Upper Tribunal
(Immigration and Asylum Chamber)

NB and ZD (para. 59 discretion) Guinea [2010] UKUT 302 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 1 February 2010

Before

SENIOR IMMIGRATION JUDGE GLEESON
SENIOR IMMIGRATION JUDGE SOUTHERN

Between

NB
ZD

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the first Claimant: Mr Abid Mahmood and Mr Rupert Beloff, Counsel instructed by Blakemores Solicitors
For the second claimant: Mr C Jacobs, Counsel instructed by Howe & Co, Solicitors

For the Respondent: Mr A Payne, Counsel instructed by the Treasury Solicitor

1. *The Court of Appeal decided in the present case that a failure by a party to comply with the provisions of the Procedure Rules is an "error of procedure" within the meaning of rule 59, and that rule therefore operates to preserve the validity of steps taken in the proceedings thereafter, unless the Tribunal exercises the discretion therein to order to the contrary.*
2. *The power may be exercised even when the point has not been raised by the appellant.*
3. *In the exercise of its discretion in relation to rule 23, the Tribunal must consider the nature and extent of the breach and this will entail a consideration of all material factors. These are likely to include:*
    a. *The length of the delay in the context of the strict time-limits under the Rules for filing and serving grounds of appeal, (19 days in a case when the time for appealing was 5 days).*
    b. *The Secretary of State's action in misinforming the Upper Tribunal that she had complied with the requirements of rule 22(5)(a) as to the date when service had been effected.*
    c. *The Secretary of State's failure to draw to the attention of the Tribunal her failure to have complied with rule 23(5)(b).*
    d. *Prejudice suffered by the applicant such as the effect of being notified by the Tribunal that the respondent is seeking permission to appeal when the appellant has not yet received the determination, the loss of the opportunity to protest that the Secretary of State's application is out of time and the effect of the passage of time.*
    e. *Repugnance arising from the Secretary of State's pursuing for any prolonged period her challenge to the decision of the Tribunal without the successful party being aware of that decision.*
    f. *The merits of the substantive application.*
    g. *The fact that the failure does not prevent a fair hearing is not decisive.*

DETERMINATION AND REASONS

1. These appeals, which were not linked before the original Immigration Judges or those who reconsidered the appeals, were listed together before the Court of Appeal and remitted together as both of them concerned the effect of paragraph 23(5)(i)(a) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, in cases where the respondent had failed to serve the Tribunal's determination on an appellant before filing her application for reconsideration.

2. The first claimant is a citizen of Guinea and the second claimant is a citizen of Turkey. In each case, the claims succeeded before the first Immigration Judge, at least in part, and the respondent sought reconsideration. The respondent failed to serve the Immigration Judges' determinations on the appellant 'not later than the date on which the respondent makes [the reconsideration] application'. That is not disputed.

3. The facts as to delayed service of the determinations were that in each case the respondent sent his application for reconsideration by facsimile to the AIT within the time limited, but delayed in serving the determination on the claimant. The respondent did not serve the first claimant until 19 days after faxing his application for reconsideration, but the claimant asked the AIT for a copy and received that after only a four day delay. The second claimant's copy of the favourable determination was posted on the day after the respondent faxed his reconsideration application to the Tribunal and was thus one, or perhaps two days late.

Paragraphs 23 and 59 of the Asylum and Immigration Tribunal (Procedure) Rules 2005

4. The respondent's responsibility as to service is set out at out in paragraph 23 of the Asylum and Immigration Tribunal (Procedure) Rules 2005:

> "**23 Special procedures and time limits in asylum appeals**
>
> … (5) The respondent must—
> (a) serve the determination on the appellant—
> (i) if the respondent makes an application for permission to appeal against a decision of the Tribunal, by sending, delivering or personally serving the determination not later than the date on which the respondent makes that application; and …
> (b) as soon as practicable after serving the determination, notify the Tribunal on what date and by what means it was served.
> (6) If the respondent does not give the Tribunal notification under paragraph (5) (b) within 29 days after the Tribunal serves the determination on it, the Tribunal must serve the determination on the appellant as soon as reasonably practicable thereafter."

5. That contrasts with the service provisions in the Immigration and Asylum (Procedure) Rules 2003:

> "**Service of determination**
>
> **3.5** (1) Except where paragraph (2) applies, the appellate authority must send to every party written notice of the Tribunal's determination on an application for permission to appeal.
> (2) Where an application for permission to appeal relates, in whole or in part, to a claim for asylum and-
> (a) the appellant-
> (i) is the person claiming asylum; and
> (ii) is in the United Kingdom; and
> (b) the Tribunal has refused permission to appeal,
> the appellate authority must send the determination to the Secretary of State, who must serve it on every other party.
> (3) Where paragraph (2) applies, the Secretary of State must notify the Tribunal when and how the determination was served on the appellant."

6. The earlier rule restricts service by the respondent to unsuccessful asylum claims, with the Tribunal being required to serve determinations on

immigration claimants and successful asylum claimants. That, with respect, is a more sensible formulation.

7. The respondent agrees that, in both these appeals, she did not comply with the new paragraph 23(5)(a)(ii) obligation, but argues that the subsequent proceedings were nevertheless valid by reason of the operation of paragraph 59, the failure to serve being, in her contention, a procedural error rather than one of substance:

> "**59 Errors of procedure**
> (1) Where, before the Tribunal has determined an appeal or application, there has been an *error of procedure such as a failure to comply with a rule—*
> (a) subject to these Rules, *the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders*; and
> (b) the Tribunal may *make any order, or take any other step, that it considers appropriate to remedy the error."*
> *[Emphasis added]*

8. There has been no suggestion that the original Immigration Judge's determinations were invalid, so paragraph 59(2) is inapplicable. The effect of paragraph 59(1) is to keep effective any step in the proceedings unless or until the Tribunal exercises a discretion to treat that error a invalidating a step in the proceedings, or make an order, or take any other step it considers appropriate.

Second claimant's appeal: grant of leave to remain

9. In the case of the second claimant, the original Immigration Judge allowed the appeal on human rights grounds only (suicide risk), dismissing the asylum appeal. On 19 March 2010, after the hearing of this appeal, but before this determination was finalised, the respondent granted her leave to remain under a legacy exercise which is dispositive of her human rights appeal.

10. The second claimant served a timely notice under rule 17 indicating that she wished to revive and pursue the Refugee Convention appeal dismissed by the original Immigration Judge in 2006. Subsection 104 (4A) of the Nationality. Immigration and Asylum Act 2002 provides that an appeal under s 82(1) (against an immigration decision) shall be treated as abandoned where leave to enter or remain is granted, save as set out in subsection 104 (4B):

> "104(4B) Subsection (4A) shall not apply to an appeal in so far as it is brought on the ground relating to the Refugee Convention specified in section 84(1)(g) where the appellant –
> (a) is granted leave to enter or remain in the United Kingdom for a period exceeding 12 months, and
> (b) gives notice, in accordance with any relevant procedural rules (which may include provision about timing), that he wishes to pursue the appeal so far as it is brought on that ground."

11. Section 84(1)(g) provides that it shall be a ground of appeal under section 82(1):

> "84 (1)(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention…"

12. The original Immigration Judge's dismissal of the asylum appeal in January 2006 has stood unchallenged until now and it is not therefore clear why the second claimant considered that her Refugee Convention claim could be revived at this late stage. That element of her appeal is not treated as abandoned because she has been granted leave: it was dismissed in 2006 and she has never challenged that dismissal. The second claimant therefore has no Refugee Convention claim before this Tribunal. If her circumstances have changed, she would need to make a fresh claim to the Secretary of State.

13. As far as her human rights claim is concerned, the exception in s 104 (4B) does not avail her. The second claimant has been offered and accepted leave to remain in the United Kingdom and that is an end of her human rights appeal, which is statutorily abandoned.

14. Accordingly, there is no element of the second claimant's appeal which is still before the Tribunal for determination. We record below the very helpful evidence given by her solicitor Mr Saldanha, and the useful skeleton argument and submissions by Mr Jacobs. We have given weight to them in considering the appeal of the first claimant, and we also had the advantage of a skeleton argument and oral submissions by Mr Mahmood on behalf of the first claimant.

Transitional provisions

15. This determination was not completed before the AIT ceased to exist on 15 February 2010; the AIT was replaced by the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber). Pursuant to Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (S.1.2010/21):

> "4. Where the reconsideration of an appeal by the Asylum and Immigration Tribunal under section 103A of the 2002 Act has commenced before 15 February 2010 but has not been determined, the reconsideration shall continue as an appeal to the Upper Tribunal under section 12 of the 2007 Act and section 13 of the 2007 Act shall apply."

16. This remitted reconsideration therefore falls to be determined as though it were an appeal before the Upper Tribunal.

The history of the first claimant's appeal

17. We are concerned in this determination only with the first claimant's appeal (hereafter 'the claimant'). The claimant succeeded before the first

Immigration Judge on both human rights and Refugee Convention grounds; the reconsideration (now overturned) substituted a decision dismissing both elements of her appeal on the same grounds.

18. The claimant did not raise the question of delayed service of the determination until the Court of Appeal grounds. SIJ Freeman granted leave, querying nevertheless whether the claimant should be permitted to pursue such a fundamental new issue so late in the day. However, it appears that in the Court of Appeal there was no difficulty perceived in allowing the claimant to do so.

19. Both appeals were considered together by the Court of Appeal on 17 November 2008, and the reconsideration determinations set aside. In each case, the respondent was ordered to pay 75% of the claimant's agreed or assessed costs. The Court of Appeal judgment herein is reported as NB (Guinea), ZD (Turkey) v The Secretary of State for the Home Department [2008] EWCA Civ 1229. The judgment of Jackson LJ clarifies the task set for the AIT, and now the UT (IAC) to perform.

> "19. I have set out the provisions of paragraph 59(1) in part 1 above. There can be no doubt that the Secretary of State's failure to comply with paragraph 23(5)(a)(i) constitutes an 'error of procedure' within the meaning of paragraph 59(1). Paragraph 59(1) (a) expressly provides that such an error does not invalidate any step taken in the proceedings unless the tribunal so orders. The inexorable consequence of paragraph 59(1) is that the Secretary of State's failure to serve the immigration judge's decision on the date when he applied for reconsideration does not automatically invalidate the reconsideration proceedings. In my view the correct analysis of paragraph 59(1) is that in the case of procedural error, save where the rules expressly provide otherwise (e.g. rule 35), the AIT has a discretion as to whether or not subsequent steps in the proceedings are invalidated. Some procedural errors plainly will not have that Draconian consequence. However, a breach of paragraph 23(5)(a)(i) (the rule in issue in these proceedings) may well attract such a consequence. In each case the AIT must carefully consider the nature and extent of the Secretary of State's breach of paragraph 23(5)(a)(i) and the effect of that breach upon the claimant. It will undoubtedly be relevant if the claimant has suffered prejudice as a result of late receipt of the appeal decision. For example, he may lose the opportunity to protest that the Secretary of State's application for reconsideration is out of time (even though the rules do not confer upon him the right to make submissions in respect of the Secretary of State's application for reconsideration). However, mere absence of prejudice does not automatically give the Secretary of State a licence to delay serving the appeal decision. The proposition that the Secretary of State can pursue for any prolonged period his challenge to an AIT decision without the victorious party being aware of that decision is repugnant. The AIT should take that repugnance into account when deciding whether a) to allow reconsideration proceedings to go ahead or b) to declare those proceedings invalid.
>
> 20 Let me now consider how those principles should be applied to the two cases before this court. In NB's case there was a delay of 20 days between the Secretary of State applying for reconsideration and NB receiving a copy of the appeal decision from the Home Office. That probably means that the Home Office posted the appeal decision 19 days too late. That period of delay on the part of

the Home Office cannot simply be brushed aside as immaterial. First of all the Secretary of State's application for reconsideration included the following statement:

> "The determination of the AIT was served on the appellant by first class post on 23 November 2006"

That statement was incorrect on the evidence available to us. Secondly, during the course of the 20 day period NB received a letter from the AIT informing her that the Secretary of State had applied for reconsideration. She had no copy of the determination, and did not yet know what the Immigration Judge had decided. On 27 November her solicitors wrote to the AIT in the following terms:

> "Our client has received a letter confirming the acknowledgement of an application for a review of the tribunal's determination. Nevertheless neither ourselves nor our client has received a copy of the tribunal's determination."

