IMMIGRATION APPEAL TRIBUNAL

Date heard: 10/05/2001
Date Determination notified: 22/6/2001

Before

The Honourable Mr Justice Collins (President)
Mr M W Rapinet
Dr H H Storey

ENTRY CLEARANCE OFFICER, HARARE

APPELLANT

and

BRENDAN COLIN HUGHES

RESPONDENT

For the Appellant: Ms Shahin Rahman, Counsel, instructed by
The Treasury Solicitor

For the Respondent: Mrs Fay Mustapha, Solicitor,
Lawson Turner & Gilbert

DETERMINATION AND REASONS

1. The respondent is a citizen of Zimbabwe. On 29 June 1999 he applied for an entry clearance to enable him to come to the United Kingdom as a working holidaymaker. Following an interview on 23 September 1999, his application was refused on 24 September 1999. He appealed to an adjudicator against that refusal and, following an unacceptable delay, his appeal was allowed on 10 November 2000.

2. Because of the delay, the respondent went to see the appellant and on 9 August 2000 he withdrew his appeal and made a fresh application which was refused on 31 August 2000. On 28 September 2000 the respondent's father wrote a letter to the Immigration Appellate Authority saying that, because he had not heard anything about his appeal for many months, his son, the respondent, went to see the ECO and "was told he could re-apply, which he did and was interviewed on 31 August 2000 and once again was refused entry". His father in the letter complained that the respondent had been misled by the ECO into signing the withdrawal of his appeal although the ECO knew that "he was not going to grant...entry".

3. Notwithstanding the withdrawal of the appeal, the adjudicator heard it on 30 October 2000. The appellant was not represented; but such absence of representation is all too common. The adjudicator allowed the appeal: his conclusions are based on his acceptance

of evidence given by the respondent's father and cousin, who was acting as his representative. Those conclusions were properly reached.

4. Leave to appeal was sought on the ground that the appeal had been withdrawn. The adjudicator's determination was promulgated on 10 November 2000. Notice of appeal was received by the tribunal on 30 November 2000. In those circumstances, the President when granting leave to appeal was concerned that the question whether the application had been made in time in accordance with Rule 18(2) of the Immigration and Asylum (Procedure) Rules 2000 (the 2000 Rules) should be decided. This meant deciding what is the true construction of Rule 18(2) and so this determination has been starred.

5. Rule 18(2) reads as follows:-

> "An application for leave to appeal shall be made not later than ten days, or in the case of an application made from outside the United Kingdom, twenty-eight days, after the appellant has received written notice of the determination against which he wishes to appeal."

The application in this case was made by the Home Office and so, if the words of Rule 18(2) are read literally, it was clearly not made from outside the United Kingdom. The same would apply to an application made, as is commonly the position, by the representative of an appellant who is overseas.

6. We must also consider Rule 48(2) which provides inter alia that a notice sent to a person within the United Kingdom shall be deemed to have been received on the second day after it was posted and that a notice sent to a person outside the United Kingdom shall be deemed to have been received on the twenty-eighth day after it was posted. Rule 46(2) provides that a notice sent to a person appearing to represent a party shall be deemed to have been sent to that party. And Rule 15 requires that written notice of an adjudicator's determination shall be sent to "every party and the appellant's representative (if he has one)".

7. The Rules suffer from a combination of poor draftmanship and a failure properly to marry different provisions. It is tolerably clear that the intention behind Rule 18(2) was to give applicants who are not in the United Kingdom an extended period to enable them to have time to receive the adjudicator's determination and to seek advice and give instructions whether to apply for leave to appeal. Thus the notice accompanying the adjudicator's determination reads, so far as material:

> "In accordance with Rule 18(2) of the [2000 Rules] any application for leave to appeal to the Immigration Appeal Tribunal together with all the grounds of appeal must be submitted to the following address WITHIN 28 DAYS OF RECEIPT OF THIS NOTICE...
>
> This notice is deemed to have been received by you 28 days after it was posted. Therefore you must lodge your application within 56 days of the date of this notice."

The notice cannot, of course, dictate the true construction of the Rules, but it is certainly desirable that they should, if possible, be construed so as to give effect to their purpose.

8. There are two stages. The first is the time for service in accordance with Rule 48(2). The problem is created by Rule 46(2) since many (but not all) appellants before an adjudicator will have a representative and the ECO will always be represented by the Home Office. Thus service on the representative will be deemed to be service on the party, who is by virtue of Rules 2(1) and 29(1) the appellant and the respondent. In Part III of the Rules, which deals with appeals to the Tribunal, 'appellant' is stated by Rule 17(2) to include an applicant for leave to appeal.

9. The answer to the problem lies first in Rule 15. This specifically requires that the adjudicator's determination is, in the case of an appellant (that is to say, an appellant before the adjudicator who will always be the individual who has received an adverse decision from the Secretary of State, an Immigration Officer or an Entry Clearance Officer) sent to his representative. The explicit requirement to serve the appellant and his representative means that the deeming provision in Rule 46(2) cannot apply. Secondly, paragraph 22(1) of Schedule 4 to the Immigration and Asylum Act 1999 gives a right of appeal to the Tribunal to

> "any party to an appeal ... to an adjudicator ... if dissatisfied with his determination ."

In this paragraph, 'party' means what it says and there is no deeming provision to saddle a party with his representative's knowledge. A person must know what has been determined before he can be dissatisfied with it and decide to appeal. The Court of Appeal in *R (Asifa Saleem) v Secretary of State for the Home Department* [2000] 4 All ER 814 has recently adopted this reasoning in striking down the predecessor of Rule 48(2) which provided that service of a notice was to be deemed to have been effected even if it could be established that it had not in fact been received.

10. Thus an individual who was an appellant before the adjudicator will always have twenty- eight days before time for lodging his application begins to run. This extended period will often be needed when, for example, the individual lives in a remote part of a country in which communications may not be entirely satisfactory. But the same should not apply to the Entry Clearance Officer. Rule 15 is the wrong way round, since on its face it requires service in all cases on the individual Entry Clearance Officer or the Secretary of State himself. That is absurd. The Home Office accepts service on its Presenting Officers' Unit as good service on the Secretary of State or Entry Clearance Officer as the case may be. The absence of the requirement in the case of the respondent to serve both the party and his representative means that Rule 46(2) can apply and so service on the Home Office Presenting Officers' Unit is service on the respondent. Since that service is by means of a notice served within the jurisdiction, either two days is allowed, if it is sent by post, or if it is, as is the usual practice served by hand, immediate service is effected. Thus the respondent has only at most two days before time for lodging the application starts to run. Ms Rahman accepted that this was so and to that extent the notice served with the adjudicator's determination is not accurate. But since the Home Office will not be misled it is probably better to leave it as it is to avoid any possibility of confusion in the minds of appellants.

11. We now come to Rule 18(2). As we pointed out in argument, if read literally it would enable all applicants to gain an extra eighteen days by making the application from anywhere outside the United Kingdom. A day trip to Calais or the use of a friend or an office outside the United Kingdom to lodge the application would suffice. And, put the

other way round, if the representative lodges the application, it is made from within the United Kingdom and so only ten days is permitted. This is manifestly not what was intended and both Ms Rahman and Mrs Mustapha have urged us to construe the rule so that twenty-eight days is given when the applicant is outside the United Kingdom, which is what was intended.

12. Although we recognise that we are straining the language, in our judgment in Rule 18(2) the word 'application' means the document which is lodged by or on behalf of the applicant. If the applicant is outside the United Kingdom, the application that he makes, whether by himself or by his representative, is made from outside the United Kingdom. An Entry Clearance Officer is outside the United Kingdom and so he has twenty-eight days to make his application after he has been served with notice of the adjudicator's determination. Accordingly, the application in this case was in time.

13. Ms Rahman asked for an adjournment of the appeal to enable the Entry Clearance Officer to produce a statement to deal with the allegations contained in the respondent's father's letter of 28 September 2000 and the suggestion, which it was said had not been foreseen, that the respondent had been tricked or misled into withdrawing his appeal. We found that application unimpressive since it was obvious that, in order to uphold the adjudicator's decision, the respondent would have to establish that his withdrawal of the appeal should be treated as of no effect. The appellant had had ample time to obtain any necessary statement and the attempt to do so at the hearing was contrary to the tribunal's standard directions. In any event, we expressed great concern that the Entry Clearance Officer, as respondent to an appeal against his decision, had thought it appropriate to have a meeting with the appellant the upshot of which was that the appeal was withdrawn and a fresh application made at no inconsiderable expense which was then refused. We appreciate that we have not seen any explanation from the Entry Clearance Officer, but we find it difficult to envisage any justification for what happened.

14. However, we do not need to go into the merits. Rule 18(4) of the 2000 Rules provides, so far as material:

> "An application for leave to appeal shall be made by serving upon the Tribunal the appropriate prescribed form....."

The appropriate prescribed forms are identified in the Schedule to the 2000 Rules, but Rule 3(1) provides, after referring to the forms in the Schedule, in addition:

> "... and those forms, or similar forms, may be used with any variations that the circumstances may require."

The Schedule has three prescribed forms. One is for family visit appeals which fall into a special category. The other two deal with United Kingdom and overseas appeals respectively. In this case, the Home Office used a form headed "Asylum Appeal" which was signed "on behalf of the Secretary of State." It was a form which had been used under the Asylum Appeals (Procedure) Rules 1996 and which on its face referred to those rules. This was the wrong form. Not only was this not an asylum appeal nor one to which the 1996 Rules applied but it was not even signed on behalf of the correct party who was not, of course, the Secretary of State but was the Entry Clearance Officer.

15. In our judgment, the application was defective and could not properly be brought within the scope of the definition of 'appropriate prescribed forms' in Rule 3(1) of the 2000 Rules. Ms Rahman submitted that this was a purely technical point which should not prevent the appeal proceeding. She did not apply for leave to issue a correct application out of time.

16. Although neither counsel drew it to our attention, we have had to consider the decision of the Court of Appeal in *R v I.A.T. ex parte Jeyeanthan* [1999] INLR 241. That case concerned the failure by the Secretary of State to include in his application for leave to appeal a declaration of truth which was required by the provisions then in force, namely Rule 13(3) of the Asylum Appeals (Procedure) Rules 1993. That failure meant, as the Court decided, that the equivalent of Rule 3(1) (which was in identical terms) could not validate the application. But that was not the end of the case. Lord Woolf, M.R. said (at page 244F):

> "… the Tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation the Tribunal's task will be to seek to do what is just in all the circumstances…."

We therefore must consider whether, notwithstanding the defect, the appeal should be allowed to proceed.

17. The point is indeed technical, but the Home Office must know that the rules should be obeyed. We have to take into account not only the defective application but also the failure to comply with the standard directions in not putting forward the appellant's case in time. Furthermore, we are, as we have said, very concerned by the actions of the appellant in seeing the respondent and having a conversation with him which resulted in the apparent withdrawal of the appeal. In addition, the adjudicator has reached a conclusion on the facts which cannot be said to have been unreasonable and so the effect of allowing the appeal to go ahead would be added expense and delay to no good purpose. Even if the appellant persuaded the Tribunal that the appeal had been properly withdrawn, a fresh application would be likely to succeed, albeit at added expense to the respondent.

18. In all the circumstances, we have no doubt that we should not permit this appeal to proceed. It would not be just to do so. Accordingly, since it has not been properly brought, this appeal is dismissed. In consequence, the respondent must forthwith be issued with an entry clearance to enable him to come to the United Kingdom for a working holiday in accordance with his application. Although we appreciate that we cannot so direct, we would expect that he be refunded whatever he has paid in order to make his second application following the purported withdrawal of his appeal.

MR JUSTICE COLLINS