ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House
13 March 2007

Date of Hearing:

Date of Promulgation: 05 April 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Grubb

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr H N Taylor, instructed by Wilson & Co.
For the Respondent: Mr S Walker, Home Office Presenting Officer

(1) Compliance with rule 23(5)(a)(i) is a precondition for a valid s103A application by the respondent. (2) Rule 23 applies to all (and only) appeals in relation to asylum claims. It does not apply to all (or only) determinations of appeals on asylum grounds.

DETERMINATION AND REASONS

1. This reconsideration or purported reconsideration raises a number of difficulties in the interpretation of Rule 23 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. That Rule provides a particular procedure, and time limits, in in-country appeals that relate to 'an asylum claim'. The principal question is whether Rule 23 applied to this appeal.

2. The appellant is a citizen of Iraq. He entered the United Kingdom on 14 August 2000 and claimed asylum in a name which he now says is his real name. His claim was refused and he was removed from the United Kingdom in February 2001. He claims to have re-entered the United Kingdom on 21 July 2002; the next day he claimed asylum in a new name. In November 2002 he married an Iraqi resident here, whom he had met immediately on his arrival. He then applied for leave to remain with her. On 8 June 2006 he was served with a notice refusing him leave to enter, his claim for asylum having been again rejected. He appealed, to an Immigration Judge. He then withdrew his appeal insofar as it relied on asylum grounds: he thus accepts that he would not be at risk of persecution if he were returned to Iraq. The Immigration Judge allowed his appeal on Article 8 grounds, apparently on the basis that because of the lapse of the time since they married and the impending birth of a child the appellant and his wife, both of them Iraqi nationals, could not be expected to return to Iraq and that their circumstances were in the Huang v SSHD [2005] EWCA Civ 105 sense 'truly exceptional'. The Immigration Judge signed her determination on 5 September 2006.

3. Rule 23 reads as follows:

> *"**Special procedures and time limits in asylum appeals***
>
> *23. - (1) This rule applies to appeals under section 82 of the 2002 Act where -*
>
> *(a) the appellant is in the United Kingdom; and*
>
> *(b) the appeal relates, in whole or in part, to an asylum claim.*
>
> *(2) Subject to paragraph (3) -*
>
> *(a) where an appeal is to be considered by the Tribunal at a hearing, the hearing must be fixed for a date not more than 28 days after the later of -*
>
> *(i) the date on which the Tribunal receives the notice of appeal; or*
>
> *(ii) if the Tribunal makes a preliminary decision under rule 10 (late notice of appeal), the date on which notice of that decision is served on the appellant; and*
>
> *(b) where an appeal is to be determined without a hearing, the Tribunal must determine it not more than 28 days after the later of those dates.*
>
> *(3) If the respondent does not file the documents specified in rule 13(1) within the time specified in rule 13 or directions given under that rule -*
>
> *(a) paragraph (2) does not apply; and*
>
> *(b) the Tribunal may vary any hearing date that it has already fixed in accordance with paragraph (2)(a), if it is satisfied that it would be unfair to the appellant to proceed with the hearing on the date fixed.*
>
> *(4) The Tribunal must serve its determination on the respondent -*
>
> *(a) if the appeal is considered at a hearing, by sending it not later than 10 days after the hearing finishes; or*
>
> *(b) if the appeal is determined without a hearing, by sending it not later than 10 days after it is determined.*
>
> *(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

(ii) otherwise, not later than 28 days after receiving the determination from the Tribunal; 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.

*(7) In paragraph (2) of this rule, references to a hearing do not include a case management review hearing or other preliminary hearing."*_

4. Rule 2 contains interpretations and provides that 'asylum claim' has the meaning given by s 113(1) of the Nationality, Immigration and Asylum Act 2002, which is as follows:

"113...

(1) 'asylum claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would reach the United Kingdom's obligations under the Refugee Convention."

5. Because this appeal had begun as an appeal raising, inter alia, asylum grounds, it had been assigned a file reference within the Tribunal with the prefix AA, and it was no doubt for that reason rather than any more advanced consideration of the surviving issues that caused the Tribunal's staff to treat the appeal as governed by r 23. On 11 September the determination was sent to (or, at any rate, received by) the relevant department of the Home Office. On 18 September the Home Office submitted to the Tribunal an application for reconsideration, on which an Order was made by a Senior Immigration Judge on 21 September. But the Home Office did not serve the determination on the appellant on 18 September (as apparently required by r 23(5)) or at all. Instead, it appears that the Home Office decided that as the appellant had withdrawn his asylum grounds, so that the determination was not of an asylum appeal, the appeal was not governed by r 23. The Home Office therefore returned the determination to the Tribunal, with a request that it be promulgated to both parties in the usual way, that is, not under the special procedure prescribed by r 23. That was done, on 28 September.

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 r 23(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 precondition of a valid application for reconsideration at the instance of the respondent. Mr Walker did not dissent from that view. We should emphasise that we do not mean to indicate any similar view in respect of sub-subparagraph (a)(ii) or subparagraph (b) of r 23(5), where the unfairness is significantly less apparent.

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. The alternative is that r 23 does not apply to this appeal. In that case, the sending of the determination to the respondent alone on 11 September was not an effective communication of the determination, which had instead, under the usual procedure for appeals not governed by r 23, to be sent 'to every party' (r 22). That was not done until 28 September.

