Asylum and Immigration Tribunal

RN (rule 23(5): respondent's duty) Zimbabwe [2008] UKAIT 00001

THE IMMIGRATION ACTS

Heard at Field House
On 11 October 2007

Before

SENIOR IMMIGRATION JUDGE MOULDEN
SENIOR IMMIGRATION JUDGE P R LANE

Between

RN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Muqit, Representative, of the Refugee Legal Centre
For the Respondent: Ms Cantrell, Senior Home Office Presenting Officer

The respondent complies with rule 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 rule 23(5)(a)(i), it is for the respondent to show otherwise.

DETERMINATION AND REASONS

1. The appellant, a citizen of Zimbabwe born on 22 October 1974, arrived in the United Kingdom on 17 February 2007 and claimed asylum on 13 March. On 25 April the respondent decided to refuse the appellant's application for asylum and consequently refused to vary her leave to remain in the United Kingdom.

2. The appellant appealed against that decision and on 7 June 2007 her appeal was heard at Hatton Cross by an Immigration Judge, who allowed the appellant's appeal on asylum grounds.

3. The Immigration Judge's determination was served on the respondent in accordance with rule 23(4) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 on 19 June 2007. On 26 June the respondent made an application under section 103A of the Nationality, Immigration and Asylum Act 2002 for an order requiring the Tribunal to reconsider the Immigration Judge's decision.

4. Rule 23(5) provides as follows:-

> "(5) The respondent must –
>
> (a) serve the determination on the appellant –
>
> (i) if the respondent makes a section 103A application or applies for permission to appeal under section 103B or 103E of the 2002 Act, by sending, delivering or personally serving the determination not later than the date on which it makes that application; and
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> (ii) otherwise, not later than 28 days after receiving the determination from the Tribunal; and
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> (b) as soon as practicable after serving the determination, notify the Tribunal on what date and by what means it was served".

5. In pursuance of rule 23(5)(b), at the end of Part C of the respondent's application for reconsideration, it was stated that the determination of the Immigration Judge *"was served on the applicant by post on 26 June 2007"*. The respondent's application was considered by a Senior Immigration Judge on 2 July 2007. On the information before him, it would plainly have appeared to the Senior Immigration Judge that the requirement of rule 23(5)(a)(i) had been met. The Senior Immigration Judge decided to order reconsideration on the respondent's grounds, which he summarised as contending that the findings of the Immigration Judge in relation to the appellant's credibility were perverse and irrational and that the Immigration Judge had failed to give adequate reasons for his findings and conclusions.

6. On 10 July 2007 the appellant, her representatives and the respondent were sent a notice by the Tribunal to the effect that the respondent's application for review had been granted. Enclosed with the notice was a copy of the decision of the Senior Immigration Judge.

7. In HH (Rule 23: Meaning and extent) Iraq [2007] UKAIT 00036, the Tribunal held that compliance with rule 23(5)(a)(i) is a pre-condition for a valid application by the respondent under section 103A. The Tribunal found as follows:-

> "6. If r 23 applies to this appeal, the Home Office failed in its duty to send the determination to the appellant on the day the application for reconsideration was made. In those circumstances the question arises whether the application can be considered to be validly made. This is not easy to answer; but two things are clear. The first is that the terms of r 23 are intended to give the respondent an advantage not normally available to a party to litigation. The second is that r23(5)(i) is intended to ameliorate the appellant's position in a case where the respondent seeks to challenge a decision in favour of the appellant, before the appellant even knows it has been made. Strictly speaking, the appellant is unlikely to be prejudiced by knowing about the reconsideration application only later, because the next possible act by him for which a time is fixed would be the service of a 'reply' under r 30, which does not have to be done until a week before the hearing of the reconsideration. Nevertheless, the possibility that the respondent will challenge a determination in favour of the appellant without notifying the appellant of the determination or the challenge is not clearly envisaged by the Rules and could only add to the apparent unfairness of r 23. In these circumstances we incline to the view that the requirements of r 23(5)(a)(i) are mandatory, and compliance with them is a pre-condition of a valid application for reconsideration of the instance of the respondent. Mr Walker [the Presenting Officer] did not dissent from that view. We should emphasise that we do not mean to indicate any similar view in respect of sub-paragraph (a)(ii) or sub-paragraph (b) of r 23(5), where the unfairness is significantly less apparent.
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> 7. It follows from the foregoing that if r 23 applies to this appeal, our view is that the respondent's application for reconsideration was not validly made."

8. On 30 July 2007, the RLC wrote to the Tribunal to say that it was not until they received the order for reconsideration that they were aware that the appellant's appeal had been allowed by the Immigration Judge. According to the letter, that determination was not received until 4 July 2007. Relying on HH, the letter concluded by stating that, in view of the respondent's failure to comply with rule 23(5), the application for reconsideration was invalid. The Tribunal was invited to dispose of that application accordingly.

9. On 15 August 2007 the Tribunal wrote to the respondent, enclosing a copy of the RLC's letter of 30 July. On the basis of the information contained in

that letter, the Tribunal indicated that it was satisfied that the reconsideration could be justly determined without a hearing, pursuant to rule 15(2)(d), in the sense that no material error of law was disclosed in the original determination. Any submissions to the contrary were invited within fourteen days of the date of that letter.

10. On 23 August the respondent's Border and Immigration Agency replied to the Tribunal's letter of 15 August. The Agency stated that the Immigration Judge's determination allowing the appeal had been received by the Agency's Appeals Determination Management Unit (ADMU) on 21 August 2007 and was forwarded to the Onward Right of Appeal Team (ORAT) in order for them to make a decision on whether to seek reconsideration. ORAT made an initial decision not to request reconsideration and the Immigration Judge's determination was passed to the writer of the letter, Mr Ashworth, on the fourth working day after its arrival at ADMU. (At this point, it is necessary to interject that the reference to 21 August is plainly a mistake and should be a reference to 21 June 2007.)

11. Mr Ashworth asked ORAT to reconsider their position and on the last day on which reconsideration could be sought, a "request for reconsideration" was made to the Tribunal. The letter then continued as follows:-

> "My understanding at this point was that the allowed appeal determination had already been served on the appellant and her representative either by the Tribunal when the determination was promulgated, and/or by ADMU. On 04 July 2007 I received a telephone call from the appellant's legal representative at the Refugee Legal Centre, stating that she wanted a copy of the appeal determination. In the best of faith, I therefore faxed my copy to her on 04 July 2007, assuming that either the representative's copy had not arrived or had been misplaced."

12. The letter went on to state that, because the Senior Immigration Judge had identified arguable errors of law in the determination, and in the light of the writer's explanation as to why there was *"an issue of service of the allowed determination*", the *"reconsideration request to proceed to a hearing would not prejudice the appellant. It is submitted that the interests of justice would be best served by proceeding to a hearing at which the Tribunal can hear full submissions from both parties and consider any possible prejudice to the appellant when deciding whether or not to make an order for reconsideration."*

13. At the hearing on 11 October, Ms Cantrell informed us that the respondent had no means of demonstrating that the determination had been served on or before the time when reconsideration was sought. All she could say was that it was the policy of the respondent to do so. Ms Cantrell accepted that this did not take matters very far.

14. We understood Ms Cantrell's statement to encompass service on the appellant, as well as on the appellant's representative. In this regard, it is relevant to observe that rule 55(3) requires that, if a document is served

on the appellant, a copy must also at the same time be sent to the appellant's representative.

15. Because the consequence of the decision in HH is potentially so significant, it is necessary to consider precisely what the obligation on the respondent imposed by rule 23(5) entails. At first sight, it appears that the respondent must serve the determination on the appellant not later than the date on which the respondent makes an application under section 103A. A possible problem, however, arises when one considers rule 55 (filing and service of documents). Rule 55(1) provides that any document which is required or permitted by the Rules or a direction of the Tribunal to be filed with the Tribunal, or served on any person, may be delivered or sent by post; sent via a document exchange; sent by fax; sent by e-mail; or served personally by leaving it with the individual to be served.

16. Rule 55(5) provides as follows:-

> "(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 –
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> (a) where the document is sent by post or document exchange from and to a place within the United Kingdom, on the second day after it was sent;
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> (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
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> (c) in any other case, on the day on which the document was sent or delivered to, or left with, that person."

17. If the correct interpretation of rule 23(5) is that service of the determination on the appellant must be effected for the purposes of rule 55(5) not later than the date on which the respondent makes the section 103A application, considerable difficulties arise. Despite the opening lines of rule 55(5), the only sensible interpretation of that paragraph is that, where, for example, service is sought to be effected by post but the intended recipient proves that the document in question was *never* received, that person has *not* been served with the document *for the purposes of rule 55*. In such a case, the respondent would not be in breach of rule 23(5), even where she makes the section 103A application after the determination is sent by post to the appellant. On the other hand, if the determination is sent by post and is deemed to be received (without the contrary being proved) on the second day after it was sent, the respondent would be in breach of rule 23(5) if she purported to make a section 103A application before that second day. Given the five day time limit for making a section 103A application in respect of a person who is in the United Kingdom, such an interpretation would severely circumscribe

the respondent's ability to make such an application within the statutory time limit and in accordance with rule 23(5).

18. Even more problematically, where it is proved that the determination was received later than the second day after it was sent by the respondent, the latter could in practice be precluded by rule 23(5) from making such an application at all; for example, where the determination is received more than five working days after the respondent received it from the Tribunal.

19. Such a result cannot be correct and we have concluded that rules 23 and 55, properly construed, do not, in fact, lead to it. If rule 55(5) had been intended to have a bearing upon the requirement imposed on the respondent by rule 23(5), there would have been no need for the words "by sending, delivering or personally serving" to be included in rule 55(5)(a)(i). The inclusion of those words makes it clear that rule 55(5) has no role to play in the interpretation of rule 23(5). In other words, there is no need for this purpose to determine when (or, indeed, whether) service was effected in accordance with rule 55(5). Accordingly, we find that the requirement in rule 23(5)(a)(i) must be read as a requirement that the respondent (in cases other than personal service) must *send or deliver* the determination not later than the date on which the section 103A application is made, regardless of when (or, indeed, whether) the determination is received. Thus, in a case where the respondent sends the determination by post, it must be put into the postal system not later than the day on which the respondent makes the section 103A application.

20. By the same token, the obligation in rule 23(5)(b) to notify the Tribunal on what date and by what means the determination was served must refer not to the actual date when the appellant received it (which at this stage will often be unknown to the respondent), or to the deemed date of service under rule 55(5), but to the date on which the determination was despatched.

21. In the present case, the respondent, as we have already noted, purported to comply with rule 23(5)(b) by stating at the end of Part C of the section 103A application that the determination was served by post on 26 June 2007. Although our interpretation of rule 23 means that there is no express provision (as there is in rule 55(5)) for an appellant to challenge what would otherwise be the presumption that service (in the sense we have identified) took place on the date and by the means notified in accordance with rule 23(5)(b), it must be the case that an appellant should be able to adduce evidence to the effect that the respondent did not, in fact, comply with rule 23(5)(a)(i). In the present case, the appellant's representative filed evidence that suggested the determination had not been received until 4 July 2007, when it had to be faxed to the RLC at their request. This evidence placed an evidential burden on the respondent, which she has failed to discharge. It would have been open to the respondent to adduce evidence, for example, by means of recorded delivery slips or an entry from a post log, to the effect that (whether or not

the determination was ever received) it was posted not later than the date when the section 103A application was made. As we have already recorded, however, Ms Cantrell was unable to adduce any such evidence.

22. We therefore find that, in the circumstances of the present case, the respondent failed to comply with the duty imposed by rule 23(5)(a)(i) and that, following HH, the application for reconsideration was invalid.

23. That brings us to the issue of rule 15. As has already been described, the Tribunal, following receipt of evidence regarding failure to comply with rule 23(5)(a)(i), wrote to the respondent and the appellant's representatives, indicating that the Tribunal was minded to determine the appeal without a hearing, pursuant to rule 15. The Tribunal's letter of 15 August 2007 was inaccurate, to the extent that the point at issue was not whether there was or was not a material error of law in the Immigration Judge's determination but whether the purported application for reconsideration of that determination was invalid. Nevertheless, given that the letter of 15 August referred expressly to HH, and that it was accompanied by a copy of the letter from the appellant's representatives, the point being made was sufficiently clear.

24. Mr Ashworth's letter of 23 August suggests that he was under a misapprehension as to the purpose of the hearing. The Tribunal has no power to treat the invalid applicant as valid, even were it to find that the appellant had not been prejudiced, in the sense identified by the Tribunal in paragraph 6 of HH. As a creature of statute, the Tribunal would need express statutory authority to breathe life into an otherwise lifeless application. There is none.

25. We are aware that the issue of non-compliance with rule 23(5)(a)(i) has been raised in a number of other appeals, where the respondent has purported to apply for reconsideration under section 103A. In any such case, where the respondent considers that she is able to demonstrate compliance with that provision, notwithstanding evidence of non-receipt, or late receipt, by the appellant of the determination, it is likely to be the case that the Tribunal will arrange a hearing. If, on the other hand, the respondent is lacking such evidence but nevertheless is opposed to the Tribunal proceeding by way of rule 15, the Tribunal will expect proper reasons to be adduced. In particular, it will not be sufficient merely to assert that the underlying merits of the respondent's challenge to the determination are strong or otherwise merit specific consideration.

26. In the present case, there is no reconsideration before the Tribunal and the Immigration Judge's determination accordingly stands.

Signed Date

Senior Immigration Judge P R Lane