

Neutral Citation Number: [2007] EWCA Civ 13

Case Nos: C5/2005/2634
C5/2005/2036

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEALS FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
NO.AS/05728/2004
NO.HX/54826/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 23rd Jan2007

Before :

LORD JUSTICE SEDLEY
LADY JUSTICE ARDEN
and
LORD JUSTICE WALL

Between :

FP (IRAN)	<u>Appellant</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Respondent</u>
MB(LIBYA)	<u>Appellant</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Respondent</u>

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr R Drabble QC & Mr P Richmond (instructed by Clore & Co Solicitors) for the **Appellant**
Ms S Chan (instructed by The Treasury Solicitor) for the **Respondent**

Mr R Drabble QC & Mr G Denholm (instructed by Tyndallwoods Solicitors) for the **Appellant**
Ms S Chan (instructed by The Treasury Solicitor) for the **Respondent**

Judgment

Lord Justice Sedley :

The issue

1. These two appeals raise the same question: what, if anything, can be done where an appellant's lawyers have failed to notify the Asylum and Immigration Tribunal of a change of his or her address, with the result that the appellant knows nothing of the hearing and the appeal is determined against him or her?

The facts: P's case

2. P, an Iranian asylum-seeker, was represented by Punatar and Co solicitors. Her initial, unsuccessful, appeal against the Home Office's rejection of her claim was held by the AIT to have been vitiated by an error of law. On 29 April 2005 they therefore adjourned the appeal to a senior immigration judge, Ms Deborah Taylor, for a full rehearing. It was scheduled for 3 October 2005.
3. Notice of the rehearing was sent out by the AIT to the last known address which they had on record for P, which was in Bury. She had, however, been moved by NASS (the National Asylum Support Service) in March 2004 to an address in Manchester. She had informed her solicitors of this. They had in turn informed the Home Office, but by an oversight they had not informed the AIT.
4. The notice of hearing never reached P. In her absence, the immigration judge said this:
 6. There was no appearance by the Appellant. I am satisfied that she was correctly served with notice of hearing at her last known address. Furthermore, prior to the hearing, the court received a letter from the Appellant's representatives Punatar and Company Solicitors stating that they had closed their immigration department. They had written to the Appellant at her last known address and the letter had been returned to them. They had no further instructions and asked that their firm's name be removed from the court record as acting. A check was made with the solicitors that the address which the court had was the same one as that held by the solicitors. The notice of hearing had also been returned.
 7. Paragraph 56 of the Asylum and Immigration Tribunal Procedure Rules 2005 states that every party must notify the Tribunal in writing of a postal address at which documents may be served on him and of any changes to that address. Until a party notifies the Tribunal of a change of address any documents served on him at the most recent address which he has notified to the Tribunal shall be deemed to have been properly served on him.
 8. Under paragraph 19 (1) of the same Rules the Tribunal must hear an appeal in the absence of a party or his representative if satisfied that

the party has been given notice of the time date and place of the hearing and has given no satisfactory explanation for his absence.

5. Although the Home Office had the Manchester address on file, it is an unfortunate fact that its presenting officer did not bring it to the immigration judge's attention and that she in turn did not ask him what current address the Home Office had on file. There is no reason to attribute these omissions to anything other than inadvertence, but they show how slender the margin of error was.
6. It is also material to note how the error came to be made by Punatar and Co. P's case was part of the workload of a trainee solicitor, Elizabeth Norman. When she left them, on 27 May 2005, to continue her traineeship at Clore and Co (where she again represents P), she was responsible for 392 asylum and immigration cases. As she now candidly and apologetically admits in a witness statement, the failure to notify the AIT, along with the Home Office, of P's change of address was an oversight on her part. Punatar and Co closed their immigration department four days after Ms Norman left them, leaving no firm on the record for P.
7. With the increasing pressure exerted by legal aid cuts on high street solicitors' firms, situations like this are not unusual today. It is inevitable that errors of the kind with which we are concerned will be made from time to time, even by competent and conscientious trainee solicitors such as I have no doubt Ms Norman is.
8. The immigration judge proceeded accordingly to rehear the appeal. Among her reasons for dismissing it was an apparent inconsistency in P's written testimony, as to which the immigration judge said (§13):

The appellant has put forward no explanation for the discrepancy in her written evidence and was not present in court today to answer the points made by [the HOPO].

Later she reminded herself (§19) that the burden of proof, albeit modest, lay upon the appellant, and continued:

She has chosen not to keep in touch with her legal representative nor to have informed the court of any change of address. These are not the actions of a person who is genuinely interested in pursuing her appeal.

9. It is in the nature of the kind of error with which we are concerned that the appellant will not learn about it until it is too late: either, as happened here, when the adverse decision reaches the appellant by a roundabout route (it was returned from Bury to the Home Office, who redirected it to the Manchester address), or when immigration officers arrive to remove her from the United Kingdom. It is without doubt for this reason that the senior immigration judge, Dr Hugo Storey, before whom the eventual application for permission to appeal to this court came, wrote:

As these well-drafted grounds accept, the application is out of time and there is no discretion on the part of the Tribunal to extend time.

Had the application been in time I would have granted permission to appeal. There is an arguable case that the applicant's former representatives negligently misrepresented her address details. Furthermore, the SIJ's observations at para 19 seem to indicate that attendance by the applicant may have resulted in a different approach being taken to the issue of credibility. Whilst the SIJ cannot be criticised for assuming the applicant had been notified, there may arguably have been an error of process in this case amounting to a material error of law.

10. An appellant's notice was eventually able to be filed by new solicitors on 22 November 2005. Moses LJ's grant of permission to appeal on sight of the papers carried an implicit enlargement of time. Subsequently, as the facts crystallised, permission was given to amend the grounds.

The facts: B's case

11. B is a Libyan whose appeal against the Home Office's rejection of his asylum claim was initially dismissed by an adjudicator, Mrs A.K. Simpson, in December 2003, both on refugee grounds and, more marginally, on human rights grounds. Her decision was, however, set aside by the IAT in November 2004 because of a material error of law, and was remitted for rehearing by a different Tribunal. It accordingly came before an immigration judge, Mr P.R. de Haney, on 15 July 2005.
12. B was represented by Noden and Co from 2 October 2003 until they were closed by a Law Society intervention in February 2006. He has since been represented by Tyndallwoods. Like P, he had been first accommodated by NASS in Bury, but in March 2004 had been moved, like her, to Manchester. He asserts that he told Noden and Co of the move. If he did, they failed to inform either the AIT or the Home Office, and themselves continued to write to B at the Bury address, as of course did the AIT. Assuming these to have been the facts, it is fair to assume that B would have attended the rehearing of his appeal had he known about it, and would have taken steps to secure continued representation.
13. Noden and Co were sent notice of the hearing but asserted later that they had not received it. At the allotted time, the immigration judge, as he recorded in his determination, had Noden and Co contacted by telephone. Only an answering machine seems to have responded, and the message left on it produced no return call or appearance. The hearing therefore proceeded in the absence of B and his representatives.
14. In finding against B, the immigration judge said:
 8. The Appellant failed to attend today despite the Respondents having challenged his credibility and the obvious and numerous discrepancies

between his two accounts. I find that this failure to attend serves to underline the fact that this Appellant's credibility is so fundamentally flawed that the discrepancies and quantity of unmitigated lies which he has told cannot be resolved no matter what amount of further evidence could have been supplied.

15. Dr Storey on behalf of the AIT refused permission to appeal in terms less sympathetic than those he used in P's case – understandably so, given the performance of Noden and Co. An appellant's notice having been lodged on 12 September 2005, however, Keene LJ granted permission to appeal on sight of the papers. In this case, as in P's, permission was given to amend the grounds as the facts became clearer.

The Rules

16. The material empowering provision under which the Lord Chancellor has made and amended the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) is s.106 of the Nationality, Immigration and Asylum Act 2002. In its material parts, as amended with effect from 4 April 2005, the same day as the present Rules came into operation, the Act provides:

s.106: Rules

(1) The Lord Chancellor may make rules:

- (a) regulating the exercise of the right of appeal under section 82[[, 83 or 83A] or by virtue of section 109];
- (b) prescribing procedure to be followed in connection with proceedings under section 82[[, 83 or 83A] or by virtue of section 109]

(1A) In making rules under subsection (1) the Lord Chancellor shall aim to ensure:

- (a) that the rules are designed to ensure that proceedings before a Tribunal are handled as fairly, quickly and efficiently as possible, and
- (b) that the rules where appropriate confer on members of the Tribunal responsibility for ensuring that proceedings before the Tribunal are handed as fairly, quickly and efficiently as possible.

(2) In particular, rules under subsection (1):

- (a) must entitle an appellant to be legally represented at any hearing of his appeal;
- (b) may enable or require an appeal to be determined without a hearing;

.....

- (e) may enable or require... the Tribunal to determine an appeal in the absence of parties in specified circumstances:

.....

- (n) may make provision (which may include presumptions) about service;

17. The following are the material provisions of the 2005 Rules:

Overriding objective

4. The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest.

Hearing appeal in the absence of a party

19(1) The Tribunal must hear an appeal in the absence of a party or his representative, if satisfied that the party or his representative -

- (a) has been given notice of the date, time and place of the hearing, and
- (b) has given no satisfactory explanation for his absence.

(2) Where paragraph (1) does not apply, the Tribunal may hear an appeal in the absence of a party if satisfied that:

- (a) a representative of the party is present at the hearing;
- (b) the party is outside the United Kingdom;
- (c) the party is suffering from a communicable disease or there is a risk of him behaving in a violent or disorderly manner;
- (d) the party is unable to attend the hearing because of illness, accident or some other good reason;
- (e) the party is unrepresented and it is impracticable to give him notice of the hearing; or
- (f) the party has notified the Tribunal that he does not wish to attend the hearing.

Determining the application

36(3) Where the Tribunal intends to grant permission to appeal it may, if it thinks that the Tribunal has made an administrative error in relation to the proceedings, instead set aside the Tribunal's

determination and direct that the proceedings be reheard by the Tribunal.

Filing and service of documents

55(5) Subject to paragraph (6), any document that is served on a person in accordance with this rule shall, unless the contrary is proved, be deemed to be served:

(a) where the document is sent by post or document exchange from or to a place within the United Kingdom, on the second day after it was sent;

(b) where the document is sent by post or document exchange from or to a place outside the United Kingdom, on the twenty-eighth day after it was sent; and

(c) in any other case, on the day on which the document was sent or delivered to, or left with, that person.

Address for service

56(1) Every party, and any person representing a party, must notify the Tribunal in writing of a postal address at which documents may be served on him and of any changes to that address.

(2) Until a party or representative notifies the Tribunal of a change of address, any document served on him at the most recent address which he has notified to the Tribunal shall be deemed to have been properly served on him.

18. Since these appeals were decided in the AIT, rule 60 (correction of orders and determinations) has been amended so as to permit the President to review any determination of the Tribunal and set it aside, but only “on the ground that it was wrongly made as a result of an administrative error on the part of the Tribunal or its staff” (Asylum and Immigration (Procedure) (Amendment) Rules 2006: new rule 60(1A)). The new rule thus enlarges the circumstances in which an appellate decision can be set aside by the AIT itself, but replicates the limitation contained in rule 36(3).
19. Our attention has been drawn to the earlier Procedure Rules of 2000 and 2003, but it seems to me risky, given the restructuring of the Tribunal in 2005, to try to draw inferences from differences or similarities between the earlier rules and the current ones.

Submissions

20. Among the issues raised in the written submission of Susan Chan, counsel for the Home Secretary, is the question whether either appellant’s presence would have made any difference to the outcome. I would exclude this argument at the outset. Indeed, when pressed, Ms Chan creditably decided not to pursue it. The right to be heard goes

deeper than any question about what would have eventuated if the right had been exercised. While there may be cases which are so plainly worthless that the court would refuse relief even where there had been no opportunity to be heard, asylum claims which have been considered sufficiently substantial by the AIT to require a rehearing cannot come into this class. The proper place for a submission that either appeal was on any view doomed was the AIT.

21. The issue of law is now set out on behalf of both appellants in the written and oral submissions of Richard Drabble QC. His written argument contends that the empowering provision, s.106 of the Nationality, Immigration and Asylum Act 2002, is not large enough to sanction the injustice worked in cases like these by the combined effect of rules 19(1) and 56 of the Asylum and Immigration Tribunal Procedure Rules 2005. The rules, he argues, have crossed the line between regulating access to justice and denying it. The separate argument that each immigration judge, albeit without fault, committed an error of law by proceeding in the appellant's absence, is – rightly - not pursued.
22. In oral argument, however, Mr Drabble accepted that the first question was not whether the material rule was ultra vires but what, in its context, it meant. If on ordinary principles the rule can be so construed as not to promote or sanction unfairness, that is how it should be construed. If it cannot be done, then and only then he submits that rule 19(1) is ultra vires in its entirety.
23. For the Home Secretary, Ms Chan submits that the rule-making power has been exercised, as required by Parliament, so as to regulate access and ensure the fair, speedy and efficient conduct of proceedings. The wording and meaning of rules 19(1) and 56 are unequivocal. That breaching the latter may result in an appellant's going unheard is a normal consequence of procedural regulation and does not represent an objectionable denial of access. If rule 19(1) is peremptory in shutting out adjournments, that is an aspect of efficiency and fairness, including fairness as between one asylum-seeker and another. In cases falling within rules 36 and 55(5) relief is available. In cases where the want of due notification of a change of address, or non-appearance, is due to circumstances beyond the party's control, judicial review or appeal to this court is available. To distinguish the claimant from the adviser would both be contrary to principle and make the system unworkable.
24. Accepting that the combined effect of rules 56 and 19(1) is that a party who personally has done nothing wrong may find that he has lost an appeal of which he knew nothing and which he might, had he been present, have won, Ms Chan submitted that, where the reason for his absence is beyond the party's control but does not lie in administrative error on the Tribunal's part, either judicial review can be sought on the ground that the Tribunal has made an error of fact or permission to appeal can be sought on the ground of the emergence of new facts. For the former she relied on *E and R v Home Secretary* [2004] EWCA Civ 49; for the latter on *Ladd v Marshall* [1954] 1 WLR 1489. But in a case where the failure of notification was that of the party's representative, she contended that the decision of the House of Lords in *Al Mehdawi v Home Secretary* [1990] 1 AC 876, as well as ordinary principles of law, bound this court to hold that there was no remedy.

Discussion

Absence with good reason

25. Let me start from Ms Chan's concession that, if the Tribunal is alerted when it sits to the existence of a good reason for a party's non-attendance, it should adjourn the hearing. Even this involves stretching the rules, because rule 19(1) stipulates that it is the absent party who must provide a satisfactory explanation. There is nothing to prevent the other side or the Tribunal itself insisting that the appeal should go on, although everyone present knows that the absent party is coming by road and the motorway is at a standstill, because the explanation has not come from the absent party.

Informal notice

26. Then there is the case, which could easily have been P's case, in which, although the AIT has only the old address on record, the notice of hearing has been forwarded to her and has reached her on the eve or the morning of the hearing. There will be no point in her telephoning and asking for an adjournment: service of the notice is deemed by rule 55(5) to have been effected at the old address two days after it was posted. Rule 19(1) therefore applies, with the result that rule 19(2)(d) cannot. Moreover, rule 19(2)(d) itself is framed so as to permit the Tribunal to proceed even where there *is* some good reason for a party's absence: in other words it limits rather than promotes the principles of natural justice.