It is, in my view, unfortunate that those solicitors needed to send this letter on a date four days after the Secretary of State had lodged his application for reconsideration. On 29 November NB's solicitors sent an email to the Home Office expressing similar concerns to those previously expressed in their letter to the AIT dated 27 November. It is clear from this correspondence that the Home Office and the AIT were well aware that the requirements of paragraph 23(5)(a)(i) had not been complied with. It therefore behoved the Secretary of State to draw this breach of paragraph 23 and the misstatement in his application for reconsideration to the attention of the AIT in the course of his ex parte application for reconsideration. In this regard see the decision of Mr Justice Maurice Kay in *R (Cindo) v The Immigration Appeal Tribunal* [2002] EWHC 246 (Admin) at paragraph 11. Even if the Secretary of State did not do so, it behoved the AIT as a specialist tribunal alerted to the relevant facts, to consider the matter. See rule 4 of the Procedure Rules. The AIT should have considered how to exercise its discretion under paragraph 59(1). The AIT did not order so. It simply proceeded to make an order for reconsideration.

21. Mr Payne for the Secretary of State submits that neither party raised the breach of paragraph 23(5)(i)(a) [sic] at the reconsideration hearing and it is now too late to take the point. He submits that in the absence of any order by the AIT under paragraph 59(1) of the Procedural Rules the error had automatically been cured. In support of this submission Mr Payne relies upon the decision of the Court of Appeal in R v Secretary of State for the Home Department ex parte *Jeyenthan* [2000] 1 WLR 354 , in particular at page 366. I do not accept this argument. The original order for reconsideration was made on the basis of an erroneous statement in the Secretary of State's application. The AIT must now consider this matter on the correct factual basis. In my view this case should now be remitted to the AIT so that the tribunal can consider how to exercise its discretion in relation to the breach of paragraph 23(5)(a)(i) which has occurred. "

20. The meaning of the judgment is plain: the Tribunal is to consider, and exercise, its paragraph 59 discretion on the facts. To the extent that the line of guidance determinations by the Tribunal indicated that paragraph 23(5)(a)(i) could be considered without reference to paragraph 59, they were no longer good law.

The hearing

21. The Tribunal directed the filing of evidence and skeleton arguments before the hearing. We had the benefit in addition of oral evidence for the second claimant, supported by a witness statement, from Mr David Saldanha, a solicitor with Howe & Co. We have given Mr Saldanha's statement and oral evidence weight, although his client's appeal is not before us now due to the statutory abandonment of the human rights appeal.

22. Mr Saldanha has made a very detailed study of the Secretary of State's practice over time in relation to paragraph 23 which has been very helpful to the Tribunal in this and other appeals.

23. Evidence from Mr Saldanha was considered and approved in Semere, R (on the application of) v Asylum and Immigration Tribunal [2009] EWHC 335 before Blake J at paragraphs 32-35 thereof:

> "32. Mr. Saldanha is a solicitor in the firm of Howe and Co who had previously been appearing as an advocate before the AIT and its predecessors for some twenty years. He has made a witness statement in which he points to evidence of the practice of the former Immigration Appellate Authority to allow two working or business days for receipt of its determinations when calculating time to appeal to the former second tier authority. This was at a time before 2005 when the IAA had the responsibility for service of its own decisions. He indicates that there was no notification of a change in practice in 2005. He points out that in 2006 when the Home Office adopted the practice of postmarking envelopes with the date of posting it became apparent that the actual date of posting of determinations was one business day after the date that had been stamped by the Home Office on the AIT's determination as the date of promulgation, and this latter date could not be considered the date of posting.
>
> 33. This account is supported by the pertinent observations of Mr. Justice Hodge OBE when sitting as the President of AIT in the case of *EY (Democratic Republic of Congo)* [2006] UKAIT 00032. He observed:
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> "[11] It is of the first importance, given the time limits in this jurisdiction, that the date of service by the Secretary of State is clear. Where asylum decisions are served by post by the Secretary of State it is consistently the case that the date of posting such determinations is unclear.
>
> [16]...It is within the knowledge of the Tribunal that in the majority of asylum cases the respondent does not give the Tribunal notification on what date and by what means determinations have been served. This is breaching Paragraph 23(5)(b). Senior immigration judges considering time limits are not assisted by this failure....
>
> [19] The word "promulgation" has been used for many years within this jurisdiction. It appears on the front sheet of all determinations. It was traditionally completed by the administrative staff within the Tribunal with a date stamp. That stamp was the same date as that on which the determination was served by post on the parties. Where the determination is served by the Tribunal on the respondent alone the date is left blank. In asylum cases any date placed beside the word promulgation on the determination of the Tribunal is unlikely to be of great assistance in deciding when the document was served. It is not a matter for the respondent to add dates to determinations made by the Tribunal"

34. The Treasury Solicitor's letter of the 29th January 2009 does not dispute the evidence of Mr Saldanha, rather it gives some independent support for it. It states:

> "ADMU have no paper records reaching back to 2005. The only record of service is found on the UK Border Agency's computer system. This records the date that the determination would be sent to the post room to be sent out via royal mail, and the determination itself would have been date stamped prior to being sent to the post room. It is therefore possible that in cases where the determination was sent late in the day (or after the last post collection) the date stamp of the determination may not have reflected the day on which the determination was posted"

35. The letter continues that the 2005 franking machine has been superseded and it is now impossible to be sure that the date of sending was included in the franking machine in 2005. Since 15th October 2008 all AIT determinations are served by recorded delivery which acts as confirmation of the date when it was sent by the Home Office and when it was received by an appellant or his representatives."

24. At paragraph 39, Mr Justice Blake said this:

> "39. …The present application is concerned with events in July 2005 three months after the new rules came into force. The date stamping in the present case is precisely what the President of the AIT indicated should not occur. The evidence of Mr Saldanha supports the AIT's observation that the date stamping of the decision is not the same as evidence of sending, as does the response to it by the Treasury Solicitor."

