# ASYLUM AND IMMIGRATION TRIBUNAL

AH (Notices required) Bangladesh [2006] UKAIT 00029

**THE IMMIGRATION ACTS**

Heard at: Manchester
Date of Hearing: 25 January 2006

Date of Promulgation: 16 March 2006

Before:

Mr C M G Ockelton (Deputy President)
Mr P W Cruthers (Immigration Judge)
Mr S P Alis (Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M Plimmer, A S Law Solicitors
For the Respondent: Mr M Raj, Home Office Presenting Officer

*Although some of the requirements of the Notices Regulations can be waived and not all of the requirements for giving Notice of Appeal are mandatory, there can be no appeal without a Notice of Decision and a Notice of Appeal.*

## DETERMINATION AND REASONS

1. The Appellant is a citizen of Bangladesh. He came to the United Kingdom on 14 May 1998 with entry clearance as a spouse. He was granted leave to enter for one year. During that period of time, the marriage failed. On 11 May 1999, however, while the Appellant still had leave, he applied for further leave to remain in order to enable him to continue his paternal role towards the son of the marriage.

2. On 4 May 2000, the Secretary of State refused his application for further leave to remain on the ground that there was no provision in the Immigration Rules for the granting of leave to remain for such a

purpose; and that he did not consider that there were sufficient reasons to justify his departure from the Rules in the Appellant's case. The Appellant appealed to an Adjudicator under section 14 of the 1971 Act. The grounds of appeal were as follows:

> "[The] decision is flawed. Any steps to force me to leave the UK will breach the UK's obligations under Article 8 ECHR."

3. The explanatory statement prepared for the purposes of the appeal is dated 22 May 2003. It refers to further correspondence with the Appellant's solicitors in late 2002 and information submitted on the Appellant's behalf at that time. It records that the Secretary of State does not accept the existence of a subsisting family life between the Appellant and his son, and notes that the Appellant could obtain entry clearance from abroad for the purpose for which he seeks leave to remain. The following sentences give the Secretary of State's conclusion on the human rights issues put to him:

> "The Secretary of State therefore does not accept that his decision breaches Article 8. ... The Secretary of State has considered the further information which has been submitted, but can find no reason to reverse his decision."

4. The appeal came before an Adjudicator, Mrs N J Gladstone, on 26 April 2004. At the hearing, it was conceded on the Appellant's behalf that the Appellant could not succeed in an appeal under the Immigration Rules, because, as the Secretary of State had indicated, the application was for a purpose not covered by the Immigration Rules. Mrs Gladstone was nevertheless persuaded by the parties to hear an appeal on human rights grounds. Her determination records that the Respondent's representative, having spoken to a senior caseworker, reported that "*the view was taken that the explanatory statement of 22 May 2003 was, in effect, a reconsideration as it addressed Article 8. On that basis there was a human rights appeal.*" The Appellant's representative agreed. In the result, the Adjudicator considered that the decision to refuse to vary was appealable (although doomed to failure) under the Immigration Rules as they were on 4 May 2000, and was also appealable on the basis of the Appellant's human rights as they were at the date of the hearing. Having considered the evidence and arguments before her, she dismissed the appeal.

5. The Appellant applied for and was granted permission to appeal to the Immigration Appeal Tribunal. In granting leave, the Vice President made it clear that the issue of whether the Adjudicator had jurisdiction to deal with an appeal on human rights grounds would have to be addressed. Following the commencement of the appeals provisions of the 2004 Act, the grant of permission to appeal operates as an order for reconsideration by this Tribunal. The matter was listed on 3 November 2005, but it appears that neither the Appellant nor the Respondent were properly prepared to argue the point, and the Tribunal as then constituted felt itself unable to deal with the issue in those

circumstances. The appeal was then relisted to be heard by us. There was a suggestion that (apparently because of the complexity of the issues involved) the matter should be regarded as reserved to the original panel of the Tribunal; but Miss Plimmer did not persist with that submission before us.