Tribunal's knowledge

27. Next there is the case, which could also easily have been P's case, where a simple enquiry by the Tribunal elicits – or the HOPO volunteers – the fact that the Home Office file shows that the absent party has moved to a new address which the Tribunal does not have on record. If then or later it turns out that this is because of an administrative error within the AIT, the decision can be set aside: see rules 36(3) and 60(1A). But this too may involve contested facts and difficult inferences: if the absent party is believed when he asserts that the Tribunal was duly sent notice of the new address (he may even have a certificate of posting), it still has to be decided whether the notice reached the Tribunal – for only in that event would there have been an administrative failure to record it. If it was simply lost in the post, the absent party would have no remedy except – if it is available - the judicial recourse suggested by Ms Chan.

Judicial recourse

28. As to this suggestion of Ms Chan's, although it was not in Mr Drabble's clients' interests to contest it, I am not satisfied that the non-appearance of a party because, say, her notice of change of address never reached the Tribunal, or because a notice of hearing posted to the correct address failed to reach her, or because a road accident

held her up on her way to the hearing, will rank either as a material error of fact or as fresh evidence.

29. To begin with, the veracity of the explanation may very well be in issue. If it is, the *E and R* requirement of an uncontentious and objectively verifiable fact will not be met even if the court is inclined to believe the claimant's explanation. This reflects the fact that both error of fact and fresh evidence are in their nature forms of challenge to a substantive decision. The ordinary remedy for a failure of due process is a setting aside or (where it has occurred in an inferior Tribunal) a quashing of the decision^[1]. But, in contrast to CPR 52.17 (which in stringently defined but open-ended circumstances permits the reopening of appeals), the 2005 Rules allow a determination to be set aside only where the error was the Tribunal's own. There is also the problem that, at least as expressed in *E and R* at paragraph 66, the mistake must be one for which neither the appellant nor his adviser was responsible.
30. As to a *Ladd v Marshall* appeal, I have difficulty in seeing what new evidence could enable this court to reopen a determination made in the asylum-seeker's absence, for no explanatory or exculpatory evidence that I can think of would be able to overcome the combined effect of rules 19(1) and 56 so long as they stand.

Are the Rules fair?

31. For all these reasons, it is evident that the Rules in their present form are capable of working irreversible injustice on people who have done nothing wrong. The undoubted fact that the Rules take this form in order to eliminate manipulation of the system by individuals (and sometimes their advisers) whose aim is to avoid finality or seek some improper advantage explains but cannot by itself justify the breadth of their effect. It nevertheless forms a key component in the balance of means and ends to which I shall have to return.

The surrogacy principle (1)

32. I have left aside so far the question whether in the field of refugee law the errors of representatives are to be imputed to their clients. I will call this form of imputed fault the surrogacy principle. All of the issues set out above arise independently of this principle, with the result that even if neither he nor his representative has done anything wrong, a party may go unheard and an irremediable injustice result. It is therefore useful first to consider the Rules without reference to the surrogacy principle.

^[1] In *E and R*, the allocation of errors of material fact to fairness (a procedural matter) rather than to jurisdiction (a substantive matter) is in my respectful view both novel and problematical. It may not necessarily follow from the decision in *R v CICB ex parte A*[1999] 2 AC 330, and it has practical as well as doctrinal implications which may have to be addressed in a future case.

What do the Rules mean?

33. The material statutory purposes, now set out in s.106(1A), are fourfold: to deal with proceedings as fairly as possible, as quickly as possible and as efficiently as possible, and where appropriate to place on the immigration judges the responsibility for ensuring this. The Procedure Rules by rule 4 adopt these purposes as the overriding objective of the 2005 Rules, additionally describing the supervisory responsibility of Tribunal members as being “in the interests of the parties to the proceedings and in the wider public interest”.
34. The primary duty of the court is to read the Rules in a way which respects the empowering provisions and gives effect to the overriding objective. If, but only if, this still results in systemic unfairness, we will have to decide whether such a result is either required or clearly authorised by the primary legislation and, if it is not, what follows.
35. The objectives I have summarised are as much judicial as administrative objectives. But judges are well aware that they are objectives which can pull in opposite directions. One sees this immediately one turns to rule 19(1), which is devoted entirely to speed. As the examples I have given illustrate, its literal application can result in injustice, and injustice is neither efficient nor fair. Does rule 19(1) therefore have such meaning and effect?
36. One element of flexibility lies in the words “... if satisfied that...”. It will not always be possible for a Tribunal to be satisfied without further enquiry of the matters set out in rule 19(1)(a) and (b). Such enquiry may be able to be made in a few minutes, or it may require longer. The rule by necessary implication requires the Tribunal to take as long as is required. It might, for example, require an adjournment where (see paragraph 25 above) a potentially satisfactory explanation has come from someone other than the absent party. But this element of procedural flexibility does not meet the real problem, which is the mandatory language of the governing provision – “must hear an appeal in the absence of a party” – and the minimal preconditions for its operation: due notice, the receipt of which is the subject of deeming provisions which may well be counterfactual, and the absence of a satisfactory explanation from a party who, for that very reason, may not know that there is anything to explain. These rigidities eliminate any useful supervisory role (beyond that mentioned above) for the Tribunal pursuant to s.106(1A)(b) and rule 4 in aid of fairness as opposed to speed.
37. Another possibility canvassed by Mr Drabble is that deemed due service under rule 56(2), albeit by definition not rebuttable, does not exclude non-receipt as an explanation under rule 19(1)(b). Ms Chan was initially disposed to accept this, but her instructing department took a different view and, on instructions, she therefore contested it. In my judgment the departmental view is right: the rules have to be read as a whole, and the combined effect of rules 55(5)(a), 56 and 19(1) is that a party cannot be heard to say that he or she did not receive a notice posted to the most recent address on the AIT’s records. I have no doubt that it was the rigidity of this scheme and its potential for injustice that led Ms Chan to make the initial concession.

The surrogacy principle (2)

38. What then is the position when there has been an admitted failure to notify the AIT of a party's new address, and the failure is that of a representative on whom the party has relied to do what is required?
39. The first answer appears to be that rule 56(1) anyway requires both of them to give notice: it uses the word "and". The pointlessness of such a requirement is shown, however, by rule 56(2) which bases the provision for deemed service on the latest address given to the AIT by the party *or* his or her representative. It is reasonable to infer that, for the purposes of rule 56(1), either that "and" means "or" or that notice given by the representative is notice given by the party.
40. The second answer, however, is that the effect of rule 56(1) and (2) in combination is that the representative's error is fatal to the client, not because the client is fixed with it in legal principle but simply because the AIT has no notice of the new address from either source and will therefore effect what is deemed to be good service at what is in reality the wrong address.
41. Is this fair? The question is not, of course, decisive of the issue of vices (I will come shortly to the law on this) but it is a necessary first step. It is here that the surrogacy principle becomes material. If it is, as Ms Chan submits it is, a general principle of law subject at most to limited and specific exceptions, it will be difficult to say that rules which adopt or reflect it are unfair. If it is, as Mr Drabble submits it is, a working rule designed to transfer the liability from the defendant to the representative whose negligence has let the defendant escape, there will be good reason to ask whether it is fair to let it bring about the irretrievable and uncompensable loss of a right to be heard in support or in defence of a claim to asylum.
42. In a well-known passage of his speech in *Al Mehdawi v Home Secretary* [1990] 1 AC 876, Lord Bridge said (at 898):

It has traditionally been thought that a Tribunal which denies natural justice to one of the parties before it deprives itself of jurisdiction. Whether this view is correct or not, a breach of the rules of natural justice is certainly a sufficiently grave matter to entitle the party who complains of it to a remedy *ex debito justitiae*. But there are many familiar situations where one party to litigation will effectively lose the opportunity to have his case heard through the failure of his own legal advisers, but will be left with no remedy at all except against those legal advisers. I need only instance judgments signed in default, actions dismissed for want of prosecution and claims which are not made within a fixed time limit which the Tribunal has no power to extend. In each of these situations a litigant who wishes his case to be heard and who has fully instructed his solicitor to take the necessary steps may never in fact be heard because of his solicitor's neglect and through no fault of his own. But in any of these cases it would surely be fanciful to say that there had been a breach of the *audi alteram partem* rule. Again, take the case of a county court action where a litigant fails to appear at the hearing because his solicitor has neglected to inform him of the date and consequently judgment is given against him. He can at best invite the court in its discretion to set aside the judgment and it is likely to

do so only on the terms that he should pay the costs thrown away. Yet, if it can be said that he has been denied natural justice, he ought in principle to be able to apply for certiorari to quash the judgment which, if he is personally blameless, should be granted as a matter of course.

These considerations lead me to the conclusions that a party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the dispute on his behalf cannot complain that he has been a victim of a procedural impropriety or that natural justice has been denied to him, at all events when the subject matter of the dispute raises issues of private law between citizens. Is there any principle that can be invoked to lead to a different conclusion where the issue is one of public law and where the decision taken is of an administrative character rather than the resolution of a *lis inter partes*? I cannot discover any such principle and none has been suggested in the course of argument.

43. The result in *Al Mehdawi* was that a foreign student whose leave to remain had expired forfeited his entitlement to an appeal hearing because of his solicitors' errors. Not only did the case not concern the possibility of returning somebody to persecution, torture or death; it left to the Home Secretary, if he thought the application had merit, a power to invite an adjudicator to hear the applicant's evidence and report whether in his opinion it would have made a difference to the decision: see p.901. Although Lord Bridge's opinion is carefully framed in terms of principle and not of pragmatism, the case before the House was far distant from the kind of case we are concerned with. These cases do not only involve asylum-seekers who are either making a first appeal or have lost their first appeal and are making a second endeavour to establish their claim: they include asylum-seekers who have won their initial appeal before an immigration judge and are seeking to hold the decision against the Home Secretary's appeal. For some of these, the exercise of the right to be heard may literally be a matter of life and death; for all of them save the bogus (and even they have to be identified by a judicially made decision) it is in a different league from the loss of a student's right to remain here. The remedial discretion which afforded Mr Al Mehdawi a fallback is absent from asylum law.
44. It is unsurprising therefore that the surrogacy principle has not been uniformly adopted or applied by the courts. The appeal to this court in *Haile v IAT* [2001] EWCA Civ 663 was based on fresh evidence which could have been obtained much sooner had the appellant's solicitors exercised reasonable diligence at first instance. Mr Haile was an Ethiopian seeking asylum from political persecution. Simon Brown LJ said:
 25.It is of course most unfortunate that this mistake was not uncovered until it was when and plainly it could and should have been. Were the old *Ladd v Marshall* principles to be strictly applied, then surely the appellant would fall at this first hurdle. The fact is however that these principles never did apply strictly in public law and judicial review. As Sir John Donaldson MR said in *R v Secretary of State for the Home Department ex parte Ali* [1984] 1 WLR 663, 673:

“... the decision in *Ladd v Marshall* [1954] 1 WLR 1489 has no such place in that context,”

although he then added:

- (a) “ However, I think that the principles that underlie issue estoppel and the decision in *Ladd v Marshall*, namely that there must be finality in litigation, are applicable subject always to the discretion of the Court to depart from them if the wider interests of justice so require.”

26. Nor am I persuaded that the House of Lords’ decision in *Al-Mehdawi* precludes this court having regard to the wider interests of justice here, not least given that this is an asylum case rather than a student leave case as was *Al-Mehdawi*. Aspects of that decision may in any event now need to be reconsidered in the light of the House of Lords’ speeches in *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330.

45. It has not been suggested that we have to choose between *Al Mehdawi* and the *CICB* case. Rather Mr Drabble submits that *Haile* is authority in this court for the proposition that *Al Mehdawi* does not, or does not necessarily, govern asylum cases, and that the *CICB* case may help to explain why. This seems to me to be correct. It is supported by the decision of this court in *R v IAT ex parte Mehta* [1976] Imm AR 38 (a student case), where Lord Denning MR, holding that a solicitor’s mistake might amount to special circumstances for enlarging time, said:

We never let a party suffer because his solicitors have made a mistake and are a day or two late in giving notice of appeal....All the more so ... where [the appellant] would have no remedy against her solicitor for any negligence. If she is out of time for appeal, she will be removed from this country, and it would be of no consolation to her to say that she has a remedy against her solicitor.

This decision was followed in *R (Tofik) v IAT* [2003] EWCA Civ 1138 (an asylum case) where, at §24-5, with the agreement of the other members of the court, I said:

The law has historically regarded client and solicitor as one, at least to the extent that the latter acts as agent for the former. But ... a client is not necessarily fixed with her or his solicitors’ errors in seeking to oppose removal from the United Kingdom, at least when the client has been in no way responsible for them.

46. Accordingly I would hold, contrary to Ms Chan’s submission, that there is no general principle of law which fixes a party with the procedural errors of his or her representative. The materiality of this is not that it renders the 2005 Procedure Rules or any part of them ultra vires, since they are not predicated on a contrary assumption:

it is that there is no universal surrogacy principle which the rules would have to depart from in order to operate justly.

The law on delegated legislation

47. Ms Chan has usefully set out a summary of the well-established principles by which the common law tests the legality of delegated legislation. They can best be taken, for present purposes, from two of the judgments in *Saleem v Home Secretary* [2000] Imm AR 529. Roch LJ said:

19. It follows that infringement of such a right must be either expressly authorised by a provision in an Act of Parliament or arise by necessary implication. Even where it can be said that the making of a rule under powers to make rules by subordinate legislation arise by necessary implication, it will still be in question whether the rule formulated is reasonable. Even where the need for such a rule does not arise by necessary implication either because the purpose of Parliament cannot be achieved without it or the function Parliament has laid in a person or body cannot be discharged without it, the rule will be *ultra vires* the rule-making power if the rule as framed is unreasonable: if it is wider than necessary; if it infringes the fundamental right to a greater extent than is required.

26. The conclusion I have reached is that rule 42(1)(a) is not expressly authorised by the 1971 Act. The rule goes beyond regulating rights of appeal to the Tribunal in that it can deny a party her chance to appeal where the party has, through no fault of her own, failed to comply with the five day rule. A rule of such severity is not reasonable because it is not necessary to achieve the objective of timely and effective disposal of appeals and may well deny an asylum seeker “the just disposal” of her appeal which is another objective identified in rule 23. The rule, in the circumstances which have arisen in this case, goes beyond regulating the right of appeal and is destructive of that right. I would declare the rule invalid insofar as it purports to determine conclusively the moment at which an asylum seeker receives notice of the special adjudicator’s determination for the purpose of starting the five day period for applying leave to appeal. I would express no view on the validity of the rule for determining the date on which other notices have been received by parties to asylum appeals. The operation of the rule in respect of other notices has not been the subject of evidence or argument before us.

Hale LJ at §53 set out the classic guidance given by Lord Russell of Killowen CJ in *Kruse v Johnson* [1898] 2 QB 91, 99-100:

I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn bye-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they

involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can be properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges think ought to be there.

Having noted that the European Court of Human Rights had not, or not yet, included asylum appeals in the civil rights directly protected by article 6, she said at §55:

...There are now a large number of Tribunals operating in a large number of specialists fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that Tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of disputes between private persons, Tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a Tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the courts.

56. I also accept that the more fundamental the right interfered with, and the more drastic the interference, the more difficult it is to read a general rule or regulation-making power as authorising that interference. Whether that is approached along the route of “necessary implication” adopted in *Leech* or along the route of “reasonable contemplation of Parliament” derived from *Kruse v Johnson* may not matter; the result will be the same.

Conclusions

48. The situation therefore seems to me to be this. The Rules as at present framed are productive of irremediable procedural unfairness. Both of the present appellants are among those affected by this deficiency, because both have lost the opportunity to be heard through the default of their representative and not through their own fault. The wide difference in merit between the two firms of solicitors – the one apparently

neglecting the entire appeal, the other striving conscientiously to do what was required – matters only to the extent that the surrogacy principle is to be applied.

49. We are at present seized of appeals on a question of law. In law, the refusal of the AIT to reopen the appeals in the light of the reasons for non-appearance was not only permitted but demanded by the Rules. They cannot in my opinion be read in any other way. But the appellants have without objection raised the underlying question whether, in that case, the Rules themselves are lawful. In my judgment they are not. For reasons which I have given, they forfeit what our constitutional law (consonantly now with article 6 of the European Convention on Human Rights) regards as a fundamental right, the right to be heard on an issue of radical importance to the individual, on grounds which are so widely and rigidly prescribed that they shut out parties who have done nothing wrong but whose lives and safety may in consequence be put at risk. In so doing they sacrifice fairness to speed and deny the Tribunal any power to hold these two desiderata in balance.
50. In these respects the Rules, in my judgment, go outside (a) the powers given to the rule-maker by s.106 and (b) the prescribed purposes for which he is to exercise them. Rather than regulate it fairly, the Rules arbitrarily deny what the Strasbourg court calls “the very essence” of the right to be heard. By making the provision they do in rule 19(1), when read with rules 55(5) and 56, they frustrate their own overriding objective and stultify the requirement of s.106(1A)(b) that where appropriate the rules are to give the Tribunal members responsibility for ensuring fairness as well as speed.

What is to be done?

51. I would therefore allow both appeals but – as we indicated we would do in this event – would await the written submissions of the parties, including (if so advised) the Lord Chancellor as the rule-maker, as to what further order is appropriate. We would expect to be able on this basis to make a final order on handdown.
52. The witness statements of 7 September 2005 and 30 April 2006 which were adduced in the case of B, and Ms Norman’s witness statement of 12 April 2006 in the case of P, will be admitted.

Postscript

53. Since the conclusion of argument I have made enquiries of judicial and administrative colleagues in Australia, Canada, the United States, South Africa and New Zealand as to their law and practice in cases where an asylum-seeker fails to appear on an appeal because of his or her representative’s failure to notify the Tribunal of a change of address. Although what I have learned has played no part in reaching the judgment recorded above, it suggests that good administration is not regarded in other common law jurisdictions as requiring as inflexible a régime as we have here. This in turn may have a bearing on what is now proposed to remedy the present unfairness.

54. In Canada, the Immigration and Refugee Board will not ordinarily proceed in the unexplained absence of a party but will remit the appeal to a “show cause” hearing at which the absent party will have the opportunity to show why the claim should not be treated as abandoned. Error on the part of a representative may constitute good cause. In the United States, an order will be made in the absence of the party who has not appeared, but the party may file a motion to rescind the order. A ground for rescission is non-receipt of notice, and the motion (known as a Losada motion) may ascribe this to inefficient representation by counsel. In New Zealand, the practice is to dismiss the appeal for non-appearance but to entertain a subsequent application to reopen the appeal where good reason for non-appearance and a meritorious case can be shown. Default by a representative may in some circumstances be regarded as good reason. In South Africa, the Refugee Appeal Board is required by its rules to dismiss an appeal at which the appellant, having been duly served (service being proved by whatever means the Board deems fit, but having to be acknowledged by signature and thumbprint), fails to appear; but the Board may, having considered the reasons for non-attendance, grant a rehearing.
55. The Australian rules, which are contained in primary legislation that also contains a privative clause, exclude any recourse save arguably on grounds of fraud. (The split decision of the Federal Court in *SZFDE v Minister* [2006] FCAFC 142 that an agent’s dishonest advice which has kept the appellant from the hearing is not a sufficient ground for reopening the appeal is currently the subject of a petition for special leave to appeal to the High Court of Australia.) But the rules contain express provision permitting the Tribunal to reschedule appeals or adjourn them part-heard in order to allow the asylum-seeker to appear. Moreover, in *SZFML v Minister* [2006] FCAFC 152 the Federal Court has held that a consent to the conduct of an appeal in the applicant’s absence, given by her agent without her authority, was of no effect.

Lady Justice Arden:

Introduction

56. The Asylum and Immigration Tribunal (Procedures) Rules 2005 (“the AIT Rules”) were made by the Lord Chancellor in exercise of the powers conferred on him by sections 106(1) to (3) and 112(3) of the Nationality, Immigration and Asylum Act 2002 and section 40A(3) of the British Nationality 1981, after consulting with the Council on Tribunals in accordance with section 8 of the Tribunal and Inquiries Act 1992. The AIT Rules were made on 6 February 2005 and came into force on 4 April 2005. They have now been amended, but the amendments are not material for the purposes of this appeal.
57. The terms of section 106 are important. Section 106 empowers the Lord Chancellor to make rules regulating the exercise of the right of appeal under specified sections of the 2002 Act. Section 106(1A) provides that:

“in making rules under subsection (1), the Lord Chancellor shall aim to secure (a) that the rules are designed to ensure the proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible...”.

Section 106(2) provides that:

“In particular, rules under subsection (1) ... (e) may enable or require... the Tribunal to determine an appeal in the absence of parties in specified circumstances....”

58. Section 106(1A) requires the Lord Chancellor to seek to make rules which balance the requirements for fairness, speed and efficiency. In this field, speed and efficiency are unquestionably important, but there must be a limit to the degree to which fairness can be sacrificed in order to achieve speed and efficiency. It must still be possible to say that a rule which has been designed to achieve speed and efficiency is fair in its operation. Otherwise, the balance required by section 106 (1A) is not achieved. The requirements of fairness must depend on the context. When the issue of fairness arose in *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, at 414, Bingham LJ, as he then was, held that asylum applications are of such moment that only the highest standards of fairness will suffice, and Sir John Donaldson and Mann LJ agreed with his judgment on that issue.
59. In addition, unless a minimum level of fairness is achieved, the principle of the rule of law will be infringed. The rule of law is a fundamental constitutional principle in the United Kingdom, and section 1 of the Constitutional Reform Act 2005, which came into force on the day before the AIT rules were made, expressly provides that nothing in the recent reform of the office of Lord Chancellor effected by that Act affects the principle of the rule of law:
- “1. This Act does not adversely affect-
- (a) the existing constitutional principle of the rule of law, or
 - (b) the Lord Chancellor’s existing constitutional role in relation to that principle.”
60. The 2005 Act does not define the rule of law. Dicey described the rule of law as the principle that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary Tribunal ... [and that] every official is under the same responsibility for every act done without legal justification as any other citizen.” (Introduction to *The Study of the Law of the Constitution* by A.V. Dicey). From that, it must follow that a person must have an opportunity to bring before the court his claim that he is entitled to a certain right, or his claim that some obligation should not be imposed upon him. It also follows that the opportunity must be a real one. Lord Bingham, in his recent Sir David Williams lecture on *The Rule of Law*, regarded it as one of the implications of the concept of the rule of law that there was a basic right of unimpeded access to a court for the resolution of disputes.

61. That is not to say that a litigant must always have an opportunity to place every dispute or claim before the court that he wishes. As Lord Bingham pointed out, the rule of law does not require “every claim or defence, however spurious or lacking in merit, to be guaranteed full access to the processes of the law”. The jurisprudence of the European Court of Human Rights recognizes that, while the very essence of the right must not be destroyed, the right of access to court can be restricted where the restriction is prescribed by law, serves a legitimate aim and is proportionate to the end to be achieved (*Ashingdane v United Kingdom* [1985] 7 EHRR 528). For the purposes of this case, it is enough that I limit myself to a much narrower proposition, namely that if the legal system confers a right of access to court on a person, in this case, to provide an explanation for his absence from a hearing which has been fixed by the Tribunal, that right cannot be taken away before it has been communicated to the person entitled to it. The significance of the rule of law will become apparent, as I examine this case.

62. Rule 4 of the AIT Rules (which Sedley LJ has set out in his judgment) states the overriding objective of the AIT Rules. That overriding objective reflects section 106(1A) by providing that it is:

“to secure that the proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible”.

It goes on to provide that:

“where appropriate, ... members of the Tribunal have responsibility for ensuring this in the interests of the parties to the proceedings and in the wider public interest.”

63. The overriding objective in the AIT Rules reflects the tension in asylum proceedings between the public interest and the interest of fairness to applicants. It emphasises the need for expedition and efficiency. It also highlights the responsibility of each of the parties, as well as the Tribunal, to play a role in securing that the aims of fairness, expedition and efficiency are achieved.

64. I start with the rule of law and rule 4 to show the context in which rule 19(1) must be interpreted. Rule 19 (1) provides:

“(1) The Tribunal must hear an appeal in the absence of a party or his representative, if satisfied that the party or his representative –

(a) has been given notice of the date, time and place of the hearing, and

(b) has given no satisfactory explanation for his absence.

(2) Where paragraph (1) does not apply, the Tribunal may hear an appeal in the absence of a party if satisfied that –

- (a) A representative of the party is present at the hearing;
- (b) The party is outside the United Kingdom;
- (c) The party is suffering from a communicable disease or there is a risk of him behaving in a violent or disorderly manner;
- (d) The party is unable to attend the hearing because of illness, accident or some other good reason;
- (e) The party is unrepresented and it is impracticable to give him notice of the hearing; or
- (f) The party has notified the Tribunal that he does not wish to attend the hearing.”

65. The AIT Rules do not contain any rule which provides that a party who was absent when his case was dealt with under Rule 19(1) may make an application to the Tribunal to set aside any order made under this rule in his absence. In this regard, rule 19(1) may be contrasted with other procedural rules. For example, CPR 39.3 provides:

“Failure to attend the trial

- (1) The court may proceed with a trial in the absence of a party but –
 - (a) If no party attends the trial, it may strike out the whole of the proceedings;
 - (b) If the claimant does not attend, it may strike out his claim and any defence to counterclaim; and
 - (c) If a defendant does not attend, it may strike out his defence or counterclaim (or both).
- 2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.
- 3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
- 4) An application under paragraph (2) or paragraph (3) must be supported by evidence.

5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant

- (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
- (b) had a good reason for not attending the trial; and
- (c) has a reasonable prospect of success at the trial.”

66. By way of further example, section 375(1) of the Insolvency Act 1986 provides that:

“Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction.”

67. On the other hand, rule 19(1) does not go so far as to say the Tribunal must hear an appeal in the absence of a party or his representative if it is satisfied that the party or his representative has been given notice of the date, time and place of hearing. Rule 19(1) contains also paragraph (b) which gives the party or his representative the right to give a satisfactory explanation for his absence. That explanation must however be given at the hearing at which the party or his representative is absent. The dilemma in which this rule places a party or his representative is obvious. If the reason for a party’s absence is because he has not become aware of the notice of hearing, he will be unable to give any explanation for the absence and thus he can never satisfy paragraph (b), although rule 19(1) purports to give him that opportunity. Paragraph (b) is unqualified, and an explanation could plainly include an explanation that the party did not become aware of the notice of hearing. If a party is to have the right to put forward this explanation, and to show that, in the particular circumstances, this was a satisfactory explanation, it is not enough for the rule to rely on the notice of hearing as notice of his opportunity to put forward an acceptable explanation. It is thus no answer to say that he was given an opportunity to make representations and provide a satisfactory explanation by the notice of the hearing.

68. The Secretary of State’s case is that there is no need for any provision like CPR 39.3(5) because of the limited jurisdiction to apply for judicial review on a point of law where there has been unfairness arising out of the mistake of fact. That jurisdiction is established by *E v Secretary of State for the Home Department* [2004] QB 1044. In that case this court concluded that a mistake of fact giving rise to unfairness was a separate head of challenge in an appeal on the point of law. Carnwath LJ held that normally there would be four requirements to show unfairness for this purpose:

“First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the factual evidence must have

been “established”, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning.” (para. 66)

69. In the *E* case, this court also considered the circumstances in which evidence could be admitted to prove a mistake of fact. Referring to the principles in *Ladd v Marshall* [1954] 1 WLR 1489, this court considered that those principles were applicable to judicial review but that they should be treated as a starting point with a discretion to depart from them in exceptional circumstances. This court referred to the previous decision of this court in *Haile* [2002] INLR 283, which it regarded as an example of an exceptional case where it was necessary to depart from the principles in *Ladd v Marshall*. *Haile* is relevant to this appeal for a different point. In that case, the legal representatives failed to pick up that the adjudicator had made a mistake in noting the name of the organisation with which the asylum seeker was associated. The original mistake, however, was that of the adjudicator in making a proper note. Therefore, this court in the *E* case considered that *Haile’s* case was not an example of a general departure from the rule that a party could not rely on the fault of his legal representatives.
70. I do not accept the Secretary of State’s submission that the appropriate course for an appellant, who had a satisfactory explanation to give but did not know of the hearing in time to give it, is to seek judicially to review the decision of the Tribunal on the grounds of unfairness arising from a mistake of fact as to the availability of such an explanation. There are a number of reasons for this. First, the wording of rule 19(1) does not on the face of it support such an approach, because it proceeds on the basis that the explanation must have been given before the Tribunal proceeded to hear the appeal. Secondly, it was held in the *E* case the mistake must not be the responsibility of the applicant or his representatives. In cases such as the present, there have been errors by both the party and his representatives. Both have failed to keep the Tribunal informed as to the current addresses of the applicant. Yet there will be times when a party may be able to give a satisfactory explanation for his absence from the Tribunal, even though there was a fault on the part of his legal representatives. He may have had an accident and been in hospital when the notice was sent and may not have seen it until it was too late. It may be that his legal representatives were at fault in not applying for an adjournment. He may be able to show that, shortly before the date on which notice of the hearing was given, the solicitors came off the record without giving him proper notice and events happened so quickly thereafter that the applicant could not be held to be at fault for not finding out what had happened and contacting the Tribunal himself.
71. Thirdly, as Sedley LJ points out, the jurisdiction in the *E* case is only available where the facts are uncontentious. Rule 55(5) deals with the time at which a document is served on the person. It creates a rebuttable presumption that a document is received two days after it was sent if sent by post. Where a party contends that he did not receive a notice at all and that therefore rule 19(1) did not apply, there may well be a difference of opinion between the Home Office and the applicant. It would be curious

if a person could only rely on an explanation produced after the Tribunal's decision if it was one with which the Home Office was able to agree.

72. I have a further and more fundamental concern about the case put forward by the Secretary of State on this appeal. At first sight, it would appear that rule 19(1) is not intended to apply where a party had no opportunity to give a satisfactory explanation for his absence. The reason for that impression is that it makes the implicit assumption that the party must have received the notice of hearing. This is consistent with the notice of hearing given to Mr B, which stated as follows:

"If a party or his representative does not attend the hearing, the Tribunal must determine the appeal in the absence of that party, unless there is a satisfactory explanation of his absence."
(Appeal bundle, page 101.11)

If Mr B had received that communication, he would have been given an opportunity to provide an explanation for his absence. If he did not get the notice of hearing, however, he will not have been given that opportunity.

73. The later rules undermine the first impression given by Rule 19(1), as described above. If a notice is sent by post to the address which the party has given to the Tribunal for the service of documents and duly arrives, that document is deemed to have been properly served on him: rule 56(2). There is no requirement for a party to be aware of a hearing. Put another way, rule 19(1) simply assumes that a person can never have a good reason for not knowing about a notice served in accordance with the rules. So far as he is concerned, however, the opportunity to provide an explanation for his absence is simply unrealistic.
74. In these circumstances, in my judgment, rule 19(1) enters the realm of removing the right of the party to provide a satisfactory explanation for his absence, by providing that the Tribunal must proceed in his absence if he does not provide a satisfactory explanation in cases where he did not know that he had to put forward such an explanation. A situation in which a party is given a right and then it is taken away before he has a chance to exercise it is not one, in my judgment, which is fair, nor in my judgment is it one which fulfils the basic requirements of the rule of law. Professor Lon Fuller in his work *The Morality of Law* makes this point. He wrote that an attempt to create a legal system might miscarry in any one of at least eight ways. Two of those ways concerned the enactment of contradictory rules or rules that required conduct beyond the powers of the affected party. Professor Fuller went on to conclude that a total failure in any one of the eight ways that he identified would result in something which could not properly be called a legal system at all "except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract." On a smaller scale, the two problems identified by Professor Fuller seem to me the essence of the difficulty in this case.
75. Professor Fuller argues that where two laws are inconsistent the court should seek to find a way of interpreting them to remove the inconsistency. He takes the example of a law which prevents anyone from working on January 1 and another law which requires car owners to change their licence plates on January 1. Professor Fuller states that if there were two such laws the courts would find a way of interpreting the laws so that they did not conflict, for example by treating the law against working on

January 1 as subject to an exception for changing licence plates, or, alternatively, by holding that the law about changing licence plates could be performed before January 2. In the present case, I have given careful consideration to whether rule 19(1) could be interpreted so as to permit a challenge to the decision of the Tribunal by a person who was unaware of the hearing but who could provide a satisfactory explanation for his absence after the event. I do not consider that rule 19(1) can bear this interpretation. The AIT rules do not enable the Tribunal to quash its own order, and rule 19(1) is also expressed to require the satisfactory explanation to be given before it hears the appeal. In those circumstances, the deficiencies or repugnancy in rule 19(1) cannot in my judgment be resolved by benevolent interpretation to meet the situation with which these appeals are concerned.

76. In my judgment, a useful analogy can be drawn between the principles at stake in this case and the principle of effectiveness of rights and the protection of legitimate expectations for the purposes of Community law. These principles were applied by the Court of Justice for the European Communities in its decision in *Marks & Spencer Plc v Customs and Excise* [2003] QB 866. In that case, legislation had been introduced in the United Kingdom to reduce from six years to three years the period in which traders could make claims for the repayment of VAT wrongly paid. Unfortunately, the legislation contained no transitional period for traders with claims which were outside the new period. The Court of Justice held that national legislation could in certain circumstances reduce the period within which repayment of sums collected in breach of Community law might be sought but that that was “subject to a condition not only that the new limitation period was reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of legislation for lodging claims for repayment which persons were entitled to submit under the original legislation.” The Court of Justice held that “such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.”(para.38)
77. The position adopted by the Secretary of State, that where a party does not know of a hearing his only right is to apply for judicial review of an order made in his absence pursuant to rule 19(1), leads the Secretary of State to argue that the party cannot show any procedural impropriety or denial of natural justice if he lost the opportunity to be heard because of the fault of his advisers. In *R v Home Secretary ex parte Al-Medhawi* [1990] AC 876, the House of Lords held that:

“a party to a dispute who has lost the opportunity to have his case heard through the fault of his own advisers to whom he has entrusted the conduct of the dispute on his behalf cannot complain that he has been a victim of procedural impropriety or that natural justice has been denied to him, at all events when the subject matter of the dispute raises issues of private law between citizens. Is there any principle which can be invoked to lead to a different conclusion where the issue is one of public law and where the decision taken is of an administrative character rather than the resolution of a *lis inter partes*? I cannot discover any such principle and none has

been suggested in the course of argument.” (per Lord Bridge, with whom the other members of the House agreed, at 898)

78. The question before the House in that case was whether the decision of the Tribunal could be quashed on the grounds of procedural impropriety. There are strong policy reasons for the conclusion of the House in that case. However, there is nothing to prevent rules from providing that a party should have a right to have the decision reviewed if he has failed to attend a hearing and there was no fault on the part of the Tribunal in proceeding in his absence. CPR 39.3(5) is a provision of this nature, and one of the conditions, which if satisfied will enable a litigant to have a further hearing, is that he has a good reason for his non-attendance. As Dyson LJ observed in *Estate Acquisition and Development Ltd v Wiltshire* [2006] All ER (D) 50 at [30], for the purposes of service, it may be irrelevant whether the defendant actually received and knew about the claim form; but for the purposes of deciding whether the defendant had a good reason for not attending a hearing, deemed knowledge is irrelevant.
79. That is not to say that a party whose representative has failed to give notice of a change of address will necessarily be able to provide a satisfactory explanation. He will have to put all the facts before the Tribunal and the Tribunal will have to come to a view as to whether or not the explanation is a satisfactory one. It may take the view that the explanation is satisfactory where the party gave his legal representative details of a change of address and instructions to notify the Tribunal, and also kept in reasonably constant touch with his legal representatives (as to the last point, see generally the *Estate Acquisition* case referred to above, though different considerations may arise in asylum cases). The Tribunal would no doubt also wish to consider whether the appellant had delayed at any stage. This court has held that it is undesirable to define in advance the equivalent phrase “a good reason” in CPR 39.3(5) (see again the *Estate Acquisition* case at [25]).
80. As to the defaults of legal representatives, in the context of civil litigation, Peter Gibson LJ has expressed the view that, despite the overriding objective in the CPR (rule 1.1(1) of which provides that these rules “are a new procedural code with the overriding objective of enabling the court to deal with cases justly”), “in general, the action or inaction of a party’s legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself.” (*Training in Compliance Ltd T/A Matthew Read v T/A Data Research Company* [2001] C.P. Rep. 46 at [66]). But that view was expressed in the context of civil litigation where the court had to consider the interests of all parties in order to deal with the case justly. As demonstrated by the *Thirikumar* case and the *Haile* case, referred to above, the considerations arising in asylum cases are in certain respects different.
81. However, in the light of the fact that rule 19(1) provides no proper opportunity to a party to provide an explanation for his absence, I am driven to the conclusion that rule 19(1) does not satisfy the requirements of section 106 of the 2002 Act in so far as it provides no means of challenging the decision of a Tribunal which proceeded under rule 19(1) in the absence of a party who was not aware of the fact that the hearing was taking place and who can provide a satisfactory explanation for his absence for the purposes of rule 19(1)(b) after the decision was made.
82. The decision of this court in *Secretary of State for the Home Department v Saleem* [2000] Imm AR 91 is a case in which this court has made a similar order. The

appellant there contended that she had not received a special adjudicator's determination. The Tribunal concluded that her application was out of time on the basis of rule 42(1)(a), which determined conclusively, even if contrary to the facts, when an asylum seeker received notice of the special adjudicator's determination for the purpose of starting the five-day period for lodging an appeal. This court held that the rule was ultra vires in so far as it purported to determine conclusively the date on which that five-day period started to run. Hale LJ referred by analogy to the line of authority in the European Court of Human Rights to which I have referred above.

Disposition

83. For the reasons given above, I would allow this appeal on the new amended ground. So far as the fresh evidence adduced on this appeal is concerned, I would give permission in the appeal of Mr B for his two witness statements of 7 September 2005 and 30 April 2006 to be adduced on his appeal. In addition I would give permission for the witness statement of Elizabeth Norman dated 12 April 2006 to be adduced in the appeal of Ms P.

Lord Justice Wall:

84. I have had the advantage of reading in draft the judgments prepared by Sedley and Arden LJJ. I agree with their conclusions. I also agree with the course of action proposed by Sedley LJ in paragraph 51. of his judgment.
85. I have found these two appeals extremely difficult. On the one hand stands the fact that the two appellants have plainly suffered an injustice. Each faces removal from the United Kingdom after the re-hearings of their respective claims (ordered by the AIT in the one case and the IAT in the other) have been determined against them in their absence, and without their knowledge. In neither case was this through any personal fault of their own. In each case, the AIT has subsequently concluded that it cannot properly intervene further. On the other hand stands the fact that in neither case can the adjudicating Tribunal be criticised. In each case it has acted pursuant to rules made by the Lord Chancellor under powers to govern procedure in asylum cases expressly given to him by Parliament, and which have not been challenged since they were first promulgated in 2000.
86. In the final analysis, however, I have come to the conclusion that, absent the availability of ECHR Article 6, the concepts of fairness and natural justice on which the common law prides itself must prevail, and that the two appeals must be allowed. I therefore find myself in agreement with the outcome proposed by both Sedley and Arden LJJ. Given the importance of the case, however, I feel the need to explain why I have reached the same conclusion. In so doing, I hope that I will address each of the full and careful arguments advanced by Miss Susan Chan on behalf of the Secretary of State.

87. I agree with Sedley LJ that the starting point must be the construction of the relevant rules themselves. In my judgment, however, they are clear and wholly unambiguous. I cannot, speaking for myself, construe them in any way which mitigates their consequence for either of the appellants on the facts of the two cases before us.
88. This leads me directly to the question of fairness. The overriding objective, expressed in rule 4 is “to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible”. In my judgment, the only basis upon which the outcome for these two appellants in the AIT can be regarded as “fair” is if the law requires them to be bound by the error of their respective solicitors. The critical question thus becomes: “are they so bound?”
89. My initial reaction, I have to say, was that I thought they were. Rule 56(1) imposes a duty on both appellants **and** their respective solicitors; (1) to notify the Tribunal in writing of a postal address at which documents may be served, and (2) to notify the Tribunal of any changes to that address. At first blush, if parties (whatever the language difficulties or the state of their knowledge or understanding of the proceedings) have failed to carry out those duties, it is difficult to see why they should be protected by the failures of their solicitors. Those seeking asylum are, frequently, in the country without leave and, where the Secretary of State has refused to sanction their continued presence, they depend for it on the decisions of adjudicators and appellate Tribunals provided by the State. It can be powerfully argued that in these circumstances the duty imposed by rule 56(1) coincides fully with self-interest, and that breach of it, given the stresses in the system, should be fatal to the ability to remain.
90. However, as Sedley LJ has pointed out, the deeming provisions contained in rule 56(2) begin with the words “Until a party **or representative** [emphasis added] notifies the Tribunal”. The rule thus plainly envisages that the duties imposed by rule 56(1) on the party can be carried out by the representative. The question thus remains: “if the representative fails to carry out the duty, is the party bound by the representative’s failure?”
91. Miss Chan relies on the passage from the speech of Lord Bridge of Harwich in *Al Mehdawi* which Sedley LJ has set out in paragraph 42 of his judgment, and which I will not repeat. In my judgment, however, *Al Mehdawi* can be properly distinguished for the reasons advanced by Mr. Drabble. In particular, removal in an immigration case is very different from removal in an asylum case, where Articles 2 and 3 of the Geneva Convention are engaged. This, in my judgment, is sufficient to overcome the superficial similarity between the two cases, namely that any right of action which either the appellant in *Al Mehdawi* or the appellants in the instant cases might have against their respective solicitors would be academic. Plainly, in the instant appeals, and absent intervention from this court, there are no remedies of any kind left to either appellant.
92. In my judgment, the fact that *Al Mehdawi* can properly be distinguished significantly diminishes the force of Miss Chan’s point that in *E and R v Secretary of State* [2004] 2 WLR 1351 at 1375, this court held that a mistake by the Tribunal as to an existing fact could, exceptionally, constitute an error of law in an asylum case, albeit only if four identified criteria were satisfied, one of which was that the appellant **or his adviser** [emphasis supplied] must not have been responsible for the mistake. In any

event, the point strikes me as essentially academic, since it is no longer suggested in these appeals that either Tribunal made a mistake, or committed an error of law. *E and R v Secretary of State* is accordingly, in my judgment, dealing with a different point and is readily distinguishable. The premise for the identification of the four criteria was the proposition that a mistake of fact *on the part of the Tribunal* giving rise to unfairness was to be identified as a separate head of challenge in an appeal on a point of law. That is not this case. The unfairness in the instant case does not, in my judgment result from a mistake of fact on the part of the Tribunal. It results from the consequences for the appellants of the mistake made by their solicitors.

93. Since the concept of unfairness in these two appeals is untouched by both *Al Mehdawi* and *E and R v Secretary of State*, but arises directly from the proper application of the rules, the legality of the rules is plainly called in question. Here, once again, I do not find the matter altogether easy. Parliament is plainly entitled to authorise the Lord Chancellor to put in place a system for processing applications for asylum which places a proper emphasis on efficiency and on speed. Although my experience of asylum cases in the Administrative Court as a judge at first instance was limited, it would be foolish to shut one's eyes to the sheer volume of work involved, and the enormous pressures under which the system is obliged to operate. Nor would it be sensible to shut one's eyes to the possibility of the system being abused or exploited by the unscrupulous.
94. In such circumstances, can it be properly said to be unlawful for the rule-maker to have put in place a system which requires Tribunals to hear cases in the absence of the applicant for asylum, where service is deemed to have occurred in the circumstances identified in rule 56? Is the fact that a limited number of individual cases may result in injustice sufficient, in particular, to render rules 19 and 56 in conjunction *ultra vires*?
95. In considering this question, I find myself unable to accept two of the arguments which Miss Chan advanced, albeit that she did not pursue the second in oral submissions. The first was that the decision of this court in *Secretary of State for the Home Department v Saleem* [2000] Imm AR 529 fell to be distinguished on the ground that in that case the rule wholly deprived appellants of the exercise of their right to appeal, whereas under the rules in issue in the instant appeals, the hearings proceeded: in other words, the appellants were not deprived of their rights of appeal: their appeals had been heard and determined on their merits. The argument has a modest intellectual attraction, but in my judgment is unreal. I agree with Mr. Drabble that the inability to appear and to argue or oppose an appeal is, in effect, the denial of an effective right to be heard, particularly in a context where the appraisal of credibility is of fundamental importance. It is, I think, of some importance that in each case the Tribunal regarded the perceived failure of the appellant to appear as adversely affecting their case and thus contributing to the rejection of their claim. If the failure to appear is to be regarded, as it was in both cases, as a material factor in the adjudication process, it does not seem to me properly open to Miss Chan to say that the exercise of the right of access to the Tribunal is retained and can be fairly exercised in the applicant's unexplained absence.
96. Miss Chan in her skeleton argument advanced the proposition that this court is in any event entitled to look at the respective merits of the two applications and to come to the conclusion that both would have failed in any event. However, as I understood her, she withdrew that argument when it was challenged from the bench. In my

judgment, she was right to do so. In each case, the right to a re-hearing had its origin in perceived errors of law on the part of the Tribunal hearing the appellant's cases. The re-hearings, won through a successful appellate process, cannot, accordingly be diminished or dismissed as so unmeritorious as to warrant summary dismissal.

97. I am, accordingly, left with the dilemma and the choice which I identified at the outset of this judgment. Since my construction of the rules forces me into a choice, I reach the clear view that the common law doctrine of fairness must prevail; that the rules breach it and are thus unlawful.
98. The dilemma as to what we do having reached this conclusion remains, but I find myself here in complete agreement with the initial disposal proposed by Sedley LJ.
99. I would, finally, like to associate myself fully with Sedley LJ's observations about Ms Norman contained in paragraphs 6 and 7 of his judgment.