Mr Saldanha's evidence
Witness statement

25. Mr Saldanha relied on his witness statement of August 2009, which reflected his continuing analysis of the respondent's compliance with paragraph 23(5)(a)(ii) in Howe & Co clients' appeals, where the respondent had applied for reconsideration of determinations favourable to his firm's clients. He had caused envelopes to be retained to establish dates of posting and checked the dates asserted with the AIT's records where necessary. The following conclusions could be drawn:

(i) Over the period from April 2005, when paragraph 23(5)(a)(ii) came into effect with the formation of the AIT until August 2009 when he prepared his witness statement, there were 700 appeals where the Secretary of State had failed to serve the determination as required in paragraph 23, but only 7 where the respondent had sought reconsideration. (The other 693 breaches must therefore not have concerned paragraph 23(5)(a)(ii)and do not concern the Tribunal in this appeal.)

(ii) Of the 7 appeals where the respondent had applied for reconsideration, the second claimant's case was the only one where the AIT had not held that that there was no valid appeal before it.

We do not have the benefit of equivalent statistics retained by solicitors representing the first claimant.

26. Mr Saldanha's records identified several phases in the respondent's response to paragraph 23(5)(a)(ii):

(i) Before the end of **February 2006,** determinations were served by being posted in an envelope bearing no postmark and the sequence of events was correspondingly hard to establish. (see EY (asylum determinations – date of service) Democratic Republic of the Congo [2006] UKAIT 00032);

(ii) From about **21 February 2006** to the end of 2007, the respondent served determinations in postmarked envelopes, typically showing that the determination was date stamped one day earlier than the envelope was actually posted.

During this period, despite the recommendation by Hodge P in EY, only a handful of letters were accompanied by a letter dealing with the posting date, and these letters were dated differently from the date when the determination was sent, again not as Hodge P had suggested in *EY*;

(iii) In **late 2007,** the number of determinations where the posting date was a day later than the stamped date began to decline.

On 11 October 2007, the AIT heard RN (paragraph 23(5): respondent's duty) Zimbabwe [2008] UKAIT 00001 which was promulgated in January 2008;

(iv) From **January – October 2008**, the determinations as served bore neither date stamp nor method of service.

The only way to establish the date of service was by examining the envelope and/or telephoning the AIT to find out the date asserted by the respondent and entered onto the AIT computer system, ARIA;

(v) From **October 2008**, determinations were almost invariably accompanied by standard letters dealing with the date of service, but again these letters were frequently not dated on the same day as the posting of the determination; and

(vi) Mr Saldanha provided examples up to **August 2009**, where the respondent failed to serve the determination at all. Service had been by the AIT instead, under the provisions of paragraph 23(5), after 29 days had elapsed.

He had telephoned the respondent on each occasion to establish when the determination was served on the respondent.

27. Mr Saldanha was unable to identify any prejudice to his client, the second claimant, but noted that in an appeal by a different client of his firm, NASS support was terminated, on the basis that the permission to appeal application was out of time, based on an erroneous date for service supplied to the AIT by the respondent. In another client's appeal, the respondent's failure to serve the successful determination had resulted in a two year old child almost being removed from its parent and taken into care.

28. Mr Saldanha observed that there was an element of repugnance in allowing one of the parties to control the service of the determination on the other; to permit such open breach of paragraph 23(5)(a)(ii) by condoning the respondent's failure to serve the determination at the same time as his application for reconsideration, or sometimes at all, compounded that repugnance, especially as the respondent's current practice was not to date-stamp the determination when served, making it difficult for the parties to check whether there had been compliance. He characterised the respondent's behaviour as 'a persistent course of conduct which has continued since the provision for the respondent to serve determinations was reintroduced on 4 April 2005'. The respondent's failure to observe the requirements of paragraph 23(5)(a)(ii) continued, albeit not to the same extent as formerly, right up to the date of his August 2009 witness statement.

Oral evidence

29. Mr Saldanha's evidence in chief followed his witness statement but added a clarification, that the position was now much improved, although late service of determinations continued to some extent.

30. In cross-examination, Mr Saldanha said that the respondent was considering an application by the second claimant for leave to remain under the legacy programme: he would not be pursuing any ECHR arguments before the present Tribunal. There was no factual material about the second claimant's appeal in his statement. Additional evidence about the claimant's health had been provided to the Secretary of State and was under consideration, together with further submissions from Howe & Co.

31. As already noted, that consideration had a positive outcome and the second claimant now has leave to remain for a period in excess of 12 months, apparently on human rights grounds, which has disposed of his appeal. The Tribunal is very grateful to Mr Saldanha for the detailed analysis of the varying practices of the Secretary of State since 2005 in relation to paragraph 23(5)(a)(ii).

Submissions for the claimants

32. We have taken into account the skeleton arguments filed on behalf of both claimants. In oral submissions for the second claimant, Mr Jacobs relied on Mr Saldanha's evidence of the respondent's routine failure to comply with paragraph 23(5)(a)(i). Paragraph 23(5)(a)(ii) was expressed in mandatory

terms and had an aspect of repugnance about it, as giving overmuch control of the process of serving a determination to one of the parties. The soundness and/or merits of the reconsideration determination were of no relevance to the exercise which the AIT had been asked to carry out in these appeals.

33. For the first claimant, Mr Mahmood relied on his skeleton argument. He acknowledged the breadth of paragraph 59 but argued that, taking it with paragraph 23(5)(a)(ii), the Secretary of State had a high hurdle to overcome. Breach of paragraph 23(5)(a)(ii) might be only a procedural error but it was a significant one. As to the factors which the Tribunal might consider, Mr Mahmood set out a list of factors which the Tribunal might consider when exercising its discretion under paragraph 59:

    (i) the reasons for non-compliance with paragraph 23(5)(a)(ii), and whether there was any evidence to support the account now given;
    (ii) whether that evidence was a good explanation by which the Tribunal was persuaded;
    (iii) the nature and extent of the breach (length of delay, element of misstatement);
    (iv) issues of repugnance, if relevant;
    (v) the extent of the effect/prejudice on the claimant, noting that absence of prejudice is insufficient without more to require the Tribunal to exercise its discretion in favour of validating the proceedings; and
    (vi) whether or not the reconsideration proceedings ought to be permitted to proceed, bearing in mind the overriding objective set out at paragraph 4 of the 2005 Rules (that appeals should be processed fairly, quickly and efficiently).

34. The stumbling block here was that despite having five years in which to do so, the respondent has given no explanation whatsoever for non-compliance. Well over a year after the Court of Appeal decision in these appeals, the respondent had furnished neither a witness statement nor any other evidence for the Tribunal to consider by way of explanation. The best that the Tribunal had received was an apology from the Treasury Solicitor, sent on Friday January 29 2010, some four years late, and from Counsel not the Secretary of State. The Tribunal might have sympathy for the Secretary of State and even seek to decipher a possible explanation, but there was just nothing to go on.

35. As regards the type and length of delay, the type of delay was a plain and until recently unapologetic breach of a mandatory provision of the rules. A period of 19-20 days was significantly more than the permitted time, particularly as a party wishing to submit grounds for review had only five days in which to do so. The system was there for a reason. Issues of repugnance were highly relevant here, Mr Mahmood argued. The absence of any direct evidence of prejudice was not sufficient to validate the appeal. At paragraph 20 of the Court of Appeal judgment, the prejudice was set out;

the ‘hassle’ and the passage of four years of the claimant’s life rendered the effect of the proceedings themselves prejudicial.

36. In relation to the overriding objective, contended Mr Mahmood, this was not a deportation case. There was no real need for the provision for service of determinations by the respondent on appellants such as these claimants; no successful claimant was likely to abscond. When paragraph 23(5)(a)(ii) was introduced, the understanding was that its default operation would be by personal service but in the great majority of such appeals, the respondent had in practice been content to serve the determinations by post. The merits of the claim should not weigh in the balance, although an appeal which might have been allowed would arguably be a stronger case for a refusal to use the paragraph 59 discretion.

Respondent’s case

37. In both her skeleton arguments, the respondent argued that the question for the Tribunal was whether, in the exercise of its discretion under paragraph 59, it should hold that the respondent had made an invalid application for reconsideration by virtue of its failure to comply with paragraph 23(5)(a)(i) of the AIT Procedure Rules 2005.

38. After setting out the history of each appeal and the provisions of rules 23 and 59, the respondent’s argument focused on the decision of the Court of Appeal in Benkaddouri v Secretary of State for the Home Department [2003] EWCA Civ 1250, a case decided under the earlier IAT Procedure Rules 2000. The failure to comply in Benkaddouri related to breach of directions, described by Sedley LJ as ‘verging on the contumacious’ and not to the provisions of paragraph 23(5)(a)(ii), a procedure which came into being with the AIT in 2005.

39. The respondent’s argument did not engage at all with the series of decisions by the AIT about the effect of paragraph 23(5)(a)(ii). It recited (without the neutral or any citation) paragraph 19 of the Court of Appeal’s judgment in these appeals, but out of context: the guidance at paragraphs 20-22 is omitted and instead, working from Benkaddouri, the respondent extracted four principles:

    (a) the extent of the non-compliance (whether the Secretary of State ‘pursued for a prolonged period’ his application for reconsideration without the claimants being aware of the outcome);
    (b) the prejudice (if any) to the claimants;
    (c) the impact on the respondent of not permitting the application to be made, thus ‘denying it the opportunity to challenge a legally flawed first instance determination’; and
    (d) The substantive merits of the reconsideration applications, which both succeeded at the reconsideration hearings, reversing the outcome of the appeals.

40. Where, notwithstanding non-compliance, a fair hearing could take place, the respondent contended that was 'ultimately decisive'.

41. The Benkaddouri-derived merits criterion was not among those identified by Jackson LJ in the Court of Appeal judgment in these appeals and we do not consider that it is relevant: the applications for reconsideration either were or were not correctly served, and if incorrectly served, the respondent should have notified the Tribunal as soon as she became aware of the defect so that the operation of paragraph 59 could be considered.

42. In submissions for the Secretary of State, Mr Payne accepted that there was less justification for the procedure in paragraph 23(5)(a)(ii) in cases where, as here, the claimants had succeeded and there was no risk of absconding. Where the respondent challenged a successful outcome before the first Immigration Judge, the successful party had no right of reply to the permission application. The mandatory nature of paragraph 23(5)(a)(ii) should properly be viewed as a gateway for further consideration of the consequences of non-compliance. Failure to rely paragraph 59 did not invalidate the substantive assessment of the merits of the appeal in the reconsideration determination.

43. Mr Payne relied on the consultation documents prepared on behalf of the respondent before the present Rules were introduced:

> "In commenting on the time limit for service of asylum decisions by the respondent (Immigration and Nationality Directorate of the Home Office (IND)), almost all responses expressed a preference for service of decisions to remain the responsibility of the Tribunal.
>
> Specific concerns raised in this area were that there were not safeguards to ensure that service takes place within the 28 day time limit and no sanctions if it did not. The commonly held view was that this means that successful and unsuccessful claimants may have to wait unlimited periods of time until they know the outcome of their appeal. Responses also commented that service on the respondent only by the Tribunal means that IND will receive all asylum decisions up to 28 days before the claimant. This was seen as creating procedural unfairness as it meant that the IND could apply for review of an AIT decision, and the Tribunal may order a review and set a date for a reconsideration hearing before the asylum seeker knows the outcome of the next appeal.
>
> We have retained provisions for respondent service, as these provisions support the government's intention of improved contact management in support of broader policy objectives. However, to address the specific concerns, the rules have been amended to specify that …in cases where IND are seeking to challenge a Tribunal determination they must send or personally serve the determination on the claimant at the same time, or before, they lodge their application."

44. In discussion of paragraph 59, the consultation process described that rule as mirroring the pre-2005 'slip rule' to allow the Tribunal to correct an administrative error and that:

> "Recognising the introduction of time limits at various points in the rules, it also sets out a provision whereby a determination is not invalidated if, for example, hearings do not take place within specified time periods. Respondents generally welcomed steps enabling the correction of administrative errors and agreed that a determination should be valid where time limits in the rules are not met."

45. The determination in the first claimant's appeal was received by her after four days (almost twice the intended time), but only because the AIT had sent it to her, at her request. Mr Payne argued that in the Immigration Rules made it improper for the AIT to have served the determination directly and, at least in the absence of an application for reconsideration served by the respondent, the claimant had no right of response and prejudice to her was difficult to discern. The first claimant had not relied on paragraph 23(5)(a)(ii) in proceedings before the AIT. The AIT could not be criticised for not dealing with that point, given that the claimant had not raised it.

46. Mr Payne accepted that at paragraph 20 of the Court of Appeal judgment, the court considered that the AIT as an expert tribunal should have dealt with the question of its own motion. The Secretary of State had prepared thoroughly for that hearing and he had personally examined the file but, two years after the event, there was simply no material on the files to enable the respondent to put forward any explanation for the oversight. Remittal by the Court of Appeal in both appeals was restricted to the paragraph 59 point. Both claimants had been determined on reconsideration to have no asylum or human rights claim but sought to retain the successful outcome of their initial Immigration Judge determinations, merely on the basis of a procedural breach. Had the point been taken before the reconsidering Immigration Judge that would have been different; the merits of the appeals were highly relevant to the exercise of the Tribunal's paragraph 59 discretion.

47. On any view, argued Mr Payne, the claimant was not prejudiced by the respondent's delay. She had never suggested that she needed more time to prepare or was disadvantaged or ambushed by the delay. She herself had successfully sought an extension of time to appeal to the Court of Appeal. The procedural claim was the only claim the claimant now had available to her. Mr Payne accepted that there was a breach of paragraph 23(5)(a)(ii) but invited the Tribunal to decline to exercise its paragraph 59 jurisdiction to void the reconsideration determinations. The Secretary of State had admitted and apologised for errors which, at this distance in time, it was almost impossible for her to explain.

Claimant's reply

48. For the claimant, Mr Mahmood reminded the Tribunal that the time issue had been raised in the Court of Appeal application in September 2007. The respondent should not be permitted to rely on the intervention of the claimant's solicitors which resulted in her receiving the determination after four days instead of 19 or 20. Delay and repugnance were separate and not interdependent as the respondent alleged.

49. On behalf of the second claimant, Mr Jacobs reminded the Tribunal that the last day for service by the respondent of a contested determination was the date of her review application. The 28-day limit in paragraph 23(5)(2) for service of unchallenged determinations where claimants' appeals had been unsuccessful had no relevance to this situation. It would be Draconian for the Tribunal to permit the respondent, without explanation or apology, to abuse a repugnant provision for which on the facts there was no justification. It was the policy itself which was repugnant, not the length of the delay.

50. The respondent's explanation for failure to explain the delay of 19 or 20 days in service on the claimant was unacceptable: file records and case workers would remain, even after a year or 18 months, from whom an explanation could have been sought. The default was compounded by the respondent's misleading statement that the determination had been served by post at the same time as the application for permission to appeal, which was untrue.

51. The Tribunal could not and ought not to permit a defaulting party to default with impunity on this important obligation, either by interfering with the right of appeal or supplying erroneous dates when it was those dates which triggered the statutory right of appeal. Only in exceptional circumstances should the paragraph 59 discretion be exercised to allow the appeal to proceed.

52. It was also not right to say that either claimant had lost their appeal on all grounds and now had to rely on a technicality in order to succeed. The reconsideration determinations had been struck down, the effect being that the original Immigration Judge determinations in favour of the claimants still stood. The material error of law findings in the reconsideration determinations were an integral part thereof and were now of no effect.

53. The Court of Appeal had given clear guidance as to the application of paragraph 59. There was a persistent course of non-compliance by the respondent which was relevant under EY. Late application to the Court of Appeal by the claimants was not comparable, being something which occurred in the ordinary course of events in individual appeals, rather than a course of conduct in many appeals by one of the parties. The judgment in Benkaddouri was irrelevant since it dealt with a non-mandatory provision contained in an earlier version of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and was of no relevance in considering the present, mandatory provision.

54. We reserved our determination which we now give.

Discussion

55. The AIT has had occasion to consider the Secretary of State's obligations under paragraph 23(5)(a)(ii) on a number of occasions. Before the introduction of the AIT, a similar rule had existed, the operation of which

was narrower, confined to circumstances where deportation was a possibility and the claimant had been unsuccessful. We are not concerned with that narrower version of the rule. Nor, with respect, are we much assisted by Benkaddouri, dealing as it does with a non-mandatory rule in the pre-AIT régime.

56. The first consideration of the present rule by the AIT was EY (Asylum determinations - date of service) Democratic Republic of Congo [2006] UKAIT 00032, in which, at paragraphs 15-16, the AIT (Hodge P, SIJ Gleeson and SIJ King) said this:

> "15. Because of the failure by the respondent to indicate the date on which the determination had been posted it was in fact not possible to calculate the proper deemed date of receipt in accordance with Rule 55 (5).
>
> 16. These failures are of great significance where the time limits for challenging the decision of this Tribunal are as restricted as they are. There are further difficulties for the Tribunal operating the review procedure. It is within the knowledge of the Tribunal that in the majority of asylum cases the respondent does not give the Tribunal notification on what date and by what means determinations have been served. This is breaching Paragraph 23(5)(b). Senior Immigration Judges considering time issue limits are not assisted by this failure. *A standard letter to the appellant with copies to the appellant's representatives and the AIT all dated and sent on the day of posting of the determination would remove most of the difficulties."*
>
> *[Emphasis added]*

As set out in Mr Saldanha's evidence, that guidance was not properly implemented and the date of service problems continued.

57. The AIT considered paragraph 23(5)(a)(ii) again in HH (Paragraph 23: meaning and extent) Iraq [2007] UKAIT 00036 (Mr C M G Ockelton, Deputy President, SIJ Grubb). That decision was specifically disapproved in the Court of Appeal consideration of these appeals, because it failed to deal with the effect of paragraph 59.