9. The time limits for applications for reconsideration are in primary legislation: s 103A of the 2002 Act. Subsection (3)(c) of that section provides that an application 'brought by a party to the appeal other than the appellant' must be made 'within the period of 5 days beginning with the date on which he is treated, in accordance with rules made under section 106, as receiving notice of the Tribunal's decision'. The rules are the 2005 Rules, and they make provision for service and time as well as requiring determinations to be sent out. The formulation of the period of time specified by s 103(3)(c), which is paralleled in the other paragraphs of that subsection does however make it clear that an *early* application is invalid. The subsection provides both an end and a beginning of the period for making applications. It follows that if r 23 does not apply to this appeal, the application for reconsideration was invalid: it was made on 18 September, whereas the only period during which such an application could be made did not begin until 28 September (or later actual or postal service).

10. It would therefore appear that, whether r 23 applies to this appeal or not, there was no valid application for reconsideration. That conclusion means that it is not essential to decide on the interpretation of r 23(1)(b) itself. But that is an important and general issue, on which we heard submissions from Mr Walker and Mr Norton-Taylor, as well as from another member of the Bar present at the hearing. The rule is evidently concerned with provisions relating to appeals and their determination, whereas the statutory provision governing the ambit of the rule is concerned not with appeals but with claims. A claim ought to generate a decision; if the claim is unsuccessful and the decision is an 'immigration decision' of one of the kinds listed in ss82-3A of the 2002 Act, there may be an appeal. 'Upgrade' appeals under ss 83 and 83A are restricted to asylum grounds, but in every other case the appeal may be brought on any one or more of the grounds listed in s 84(1), one of which is the ground that the appellant's removal would breach the Refugee Convention. It follows that an 'asylum claim' may be followed by an appeal not raising (or, as happened in the present case, raising and subsequently dropping) Refugee Convention grounds; or a claim that in its origin had no 'asylum' content may lead to an appeal in which the appellant claims that his removal would (also) breach the Refugee Convention.

11. As we have indicated, the provisions of r 23 are unusual, and are contrary to the normal principle that the parties before a court or tribunal are to be treated equally. There is a justification for them in that they enable enforcement of judgments that might otherwise be difficult to enforce. That justification, endorsed (in relation to the preceding version of the Rules) by the Court of Appeal in Bubaker v Lord Chancellor and others [2002] EWCA Civ 1107, must be regarded as valid even if experience shows that actual enforcement is unaffected by the existence of the rule. Nevertheless, the peculiarity and the one-sidedness of the rule remain, and for that reason one would expect construction both *contra proferentem* (as we have applied above) and so as to limit the number of cases to which the rule applied. The latter consideration would point to restricting the rule to those appeals where grounds based on the Refugee Convention were actually dealt with in the determination being sent out. That was the view evidently taken by the official in the Home Office who sent the determination in the present appeal back to the Tribunal.

12. It is, however, a construction that presents a number of difficulties. The first and most obvious is that it entirely fails to recognise that the relevant words are 'asylum claim', not 'asylum appeal', and that they are defined by reference to provisions having no necessary connexion with appeals. Further, if this construction is adopted, an appeal might, as it were, drift in and out of the rule. Asylum grounds might be argued in a case not originating in an asylum claim, or the grounds might (with the permission of the Tribunal under r 14) be varied so as to enable asylum

grounds to be added to an appeal that originally had nothing to do with the Refugee Convention. Alternatively, as we have seen in this appeal, asylum grounds might be dropped, so that the determination does not, and does not need to, deal with the Refugee Convention even where that was the whole content of the original application to the Secretary of State. Quite apart from the provisions about sending out the determination, the provisions about listing in r 23(2) and (3) would be extraordinarily difficult to apply in such cases.

13. We should add to that the realities of the Tribunal's administrative support. No doubt it can be expected that an appeal will be properly assigned to the correct category when it is first received. To expect the Tribunal's staff to take responsibility for reclassification of an appeal according to the application of r 23 from time to time during the course of an appeal is, however, quite unrealistic. And if a mistake is made it will either deprive the respondent of the enforcement mechanism lawfully envisaged by Parliament or will (as is said to have happened in the present case) give him a preview of a determination that has not been properly served at all. And it must be the staff rather than the judiciary whose responsibility it is to decide whether r 23 applies, because it appears to be part of the ratio of Bubaker that the decision-maker's function is complete once the decision is taken and that he has no input into the process of service (see Laws LJ at [15]-[18]).

14. We therefore take the view that r 23 is not to be interpreted in the narrower sense of applying only to an appeal that, at the time of the application of the rule, raises asylum grounds. It applies to all (but only those) appeals in which the immigration decision under appeal follows an 'asylum claim' within the meaning of s 113. If an appeal begins as one to which r 23 applies, it continues as such while it is pending before the Tribunal. (We should add here that an amendment to the definition of 'asylum claim' in s 113 appears in s 12 of the Immigration, Nationality and Asylum Act 2006. We do not need here to decide whether, if and when that provision is brought into force, it will affect the meaning of r 23.)

15. In the present case therefore the position is as follows. Rule 23 applied. The determination was correctly served on the respondent under r 23(4). The respondent's application for reconsideration was in time, but was invalid for failure to comply with r 23(5)(a)(i). There is no reconsideration before us. The Immigration Judge's determination stands.

C M G OCKELTON

DEPUTY PRESIDENT
Date: