It is, perhaps, surprising that it seems not to have been argued that the power of the judicial review court to correct material errors of fact was somewhat wider than was assumed by the Court. Although the procedure of judicial review is ill-suited to the resolution of factual disputes (since, save exceptionally, it proceeds on the basis of written evidence not oral evidence subject to cross-examination) strong dicta in the House of Lords have held that a material error of fact is a ground of judicial review (*Alconbury* (above) para. [53] (Lord Slynn)) and that proposition forms part of the *ratio decidendi* of *E.* v. *Home Secretary* [2004] EWCA Civ 49 (Carnwath L.J.). This is not unchallenged law (see Wade and Forsyth, 278) but it was a question that deserved further consideration. For if error of fact is a ground for judicial review the curative reach of judicial review will be significantly wider.

The Human Rights Court was careful to distinguish and not to criticise the decisions of the House of Lords mentioned above. Determining the reach of the curative principle will thus require a careful study of those decisions as well as *Tsfayo* and the statutory context. But it has been suggested that the reasoning of *Tsfayo* is inconsistent with *Alconbury* and *Runa Begum* (Howell [2007] Judicial Review 9). If this is right, administrative decision-makers will have to become much more impartial and independent, i.e. become more like judges.

CHRISTOPHER FORSYTH

THREE NEW CASES ON CONSENT

IN London, they say – or said before "Red Ken" – that you wait for ever for a bus, and then along come three at once. As with buses, so occasionally with cases. The Court of Appeal has recently delivered not one but three important judgments on the meaning of consent to sexual acts: *B* [2006] EWCA Crim 2945, [2007] 1 W.L.R. 1567; *Bree* [2007] EWCA Crim 256, [2007] 2 Cr.App.R. 13 (158); and *Jheeta* [2007] EWCA Crim 1699.

In *Bree* the issue was capacity to consent, the prosecution case being that D had intercourse with V when she was drunk. Section 75(2)(d) of the Sexual Offences Act (SOA) 2003 creates an "evidential presumption" that the complainant did not consent where he or she "was asleep or otherwise unconscious at the time of the relevant act." But what about the situation where, as in the case in hand, the woman was extremely drunk, though conscious and aware of what was happening? In a case in Swansea in 2005, the prosecution had offered

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no further evidence when the complainant admitted she had been so drunk as to be unable to remember afterwards whether she had consented or not. The publicity this case aroused had led to the popular belief that, if a man has intercourse with a drunken woman who is not actually unconscious, he cannot in law be prosecuted. But this, said the Court of Appeal in *Bree*, is wrong. The indelicate saying "drunken consent is still consent" is broadly true: but not entirely so. Section 74 of the SOA 2003, which defines consent, provides that "… a person consents if he agrees by choice, and has the freedom and capacity to make that choice." The traveller on the road to alcoholic oblivion, the judges said, may reach the point where that "freedom and capacity" is lost. And in order to dispel the false impression that the Swansea case had created, they added, significantly: "We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious."

In *B* and *Jheeta*, the issue was when the apparent consent of someone who does have capacity is vitiated.

As every lawyer knows, consent in any legal context may in principle be vitiated by force, fraud or mistake. But what this means in concrete terms varies from one legal situation to another. In the case of sexual acts, the rule at common law was that mistake as to the identity of the other person vitiated consent; but mistake about other matters only did so if the complainant failed to appreciate the sexual nature of the act: *i.e.*, that the other party's purpose was to gratify his sexual desires. So V's consent to D's intimately touching her was vitiated by her mistaken belief that he was carrying out a medical examination (*Tabassum* [2000] 2 Cr.App.R. 328); but not by her mistaken belief, fraudulently induced by D, that he meant to pay her for her sexual services (*Linekar* [1995] 2 Cr.App.R. 49).

Under the SOA 2003 there is now a statutory test. By section 76 "it is to be conclusively presumed" that the complainant did not consent to a sexual act where

> (2)… (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; [or]
> (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

This test was widely assumed to codify the position as it was at common law; and that is how the Court of Appeal has now interpreted it.

In *B*, C alleged that D had raped her using force, but D claimed that she had consented. D was HIV positive; and so the judge directed

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the jury that, if they were not convinced that D had forced C to have sex with him, they could still convict him on the basis that her apparent consent was vitiated because, had she known of his medical condition, she would not have had unprotected sex with him. The Court of Appeal accepted that, had D infected her, he might have been guilty of maliciously inflicting grievous bodily harm under section 20 of the Offences Against the Person Act 1861, because C had not consented to the risk of infection. But in the light of the wording of section 76(2)(a) of the SOA, C's ignorance of the risk of infection did not vitiate her consent to the sexual act. So D's conviction was quashed, and a retrial ordered.

In *Jheeta*, D, afraid that his relationship with C was about to end, carried out a bizarre and complicated fraud. In the course of this he sent C messages which purported to come from the police, telling her that he was suicidal, and warning her that in order to prevent him killing himself she must continue to have sex with him: and that if she refused, she would be fined. Astonishingly she was taken in, and on this basis unwillingly allowed their sexual relationship to continue. When the truth came out, D was prosecuted; and on legal advice that his fraud and her mistake had vitiated her consent, he pled guilty, inter alia, to rape contrary to the SOA 2003. The Court of Appeal said that, in the light of section 76(2)(a), this advice was incorrect. However, the court felt able to uphold the rape convictions, on the basis that, on D's own admission to the police, there had been at least some occasions "on which the complainant was not truly consenting".

On both *B* and *Jheeta* there is much to say, but room here for brief comments only.

The decision in *B*, it is suggested, is correct. As a matter of policy, it is debatable whether someone who merely exposes an unknowing sexual partner to the risk of serious infection should be guilty of a criminal offence. But if he should, the need for "fair labelling" suggests that his offence should not be rape. It is one thing to say that D is guilty of recklessly infecting his partner, where his partner was ignorant of the risk of infection. It is quite another thing to say that her ignorance of this risk turns the act of consensual sex into a rape – even where the risk did not materialise and she escaped infection. If criminal liability is really needed here, Parliament should create a special offence of reckless endangerment; and unlike rape, it should not carry imprisonment for life.

The decision in *Jheeta*, I believe, is also correct in its understanding of when consent to sexual acts is vitiated by fraud or by mistake. But unlike *B*, the gap in the law that it reveals is glaring and obvious. It is most reprehensible to procure a sexual act by fraud, whether or not the fraud vitiates consent and turns the act into a rape; just as it is most

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reprehensible to obtain property by false pretences, whether or not the obtaining also constitutes a theft. With that in mind, section 3 of the SOA 1956 intelligently provided a specific offence of procuring a woman to have intercourse by false pretences: of which Jheeta was convicted, incidentally, in respect of what he had done while the old Act was still in force. But the new Act, though hitting with the heaviest of hands all forms of sexual naughtiness, from teenage petting, via "homosexual incest" to necrophilia, fails to deal with this type of misbehaviour. Its framers in the Home Office apparently thought that this was covered by the new offence in section 4 of "causing a person to engage in sexual activity without consent"; which shows, alas, how little they understood about consent, or fraud, or mistake – or indeed any other basic concept of the criminal law.

J.R. SPENCER

ARBITRATION AND THE BRUSSELS REGULATION

WHEN, if at all, may English courts restrain claimants from suing in other Member States? The European Court of Justice has declared such relief to be inconsistent with the principle of mutual trust embodied in Regulation 44/2201, governing jurisdiction in national courts: Case C-281/02 *Turner v. Grovit* [2004] ECR I – 3565. But when does the Regulation engage, so that the ban imposed in *Turner* applies? Perhaps it does so whenever the foreign proceedings are within the Regulation's material scope. If so, civil proceedings in the courts of Member States can never be restrained. Alternatively, perhaps the Regulation only engages when it governs jurisdiction in both the foreign and the English proceedings. Judicial proceedings in other Member States could thus be restrained, provided relief is sought in English proceedings beyond the Regulation's reach.

If the second view prevails, the restraint of proceedings in other Member States is generally prohibited. Relief could not be granted, say, to enforce an English jurisdiction agreement. Nor, presumably, if jurisdiction were asserted pursuant to Article 4 of the Regulation, which preserves national law in specified cases, though they remain within the Regulation's scope: ECJ Opinion 1/03 (the "Lugano Opinion").

But the second view has an important consequence. Article 1(2)(d) exempts arbitration from the Regulation's scope. The Regulation governs neither the jurisdiction of arbitrators, nor proceedings for judicial remedies ancillary to arbitration: Case C-190/89 *Marc Rich & Co AG* v. *Società Italiana Impianti PA* [1991] E.C.R. I-3855; C-391/95 *Van Uden Maritime BV* v. *Firma Deco-Line* [1998] E.C.R. I-7091. An

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