6. The difficulty arises because the date of the decision refusing to vary leave was before 2 October 2000, which is the date upon which the Human Rights Act 1998, and the Immigration and Asylum Act 1999 (which gave an appeal to an Adjudicator on human rights grounds) came into force. There can be no doubt that if the appeal had been heard promptly after the date of the decision and before 2 October 2000, the Adjudicator would have had no jurisdiction to consider human rights grounds. There are provisions for situations such as the present, where the decision was before, but the appeal is heard after, 2 October 2000. They are in paragraph 1 of Schedule 2 to the Immigration and Asylum Act 1999 (Commencement No 6, Transitional and Consequential Provisions) Order 2000 (SI 2000/2444). That paragraph is headed "*Transitional provisions relating to the 1999 Act*", and subparagraph 7 is as follows:

> "Section 65 (human rights appeals) is not to have effect where the decision under the Immigration Acts was taken before 2nd October 2000."

7. The consequences of that provision were explored by the Tribunal in Pardeepan* [2000] UKIAT 00006. An appellant's human rights are justiciable after 2 October 2000; but they need a new decision and a new appeal as his old appeal against a pre-commencement decision cannot be argued on human rights grounds.

8. The reason why the present case is said to be less simple than that is the existence of the explanatory statement dated 22 May 2003 and dealing with human rights issues. That is said to have given the Adjudicator, and to give us, jurisdiction to deal with human rights issues because it is a decision on those issues, made since 2 October 2000 and hence appealable on human rights grounds. We must therefore consider whether it is indeed such a decision.

9. In our view, there are three separate reasons why it is not. The first is that, on its terms which we have set out above, the explanatory statement purports to make no new immigration decision but merely to decline to reverse the decision made in May 2000. The second is that there is a line of authorities, including R v IAT and SSHD ex parte Banu [1999] Imm AR 161 and Hanif v SSHD [1985] Imm AR 57, to the effect that a review of a previous decision by the Secretary of State or an Entry Clearance Officer does not constitute a fresh decision. The third reason is that there are provisions for the formal notification of a decision giving a right of appeal under s65 in circumstances where, as s65 puts it, a person alleges that an authority has, in taking any decision under the Immigration Acts relating to his person's entitlement

to enter or remain in the United Kingdom, acted in breach of his human rights. Those provisions are in the Immigration and Asylum Appeals (Notices) Regulations 2000 (SI 2000/2246). The Regulations provide in general that notices of decisions which are appealable have to be given in writing and to include a number of factors including the right of appeal and how to exercise it. Regulation 4(4) is as follows:

> "No notice of decision is required to be given … by reason only of the fact that the decision could be appealed under section 65 of the 1999 Act … if the person in question were to make an allegation that an authority had acted in breach of his human rights in taking it; but such notice must be given upon such allegation begin made."

10. There is no doubt that a notice should have been given under that Regulation. The duty to do so did not arise on the submission of the grounds of appeal, because the Human Rights Act was not in force then; but there is no doubt that the solicitors' letter of 17 October 2002, to which in essence the human rights paragraphs in the explanatory statement are a response, was an allegation under s65. As we understand the matter, the Secretary of State's obligation to serve a notice in response to that allegation is still unfulfilled.

11. A further difficulty for Miss Plimmer is that even if there had been a new decision on 22 May 2003, there has been no appeal against it. The only notice of appeal is that dated 9 May 2000, which cannot be an appeal under s65 of the 1999 Act, which was not then in force. An appeal under s65 is governed by the Immigration and Asylum Appeals (Procedure) Rules 2000 (SI 2000/2333). Those Rules require a notice of appeal in the form prescribed and appended as a schedule to the Rules. It is different from the form in use before the coming into force of the 1999 Act but, even if it were not, the consequence of Pardeepan is that there would need to be two separate appeals (one against the pre-2 October 2000 immigration decision and one under s65) each of which would need a separate notice of appeal. A further problem is that by s58(5) of the 1999 Act:

> "For the purposes of the Immigration Acts, an appeal under this part is to be treated as pending during the period beginning when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned."

12. That provision applies to s65. No appeal under s65 can have begun to be pending when the only notice of appeal was given, because s65 was not then in force; no subsequent notice of appeal has been given; it follows that, for the purposes of the Immigration Acts at least, no appeal under s65 is pending.

13. Miss Plimmer seeks to meet all these objections by advancing arguments relating to waiver. She reminds us that, although the Notices Regulations have the effect that notice of an appealable decision is not formally given until the Regulations have been complied with (so that the time limit for appealing does not until then begin to

run against the individual) lack of compliance does not always exclude jurisdiction. That is because, if, during the course of an appeal, it emerges that the Notices Regulations were not fully complied with, the Tribunal will regularly allow the appeal to proceed on the basis of waiver. The Regulations are made for the benefit of the Appellant, and, in a proper case it will be right to treat an appellant who has given notice of appeal against a formerly invalid notice of decision as having waived his right to have a valid notice of decision. By giving the notice of appeal he demonstrates, first, that he is content to accept the notice as it is and, secondly, that he is aware of his right of appeal. Miss Plimmer submits that the Appellant is similarly entitled to waive the right to have a notice following his allegation of a breach of his human rights. The problem is, of course, that there is in this case no notice of appeal either. Miss Plimmer seeks to meet that difficulty by reference to the decision of the Court of Appeal in R v SSHD ex parte Jeyeanthan [2000] 1 WLR 354. The Court there drew a distinction between mandatory and directive requirements of the Procedure Rules in relation to notices of appeal. It held that a notice of appeal was not bad for failure to comply with all the requirements of the Procedure Rules, provided that there had been substantial compliance. Despite Miss Plimmer's earnest submissions, however, we are unable to accept that the decision in Jeyeanthan can be understood to mean either that none of the requirements of the Procedure Rules is mandatory or that the decision enables the Tribunal to hear an appeal when no notice of appeal has been given at all. The problem is acute in the present case, because it would only be by the giving of a notice of appeal that the Tribunal might be able to find that the Appellant sought to waive the lack of anything approaching a notice of decision.

14. In her written skeleton, Miss Plimmer does not shrink from the conclusion that if her submissions were right the statutory requirements of written notices of decision and written notices of appeal could simply be overridden by an agreement between the Secretary of State and an individual that the latter had an appeal before the Tribunal. That conclusion shows us (if further persuasion were needed) that the arguments leading to the conclusion are not sound. The Tribunal receives its jurisdiction not by agreement between the parties that it should try an issue but by a formal process under the legislation which alone give it jurisdiction. Furthermore, there are a number of consequences of the fact that an appeal is pending before the Tribunal: it cannot have been the intention of the legislator that the existence or not of those consequences should depend, merely on whether the parties chose to agree on them, rather than on whether the various statutory notices had been served.

15. For these reasons, we conclude that there is no appeal on human rights grounds before the Tribunal. The Adjudicator erred in law in thinking that there was. Her purported determination of it is of no effect.

16. We are conscious that the concession, made before the Adjudicator on behalf of the Appellant, that his appeal could not succeed under the Immigration Rules, might not have been made if the Appellant had not thought that the Adjudicator had jurisdiction to consider his human rights claim. In the circumstances, we would not hold the Appellant to the concession, but it is nevertheless appropriate for us formally to decide that the appeal could not succeed under the Immigration Rules, for precisely the reason stated in the notice of decision.

17. As we have indicated, the Respondent remains under a duty to serve a notice under the Regulations responding to the Appellant's 2002 allegation about his human rights. That notice will need to set out the right of appeal under s65: we are not aware that the statutory structure for giving notice of a right of appeal in respect of an allegation made so long ago has changed with the 2002 or 2004 Acts. The allegation in the present case was made well before the closing date of 1 July 2003 appointed by paragraph 6(5) of Schedule 2 to the Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003 (SI 2003/754). It may, however, be worth pointing out that an appeal on human rights grounds against the Secretary of State's decision to refuse to vary the Appellant's leave may face some difficulties because it is by no means clear that the mere fact of refusing him leave (rather than removing him) breaches his human rights. He has, after all, been in the United Kingdom without having the status of a person with leave to remain since his leave ran out twenty-eight days after the making of the decision on 4 May 2000. His present position is not absolutely clear. His appeal under the 1971 Act protected him from removal while it was pending. It arguably ceased to be pending when it was conceded before the Adjudicator. Subsequent proceedings were confined to issues of human rights, but we have held that the Appellant never had an appeal pending on human rights grounds, and it follows that he never had an appeal pending under the 1999 Act. Fortunately, we are not called upon to determine the legality of his presence in the country now; but it does appear to us that he will have some difficulty in maintaining that the mere absence of a formal grant of leave to remain infringed his human rights when, in the circumstances, he has, despite the refusal of leave, been able to remain here (and no doubt to see his son) for a further six years at least.

18. The Adjudicator made a material error of law and we substitute a decision dismissing the Appellant's appeal on the only grounds open to him.

C M G OCKELTON
DEPUTY PRESIDENT

Date: