observation of Lord President Normand in *Acutt v Acutt* 1936 SC 386, 395 – when considering whether the English courts might assist the pursuer by setting aside the Scottish decree which the Court of Session had no jurisdiction to reduce – that "No court would entertain an action which was in form or substance a reduction of a decree of a foreign court." On the other hand, as the Lord President had pointed out just before making this remark, at common law a court can set aside an invalid foreign decree if it is founded upon by a party in a petitory action. That determination operates only inter partes and has no effect in rem. See also *Jack v Jack* 1940 SLT 122, 124.

99. But is the decision of the Appeal Tribunal which Mr Tehrani asks the Court of Session to reduce "a decree of a foreign court" for these purposes? Certainly, it is the decree of a court or tribunal sitting in England. But the country where a body sits is not an invariable pointer to its nationality. A judge of the Court of Session may appoint himself as commissioner and, along with his clerk and the counsel and solicitors in the case, take evidence in London or, with appropriate diplomatic clearance, in, say, Riga. Likewise, a judge of, say, the Supreme Court of Tasmania may take evidence in Glasgow. If, while in London or Riga, the judge of the Court of Session made some decision which could otherwise be subject to judicial review by the Court of Session, the mere fact that the decision had been made in London or Riga rather than in Edinburgh could not deprive that court of its power to review the proceedings. Similarly, as is explicitly recognised in para 2(m) of Schedule 8 to the 1982 Act, the Court of Session can judicially review the decision of an arbiter in an arbitration in which the procedure is

governed by Scots law, even if the arbitration is conducted outside Scotland.

100. In the present case, the mere fact that the Vice President of the Appeal Tribunal was sitting in London when he refused Mr Tehrani's application for leave to appeal does not mean that his decision is the decision of an English tribunal. The Appeal Tribunal was the creature of the 1999 Act which extends to the whole of the United Kingdom. Under para 6(1) of Schedule 2 to that Act, the Tribunal had to sit anywhere that the Lord Chancellor directed. Until 2002, it was indeed in the habit of sitting outside London – in Cardiff and in Glasgow, for instance – when that was convenient to the parties and their advisers. In 2002, in order to save time and to improve the efficiency of its operations, the tribunal adopted the practice of sitting in London and using video links to take submissions from representatives in other centres, such as Glasgow. But, equally, in theory at least, the tribunal could have set up its main offices in, say, Aberystwyth or Aberdeen and conducted the bulk of its hearings by video link to centres in England. However it arranged its operations and wherever it sat, the Appeal Tribunal remained the same and the law which it applied remained exactly the same. It was, in essence, a United Kingdom body, capable of sitting throughout the United Kingdom and applying exactly the same law throughout the United Kingdom based on a statute extending to the whole of the United Kingdom. Since the law applied by the Appeal Tribunal is just as much part of the law of Scotland as part of the law of England, when called upon to do so, the Court of Session is fully equipped to carry out the core function of judicial review, which is to ensure that the decision-maker acts within, and in accordance with, his legal powers. In that situation it would be much too crude an approach for the Court of Session to regard the Appeal Tribunal as a foreign tribunal for purposes of judicial review simply because it took a decision in London or Cardiff, but as a Scottish tribunal, within the scope of the court's jurisdiction, simply because it took a decision in Glasgow.

101. If it would be wrong to rely simply on the place where the Appeal Tribunal took its decision as determining the jurisdiction of the Court of Session, it would be equally wrong to go to the opposite extreme and to assert that in all cases all the United Kingdom courts enjoy concurrent jurisdiction to review the decisions of the tribunal just because the tribunal could sit and apply the same law in all parts of the United Kingdom. So, for instance, where the asylum seeker was given limited leave to enter at an English port, was living in England, appealed to an adjudicator sitting in England, was refused leave to appeal by the Appeal Tribunal in England and was liable to be removed from England,

there would be no basis for saying that the Court of Session had power to interfere in such wholly English proceedings by judicially reviewing the decision of the Appeal Tribunal. It therefore appears to me that the concession as to jurisdiction made by counsel for the respondent in *Sokha v Secretary of State for the Home Department* 1992 SLT 1049 was unsound. That being so, the issue of forum non conveniens did not really arise in that case. Conversely, even leaving aside article XIX of the Treaty of Union, the High Court would have no power to interfere where all the relevant events had taken place in Scotland. The potential area of concurrent jurisdiction lies in the middle.

102. One situation where there is concurrent jurisdiction is where the adjudicator determined the appeal in Scotland and the Appeal Tribunal refused leave to appeal in England. That was the position in *Struk v Secretary of State for the Home Department* 2004 SLT 468. The petitioner had been living in England when the Home Secretary refused his asylum application. He was then directed to live in Scotland and his appeal against the Home Secretary's decision was heard and refused by an adjudicator in Glasgow. The petitioner's application for leave to appeal to the Appeal Tribunal was refused, the determination being made in London. He petitioned the Court of Session for judicial review. The Extra Division held that the Court of Session had jurisdiction. I agree with their decision but would not adopt their reasoning. I would prefer to base the jurisdiction of the Court of Session on the underlying circumstances of the case.

103. In principle, the Court of Session should have jurisdiction to review the decision of a United Kingdom body, such as the Appeal Tribunal, sitting in England in cases where there is no reason to believe that any decree pronounced by the court would be ineffective and where, at the time he commences the judicial review proceedings, the petitioner is someone in Scotland whose interests are materially affected by the decision and who can therefore legitimately seek the assistance of the Scottish, rather than the English, court. In the circumstances of *Struk v Secretary of State for the Home Department* the petitioner was such a person and, for that reason, the Court of Session had jurisdiction.

104. I would also regard Mr Tehrani as such a person. At the time when he began these proceedings, he had been living in Scotland for over two years, at the direction of the Home Secretary. If he were ultimately unsuccessful in his appeal, the steps to remove him from the United Kingdom would be liable to start in Scotland. In substance, the proceedings concern the fate of someone living in Scotland. In that very

real sense they are Scottish proceedings. Their connexion with England only came about because, without consulting Mr Tehrani and to suit his own convenience, the lawyer then acting for Mr Tehrani asked for the appeal to the adjudicator to be transferred to Leeds. As a result, the adjudicator actually heard the appeal in a satellite court in Durham – a place far removed from Mr Tehrani's port of entry, far removed from where he was living and far removed from where he might ultimately be sent back to Iran. That fortuitous choice of venue has no bearing on the substance of the matter or on the character of the proceedings. Finally, there is no reason to believe that any decree of the Court of Session would be ineffective. In these circumstances the Court of Session can competently grant the remedy of reduction and the court has jurisdiction to entertain Mr Tehrani's petition for judicial review. The decision of Lord Wylie in *Lord Advocate v R W Forsyth Ltd* (1986) 61 TC 1 provides general support for that approach.

105. As I have indicated already, however, in these cases the Court of Session does not have exclusive jurisdiction. Since the Appeal Tribunal, a United Kingdom body, made its determination in England, the High Court must have jurisdiction to review that determination, if asked to do so, even though the proceedings are in substance Scottish and affect the interests of someone living in Scotland. For that reason I consider that in *Lord Advocate v R W Forsyth Ltd* Lord Wylie went too far when he asserted that the Court of Session had exclusive jurisdiction to review the decision of the Special Commissioner under the Income Tax Acts sitting in London. I respectfully agree with the somewhat tentative view of Macpherson J in *R v Commissioner for the Special Purposes of the Income Tax Acts, Ex p R W Forsyth Ltd* [1987] 1 All ER 1035, 1038g-h and j, 1039d-e, that, since the Commissioner's determination had been made in England, the High Court as well as the Court of Session had jurisdiction. It follows that in cases such as the present and *Struk*, and in their mirror images, both the Court of Session in Scotland and the High Court in England can competently review the Appeal Tribunal's decision. I would add one caveat. In the unlikely event of the Appeal Tribunal having decided in Scotland to refuse leave to appeal from an adjudicator in England, any possible implications of article XIX of the Act of Union for the competency of judicial review proceedings in the High Court would have to be considered.

106. Where both courts have jurisdiction, which court should exercise it? In my view the guiding principle in this, as in any other situation where there is more than one court with jurisdiction, is to be found in the well-known passage from the opinion of Lord Kinnear in *Sim v*

*Robinow* (1892) 19 R 665, 668 where, speaking of the plea of forum non conveniens, he said:

> "The general rule was stated by the late Lord President in *Clements v Macaulay*, 4 Macph 593, in the following terms:- 'In cases in which jurisdiction is competently founded a court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. Judex tenetur impertiri judicium suum; and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence.' And therefore the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

On that approach, where both the Court of Session and the High Court have jurisdiction, either court can, and indeed must, exercise its jurisdiction to provide the remedy which is sought, unless the respondent takes a plea of forum non conveniens.

107. As the cases show, the plea requires the court to decide whether there is some other forum which is the appropriate forum for the trial of the action. In a case like the present, therefore, the Court of Session would have to consider whether the High Court was the appropriate forum for the trial of the judicial review proceedings. Since the choice would be between two different forums within the United Kingdom, absent any other consideration, there might be a case for giving a strong preference to the forum chosen by the petitioner: cf *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 476H-477A per Lord Goff of Chieveley. But in the present context it seems to me that it would be wrong to ignore Parliament's indication, in para 23 of Schedule 4 to the 1999 Act, that, where the Appeal Tribunal makes a final determination in an appeal from a determination of an adjudicator made in Scotland, the "appropriate appeal court" to hear any appeal is the Court of Session and, in any other case, the Court of Appeal. It also makes practical sense for the courts of the same legal jurisdiction to deal with the review and any subsequent appeal. Subject to the caveat in para 105 above, I therefore respectfully agree with my noble and learned friend, Lord Hope of Craighead, that the scheme adopted by Parliament provides a touchstone for deciding that, as a general rule, the appropriate forum for the judicial review of a refusal of leave to appeal by the Appeal Tribunal

is the Court of Session where the adjudicator made his determination in Scotland, and the Court of Appeal where the adjudicator made his determination in England or Wales. Practitioners would be expected to choose their forum accordingly. So I agree with the conclusions of the Court of Appeal in *R (Majead) v Immigration Appeal Tribunal* [2003] EWCA Civ 615, per Brooke LJ at paras 10 and 13 and in *Shah v Immigration Appeal Tribunal* [2004] EWCA Civ 1665, per Sedley LJ at para 8.

108. It follows that, if the general rule applied, and a plea of forum non conveniens had been taken, the conclusion in the present case would be that the High Court rather than the Court of Session would be the appropriate forum to review the decision of the Appeal Tribunal, since the adjudicator made his decision in England. In fact, that issue does not arise since the Home Secretary has not taken that plea as a fall-back if his plea to the jurisdiction should fail. And in my view he is right not to have done so. After all, there is actually no other appropriate forum to hear this case since, understandably, Mr Tehrani's advisers did not anticipate that the Home Secretary would take the jurisdiction point and therefore did not apply to the High Court for judicial review before the expiry of the three-month time-bar in CPR r 54.5(1). The fact that the High Court has power under that rule to extend the period for making an application does not mean that it, rather than the Court of Session, is the appropriate court to review the decision of the Appeal Tribunal. In this exceptional situation I would have repelled any plea of forum non conveniens and would have affirmed the jurisdiction of the Court of Session.

109. For these reasons I would allow the appeal, recall the interlocutors of the Extra Division and of the Lord Ordinary, repel the respondent's first plea-in-law and remit the case to the Lord Ordinary to proceed as accords.

**LORD CARSWELL**

My Lords,

110. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry. I agree with their reasons and conclusions and for those reasons I too would allow the appeal and make the order proposed.