58. The next consideration by the AIT of paragraph 23(5)(a)(ii) was in RN (paragraph 23(5): respondent's duty) Zimbabwe [2008] UKAIT 00001 (SIJ Moulden and SIJ P R Lane) which held that:

> *"The respondent complies with paragraph 23(5)(a)(i) if, in cases other than personal service, she sends or delivers the determination not later than the date on which the section 103A application is made. It is not necessary for the determination to have been served on the appellant for the purposes of rule 55(5) by that date. Where the appellant adduces evidence that suggests the respondent has not complied with paragraph 23(5)(a)(i), it is for the respondent to show otherwise."*

59. Again, the paragraph 59 argument was not run. We reminded ourselves of the provisions of paragraph 59. Contrary to the submissions of the

claimants' Counsel, the primary effect of paragraph 59 is to ensure that appeals are not invalidated by procedural flaws:

"**59 Errors of procedure**

(1) Where, before the Tribunal has determined an appeal or application, there has been an error of procedure such as a failure to comply with a rule—

(a) Subject to these Rules, the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders; and

(b) The Tribunal may make any order, or take any other step, that it considers appropriate to remedy the error.

(2) In particular, any determination made in an appeal or application under these Rules shall be valid notwithstanding that—

(a) A hearing did not take place; or

(b) The determination was not made or served,

within a time period specified in these Rules."

60. In the present appeals, before the AIT determined the application, there was a plain and undisputed failure to comply with paragraph 23(5)(a)(i). We turn therefore to the guidance given by Jackson LJ in the Court of Appeal as to how the Tribunal should apply paragraph 59:

> "20. ...In my view the correct analysis of paragraph 59(1) is that in the case of procedural error, save where the rules expressly provide otherwise (e.g. rule 35), the AIT has a discretion as to whether or not subsequent steps in the proceedings are invalidated. Some procedural errors plainly will not have that Draconian consequence. However, a breach of paragraph 23(5)(a)(i) (the rule in issue in these proceedings) may well attract such a consequence."

61. Pausing there, we see that the effect of paragraph 59 is to make the proceedings valid unless the AIT (or now, UT (IAC)), exercises its discretion to invalidate them. Jackson LJ then set out what the AIT needed to consider:

a. The nature and extent of the Secretary of State's breach of paragraph 23(5)(a)(i) and the effect of that breach upon the claimant.

b. Whether the claimant has suffered prejudice as a result of late receipt of the appeal decision. For example, he may lose the opportunity to protest that the Secretary of State's application for reconsideration is out of time (even though the rules do not confer upon him the right to make submissions in respect of the Secretary of State's application for reconsideration).

c. Mere absence of prejudice does not automatically give the Secretary of State a licence to delay serving the appeal decision. The proposition that the Secretary of State can pursue for any prolonged period his challenge to an AIT decision without the victorious party being aware of that decision is repugnant.

d. The AIT should take that repugnance into account when deciding whether a) to allow reconsideration proceedings to go ahead or b) to declare those proceedings invalid.

62. We prefer that analysis to that put forward by Mr Payne based on Benkaddouri*;* for the reasons already given, we do not consider that Benkaddouri is of much assistance because both the status of the rule and the failure of the Secretary of State are significantly different.

Nature and extent of the respondent's breach of paragraph 23(5)(a)(ii)

63. It is not disputed that since 2005 the respondent has been unable to provide either a satisfactory explanation or a system which enables her to comply with paragraph 23, which we note was inserted into the Rules at her request, in the teeth of objections from consultees about precisely the type of problems which subsequently occurred. We consider that the repugnance factor of bringing within the paragraph 23(5)(a)(ii) service procedure determinations relating to claimants with no reason to abscond (because their First-tier Tribunal appeal was successful), coupled with the respondent's failure to notify the correct dates or control his internal postal system so as to comply, must be given significant weight.

64. We also note that the respondent did not apologise until the hearing of this second reconsideration, three and a half years later, and then by Counsel, and can provide no explanation of the error on in relation to the claimant's appeal. The respondent's non-compliance was systemic and her attempts to deal with it were designed to obfuscate rather than to solve the problem. There is no obligation on the respondent to serve her notice of appeal on the very last day for service nor any suggestion that it was not reasonably possible for her to have done so one day earlier, to enable proper compliance: removing the date stamp to make it impossible to tell whether there had been compliance is an unattractive 'solution' to this problem.

Prejudice

65. As set out in the judgment of Jackson LJ at paragraph 19, prejudice to the claimant is not determinative nor the lack of it necessarily fatal. Jackson LJ considered that prejudice might take many forms, over and above the delay which the necessity to go to the Tribunal and the Court of Appeal could be said to have caused to the claimant:

> "19. …For example, he may lose the opportunity to protest that the Secretary of State's application for reconsideration is out of time (even though the rules do not confer upon him the right to make submissions in respect of the Secretary of State's application for reconsideration). However, mere absence of prejudice does not automatically give the Secretary of State a licence to delay serving the appeal decision. "

66. It is right that the claimant did not raise the delayed service at first instance or in her reconsideration application and hearing: the first mention was in grounds of appeal to the Court of Appeal. She has not provided any evidence of prejudice to her. She wishes, after all this time, to have the certainty which the original Immigration Judge's favourable determination gave her. The third, conflated head of analysis is that absence of prejudice

is not determinative, and in this context we remember that the respondent served the determination almost three weeks late and misled the Tribunal about that date of service.

Repugnance

67. We bear in mind that paragraph 3.5 of the 2003 Rules, the last IAT Procedure Rules, was sensibly restricted to service by the respondent on the losing asylum claimant in the United Kingdom only, with the objective of preventing absconding. That was changed in the AIT Rules at paragraph 23(5)(a)(i) to allow service by the respondent on successful asylum claimants, at the respondent's request. It was incumbent on the respondent to come up with a method of service which was effective to meet the requirement of paragraph 23 and she has had five years to do so. The original understanding was that such service would normally be in person, in which case it would have been straightforward to give the determination and the grounds of appeal to the claimant at the same time.

68. However, the respondent has not found that necessary. The reason is clear: there is no real risk of absconding until the claimant knows the outcome of her appeal, and even less risk when a claimant knows that her appeal has been successful: the respondent has therefore not needed to devote resources to individual meetings and simply posts the grounds of appeal and determination to the claimant's address for service. The respondent is in control of that process, both as to service of the determination and of her grounds of appeal. It is not good enough for her to say that business needs mean that she cannot get her grounds of appeal ready in time for both to be served together before the grounds reach the Tribunal.

69. The repugnance factor is a weighty one. In this claimant's appeal, we remind ourselves that she received the respondent's challenge to her appeal some three weeks before the respondent served the determination in her favour. In the second claimant's appeal, of which we are not now seised, the delay was one or two days.

Should the Tribunal exercise its paragraph 59 discretion?

70. We now turn to the exercise of the paragraph 59 discretion.

> "**59 Errors of procedure**
> (1) Where, before the Tribunal has determined an appeal or application, there has been an *error of procedure such as a failure to comply with a rule*—
> (a) subject to these Rules, *the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders*; and
> (b) the Tribunal may *make any order, or take any other step, that it considers appropriate to remedy the error."*
> *[Emphasis added]*

71. The position in this appeal is that the reconsideration determination having been struck down, the original Immigration Judge's determination in the

claimant's favour stands. The material error of law reasoning forms part of the determination which was set aside and is no longer in effect.

72. The respondent has served an application for reconsideration which now is treated as grounds of appeal to this Tribunal. It was served out of time. We have to consider whether to exercise the paragraph 59 discretion or to allow that application to stand, and list the appeal for hearing before the Upper Tribunal.

73. The first question is whether the respondent's default is an 'error of procedure such as a failure to comply with a rule' thus engaging the paragraph 59 provisions. We are satisfied, given the plain language used, that this is a failure to comply with a rule and thus an error of procedure as paragraph 59 defines it. We are also satisfied that it occurred before the Tribunal reconsidered the appeal.

74. The default position under paragraph 59 is that subsequent steps in the proceedings are not invalidated. However, in the light of the Court of Appeal's judgment, there are no such steps. The appeal remains frozen at the grounds of appeal stage, the reconsideration determination having been set aside. Should the Tribunal now decline to exercise its paragraph 59 discretion to invalidate the grounds of appeal for failure to comply with the provisions of paragraph 23(5)(a)(i), then the grant of reconsideration remains valid and the appeal would be heard again before the Upper Tribunal.

75. If, on the other hand, the Tribunal considered that in the light of the respondent's long-standing failure to meet her obligations under paragraph 23(5)(a)(i) or to explain why she cannot do so, either generally or in this appeal, it would be appropriate to exercise that discretion, the Tribunal "may make any order, or take any other step, that it considers appropriate to remedy the error". There is a clear indication in the judgment of Jackson LJ in the Court of Appeal that in relation to this claimant, the exercise of the paragraph 59 discretion should be considered. We are satisfied that it is right to exercise it against the respondent. We take into account the following factors:

(a) The long period (5 years) during which successive Secretaries of State failed to make any headway in compliance with paragraph 23(5)(a)(ii) or to keep records enabling the respondent to explain what went wrong. There was no apology by the respondent until very late in the day.

(b) The delay of 19 or 20 days, four times the time for seeking reconsideration, before the Secretary of State served the determination of this claimant's successful appeal;

(c) The knowing misstatement by the respondent as to her compliance with the service requirements of rule 23(5)(a)(i);

(d) The ‘hassle’ and prejudice caused to the claimant by receiving grounds for review while she was still waiting to find out the result of her appeal, and the long delay thereafter in resolution of her international protection status.

76. This was a repugnant provision applied to a claimant who was never going to abscond because she had a determination in her favour. The respondent was fully aware of the structural problems in her postal system, which were not addressed, save for various date stamping procedures which made it more difficult to ascertain exactly when a determination had been served. The *EY* approach was not adopted as suggested by Hodge P. The Secretary of State could have arranged to complete grounds of appeal two days earlier and post them, at the same time as posting the determination to the claimants: that would have been in line with her paragraph 23(5)(a)(i) obligations. It was her practice of faxing them on the last day, then posting the determination out the next day, which has caused the delays overall. In the present claimant’s case, there is a further delay which is both lengthy and unexplained.

77. We therefore exercise our paragraph 59 discretion against the Secretary of State. We consider that the appropriate remedy for the respondent’s defective service of the determination is to treat the reconsideration application as defective, leaving the original determination standing. There is accordingly no valid reconsideration application before the Tribunal.

Merits arguments

78. Both Counsel agreed that the reconsideration before the Tribunal now turned on the paragraph 59 point alone. That is clearly right; however, even had it turned on the merits, we consider that the respondent was wrong to argue that this claimant’s appeal was bound to have failed on reconsideration and that she had a hopeless claim which she was seeking to win on a technicality.

79. The respondent’s challenge to the original determination concerned findings of fact and credibility which were partially upheld and partially reversed in the overturned reconsideration determination. Had the merits been relevant, weight would have been given to the following facts and matters:

(e) The claimant produced a medical report from Dr S K Gill who reported scarring on the left side of her upper chest wall ‘consistent with’ marks of a jaw or teeth, and with the claimant’s account of being bitten. The first Immigration Judge accepted that as confirming the credibility of the core account. The overturned reconsideration determination did not engage with the bite evidence or the Istanbul Protocol language used, although there was criticism of the Immigration Judge’s knowledge of post-traumatic stress disorder.

(f) The Secretary of State also challenged the first Immigration Judge’s reasoning for finding that the claimant had been

arrested during UFR strikes and riots which both Immigration Judges accepted took place and were well documented.

(g) It was accepted by both Immigration Judges that the claimant was a teacher, as she claimed.

80. If those points are taken into account, we consider that it was much more likely than not that any reconsideration hearing would have reached the same conclusions as the original Immigration Judge, albeit perhaps for different reasons. With or without an analysis of the merits, the right thing to do is to treat the grounds of appeal as invalid for breach of rule 23(5)(a)(i).

DECISION

81. For the foregoing reasons, our decisions are as follows:

1. There is no valid appeal to the Upper Tribunal on the first claimant's appeal and the determination of the Immigration Judge in the First-tier Tribunal stands.

2. The second claimant's appeal has been abandoned.

Signed

Senior Immigration Judge Gleeson
Judge of the Upper Tribunal