Neutral Citation Number: [2009] EWHC 335 (Admin)

Case No: CO/8980/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2009

Before :

THE HON. MR JUSTICE BLAKE

- -

Between :

R (ON THE APPLICATION OF) FREZGHI SEMERE	**Claimant**
- and -	
ASYLUM AND IMMIGRATION TRIBUNAL	**Defendant**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

(Transcript of the Handed Down Judgment of
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Christopher Jacobs (instructed by **Duncan Lewis & Co**) for the **Claimant**
No appearance for Defendant or Interested Party

Hearing dates: 21st January 2009

- -

Judgment
As Approved by the Court

The Hon. Mr Justice Blake:

Introduction

1. This is an application for judicial review of a decision of the Asylum and Immigration Tribunal dated 11th July 2007 that it had no jurisdiction to reconsider the merits of an asylum application as directed to do so by Beatson J because the application for reconsideration was made out of time and there was no reason to believe that it could not reasonably practicably have been made within the period of 5 days. It is common ground that judicial review can lie in these proceedings because the decision is not a final one concerned with the substance of the asylum claim but a procedural issue that is not otherwise capable of review or challenge.

2. The claimant is an Eritrean asylum seeker who claimed asylum on the 11th May 2005 a few days after entering the UK. His asylum claim was dismissed by the SSHD on the 31st May and he appealed to an Immigration Judge of the AIT. At all material times he was represented by the firm of White Ryland and Co, a firm of solicitors with substantial experience of asylum appeals and procedure. That firm has now become part of Duncan Lewis and Co who represented the claimant in this application. The defendant is the AIT. The SSHD is the interested party

3. As long ago as Wednesday 20th July 2005 an immigration judge of the AIT reached an adverse determination on the claimant's appeal. From April 2005, with new asylum procedure rules in place, responsibility for sending the decision to the appellant fell upon the respondent Secretary of State. What then happened can best be explained by breaking it down into a number of stages.

4. First, the relevant section of the AIT central registry sent the decision to the relevant section of the Home Office for formal transmission of the decision and service on the claimant and his solicitors as required by the procedure rules. The decision must have been received by the Home Office by Friday 22nd July 2005 as there is a stamp showing that date attached to the decision under the printed heading "determination promulgated".

5. Second, on Tuesday 26th July 2005, the claimant's solicitors White Ryland date-stamped the covering letter enclosing the determination as having been received by them on that date. There is a witness statement dated 16th August 2005 from Sean White, a partner at White Ryland, stating that the post is opened daily and stamped at the time of opening with the date of receipt. In the ensuing proceedings no-one asked the claimant personally to record when he received the document. He was an Eritrean asylum seeker who did not read English at the relevant time. Unsurprisingly the claimant did not maintain a system of date stamping his correspondence and when he was asked to make a statement recently in the context of this application he had no precise recollection about dates.

6. Third, on Monday 1st August 2005, White Ryland made an application for reconsideration of the decision by fax that was transmitted to the AIT at about 18.25 hours.

7. On the basis of these essential facts, two issues fell for consideration. First, was the application made on behalf of the claimant made within time? Second, could it

reasonably practicably have been made within that period? The AIT has looked at these two issues twice and on both occasions has answered them in the negative.

8. On the 4th August 2005 a Senior Immigration Judge (SIJ) first considered the application and noted that the solicitors claimed that the determination in question had been served on them on Tuesday 26th July. She concluded that the determination should be treated as having been received on Monday 25th July; that five clear days thereafter expired on Tuesday 1st August, and that a fax received after 4.00pm on the 1st August should be treated as being received on the 2nd August. The notice of application was therefore served late and as it was reasonably practicable to have served it in time, time could not be extended.

9. The claimant through his solicitors both made representations to the President of the AIT and an application for reconsideration of the SIJ in the High Court. In due course Beatson J directed that the merits of the asylum claim be reconsidered by the AIT as well as further consideration be given to the question of the timing of the receipt of the decision and the application. At this stage Mr. White's statement of the 16th August was available as was the Home Office letter on which the solicitor's date stamp of receipt had been affixed.

10. As a result of this direction a three member constitution of the tribunal sat on the 27th March 2007 and heard full submissions on the operation of the legislative and procedural code. It recognised that an issue arose as to its jurisdiction as it could not consider the judicial direction for reconsideration of the substantive asylum decision if it had no jurisdiction to do so because the application was made late and there was no basis for an extension under the rules.

11. It examined the matter at length and reached a fully reasoned decision that was sent out by the Home Office on the 9th July 2007. Again the answer to both questions was in the negative. The material parts of this reasoning were repeated in a decision in writing by the Deputy President of the AIT, Mr Ockelton in refusing leave to appeal to the Court of Appeal in September 2007.

12. The decision was then challenged by judicial review proceedings lodged on the 11th October 2007. Permission was granted by Wilkie J with some hesitation on 29th February 2008 but in the light of the importance of the issue to other applicants in the AIT system.

13. Both the Home Office and the AIT submitted in their written grounds in response to the judicial review that the application for reconsideration made by fax on the 1st August 2005 was out of time having regard to the date when the claimant must be deemed to have received the original decision of the AIT rejecting his appeal, and the fact that the fax sent by the claimant's solicitors was sent after the end of normal business hours. The Home Office however recognised that the history of the matter and the change of practice and expectation regarding the service of AIT documents meant that there was a credible explanation as to why the solicitors may have been misled as to the final date of service thereby rendering it impracticable for them to have served the application sooner than they did.

14. The AIT stated that it has no knowledge of such a practice, which in any event could not affect the interpretation of the procedure rules and submitted that its decision was

lawful. It indicated that it would not further participate in these proceedings. The Home Office considered that its concession on the second of the issues was enough and so it would not be proportionate to incur further costs in attending the oral hearing.

15. In the event the parties were not agreed as to how this application should be disposed of. The claimant maintained his submissions that the application was not out of time. Neither the AIT nor the Home Office has appeared at this application by counsel and so no oral submissions have been heard in opposition to those advanced on behalf of the claimant.

The legislative scheme:

16. As from March 2005 the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (the 2004 Act) made changes to the previous two tier structure of the statutory tribunal for determining asylum appeals. Amongst other changes, the 2004 Act amended the Nationality Immigration and Asylum Act 2002 by inserting into the scheme of appellate review of immigration and asylum decisions s.103A which is in the following terms:

> "103 A (1) A party to an appeal under section 82 or 83 may apply to the appropriate court, on the grounds that the Tribunal made an error of law, for an order requiring the Tribunal to reconsider its decision on the appeal.
>
> (2) The appropriate court may make an order under subsection (1)-
>
> a) only if it thinks that the Tribunal may have made an error of law, and
>
> b) only once in relation to an appeal
>
> (3) An application under subsection (1) must be made –
>
> (a) in the case of an application by the appellant made while he is in the United Kingdom, within the period of 5 days beginning with the date on which he is treated, in accordance with rules under section 106, as receiving notice of the Tribunal's decision,……..
>
> (4) But –
>
> (a) rules of court may specify days to be disregarded in applying subsection (3)(a),(b) or (c), and
>
> (b) the appropriate court may permit an application under subsection (1) to be made outside the period specified in subsection (3) where it thinks that the application could not reasonably practicably have been made within that period.

(5) An application under subsection (1) shall be determined by reference only to –

(a) written submissions of the applicant, and

(b) where rules of court permit, other written submissions.

(6) A decision of the appropriate court on an application under subsection (1) shall be final."

17. Section 103(A), therefore, provides for an application to be made within five days of the day that the applicant is treated as having received the notice. The date of the receipt of the notice is to be determined in accordance with rules made under s.106. However, the power to disregard days in calculating the five day period is assigned to the rules of the court.

18. Section 106 is the rule making power given to the Lord Chancellor for AIT appeals and s.106(1A) reads as follows:

"In making rules under subsection (1) the Lord Chancellor shall aim to ensure-
(a) that the rules are designed to ensure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible, and
(b) that the rules where appropriate confer on members of the Tribunal responsibility for ensuring that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible."

19. The matter is further complicated by the provisions of Schedule 2 of the 2004 Act that provides for transitional provisions where by applications that are due to made to the appropriate court are to be first made to a member of the AIT:

"30 – (1) This paragraph shall have effect in relation to applications under section 103A(1) or for permission under section 103A(4)(b) made –

(a) during the period beginning with commencement and ending with such date as may be appointed by order of the Lord Chancellor and

(b) during any such later period as may be appointed by order of the Lord Chancellor.

(2) An application in relation to which this paragraph has effect shall be considered by a member of the Asylum and Immigration Tribunal (in accordance with arrangements under paragraph 8(1) of the Schedule 4 to the Nationality, Immigration and Asylum Act 2002 (inserted by Schedule 1 above)).

(3) For the purposes of sub-paragraph (2) –

(a) references in section 103A to the appropriate court shall be taken as reference to the member of the Tribunal who is considering the application or who is to consider the application

(b) rules of court made for the purpose of section 103A(4)(a) in relation to the court to which an application is made shall have effect in relation to the application despite the fact that it is considered outside the appropriate court, and

(c) section 103A(6) shall be subject to sub-paragraph (5) below.

(4) Where a member of the Tribunal considers an application under section 103A(1) or 103A(4)(b) by virtue of this paragraph –

(a) he may make an order under section 103A(1) or grant permission under section 103A(4)(b) and

(b) if he does not propose to make an order or grant permission, he shall notify the appropriate court and the applicant.

(5) Where notice is given under sub-paragraph (4)(b) –

(a) the applicant may notify the appropriate court that he wishes the court to consider his application under section 103A(1) or 103A(4)(b),

(b) the notification must be given within the period of 5 days beginning with the date on which the applicant is treated, in accordance with rules under section 106 of the Nationality, Immigration and Asylum Act 2002, as receiving the notice under sub-paragraph (4)(b) above, and

(c) the appropriate court shall consider the application under section 103A(1) or 103A(4)(b) if –

(i) the applicant has given notice in accordance with paragraphs (a) and (b) above, or

(ii) the applicant has given notice under paragraph (a) above outside the period specified in paragraph (b) above, but the appropriate court concludes that the application should be considered on the grounds that the notice could not reasonably practicably have been given within that period."

20. The Rules made under s.106 were the Asylum and Immigration Tribunal (Procedure) Rules 2005 (the 2005 Rules) that came into force on the 4th April 2005. Rule 3 (1) confirms that in addition to appeal, the Rules apply to s.103A applications which are considered by a member of the Tribunal in accordance with paragraph 30 of Schedule 2 of the 2004 Act. Rule 4 sets out the overriding objective which is:

> **"**to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; an, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest. "

21. Rule 23 concerns special procedures and time limits in asylum appeals. Rule 23(5)(a) imposes the duty of service of determinations on the appellant and Rule 23(5)(b) requires the respondent to:

> "as soon as practicable after the determination, notify the Tribunal on what date and by what means it was served"

22. Part 3 of the 2005 Rules deals with applications for reconsiderations of appeals. Rule 25 confirms that the procedure for considering s.103A applications is set out in the relevant rules of court. Rule 26 sets out how applications for reconsideration should be considered by the designated senior immigration judge. It is to be noted that Rule 26 provides:

> "(2) The immigration judge shall decide the application without a hearing and by reference only to the applicant's written submissions and the documents filed with the application notice.
>
> (3) The immigration judge is not required to consider any grounds for ordering the Tribunal to reconsider its decision other than those set out in the application notice.
>
> (4) The application must be decided not later than 10 days after the Tribunal receives the application notice
>
> (5) In deciding a section 103A application, the immigration judge may –
>
> (a) In relation to an application for permission under section 103A(4)(b), either - (i) permit the application to be made outside the period specified in section 103A(3); or (ii) record that he does not propose to grant permission; and
>
> (b) In relation to an application for an order under section 103A(1), either – (i) make an order for reconsideration: or (ii) record that he does not propose to make such an order.
>
> (6) The immigration judge may make an order for reconsideration only if he thinks that –
>
> (a) the Tribunal may have made an error of law; and
>
> (b) there is a real possibility that the Tribunal would decide the appeal differently on reconsideration."

23. It is apparent from these parts of the 2005 Rules read in the light of the rule making power and the over-riding objective that speed, efficiency and fairness are the competing considerations that inform the interpretation and application of the rules. An unsuccessful party in an asylum appeal who seeks reconsideration of a decision is confined to a single application that must be made within five days and decided within ten days thereafter on the basis of the written material provided to the designated member of the AIT. This application must be directed to indicating that the Tribunal have made an error of law and the existence of a real possibility that the Tribunal would decide the appeal differently on reconsideration. By contrast to previous practice and procedure in this jurisdiction, it is not permitted for an appellant to lodge outline grounds to comply with the time limit and indicate that grounds will be perfected and supplemented later (*R v IAT ex p Pollicino* [1989] Imm AR 531 (QBD). The Tribunal does not have to consider any point raising doubts as to the legality of the previous decision that is not in the applicant's notice. It is not permitted to appeal on a pure question of fact or evidence.

24. This all suggests that an applicant for asylum is likely to need to have access to a competent representative versed in the practice and procedure of asylum and immigration law and able to speedily consider determinations made by Immigration Judges and draft any appropriate legal grounds for review in response. The right to seek a review was intended to substitute the former right to make a judicial review application of decisions of the AIT where permission to appeal to the second tier tribunal had been refused. It is now clear that judicial review of AIT decisions is confined to cases of the most exceptional variety where there is flagrant injustice, otherwise applications will be considered an abuse of the process of the High Court (see *R (AM) Cameroon v AIT* [2008] EWCA Civ 100, [2008] 4 All ER 1159, distinguishing *R (G) v IAT* [2004] EWCA Civ 173, [2005] 1 WLR 1405.

25. Turning from the rules that set out the background and purpose of the statutory scheme to the rules that more directly relate to the issues in contention, it is common ground that the starting point for the calculation of time is rule 55 of the 2005 Rules which is concerned with the filing and service of documents:

> "55. (1) Any document which is required or permitted by these Rules or by a direction of the Tribunal to be filed with the Tribunal, or served on any person may be –
>
> a) Delivered, or sent by post, to an address;
>
> b) Sent via a document exchange to a document exchange number or address;
>
> c) sent by fax to a fax number; or
>
> d) sent by email to an e-mail address,
>
> specified for that purpose by the Tribunal or person to whom the document is directed.

(2) A document to be served on an individual may be served personally by leaving it with that individual.

(3) Where a person has notified the Tribunal that he is acting as the representative of an appellant and has given an address for service, if a document is served on the appellant, a copy must also at the same time be sent to the appellant's representative.

(4) If any document is served on a person who has notified the Tribunal that he is acting as the representative of a party, it shall be deemed to be served on that party.

(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 –

(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;

(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

(c) in any other case, on the day on which the document was sent or delivered to, or left with, that person.

26. It will be seen from Rule 55 that service on a representative is mandatory as well as service on the last notified address of the appellant. Service on the representative suffices as service on the appellant. Documents can be served by fax or by post. Where a document is sent by post there is a deemed date of service calculated by reference to the day on which the document was sent, unless the contrary is proved. Where the document is sent by any other means (such as by fax) it is deemed to be served on the date it was sent, delivered or left, again unless the contrary is proved.

27. Once the starting point of the date of service is identified by reference to Rule 55, the rules with respect to applications to be made to the AIT or the High Court are governed by CPR 54.28 which are the relevant rules of court. It is in the following terms:

"(1) This Section of this Part contains rules about applications to the High Court under section 103A of the Nationality, Immigration and Asylum Act 2002 for an order requiring the Asylum and Immigration Tribunal to reconsider its decision on an appeal.

(2) …

(3) Any reference in this Section to a period of time specified in –

(a) section 103A(3) for making an application for an order under section 103A(1); or

(b) paragraph 30(5)(b) of Schedule 2 to the 2004 Act for giving notice under that paragraph,

includes a reference to that period as varied by any order under section 26(8) of the 2004 Act.

(4) Rule 2.8 applies to the calculation of the periods of time specified in –

(a) section 103A(3); and

(b) paragraph 30(5)(b) of Schedule 2 to the 2004 Act.

(5) Save as provided otherwise, the provisions of this Section apply to an application under section 103A regardless of whether the filter provision has effect in relation to that application."

28. By the terms of CPR 54(28)(4) it is then necessary to turn to CPR 2.8 to see what provision is made in respect of the calculation of time for the relevant applications. CPR 2.8 is in the following terms:

"Time

(1) This rule shows how to calculate any period of time for doing any act which is specified –

(a) by these Rules;

(b) by a practice direction; or

(c) by a judgment or order of the court.

(2) A period of time expressed as a number of days shall be computed as clear days.

(3) In this rule 'clear days' means that in computing the number of days
(a) the day on which the period begins; and

(b) if the end of the period is defined by reference to an event, the day on which that event occurs are not included……

(4) Where the specified period –

(a) is 5 days or less; and

(b) includes –

(i) a Saturday or Sunday; or

(ii) a Bank Holiday, Christmas Day or Good Friday,

that day does not count.

Example

Notice of an application must be served at least 3 days before the hearing.

An application is to be heard on Monday 20 October.

The last date for service is Tuesday 14 October.

(5) When the period specified –

(a) by these Rules or a practice direction; or

(b) by any judgment or court order,

for doing any act at the court office ends on a day on which the office is closed, that act shall be in time if done on the next day on which the court office."

The Claimant's submissions

29. The claimant submits that the notice of the 1st August 2005 was not served out of time for the following reasons:-

i. CPR 2.8 (and the equivalent provision in Rule 57 of the 2005 Rules) that applies for the purposes of calculating the period of 5 days, precludes weekends and holidays as being taken into account for the purpose of calculating any time for doing an act. If the notice appealed against was sent on Friday 22nd July then it should not be treated as being received on Sunday 24th July but the second clear business day after sending which would be the Tuesday 26th July.

ii. Alternatively, while Rule 55 (5)(a) presumes that a notice sent by post will be received on the second day after sending, that is not an irrefutable presumption. The deemed date of receipt was a Sunday, a day on which there is no postal delivery. Here the fact that the solicitors recorded that they received the determination on the Tuesday 26th July rebuts the presumption that it was received on the Sunday. If the solicitors received it on the Tuesday there is no reason to believe that the appellant personally received it earlier.

iii. Moreover the fact that the solicitors received it on the Tuesday is some indication that the determination was not sent out by the Home Office on the Friday 22nd July. There is evidence that at the material time there was concern by the AIT that they were not being informed by the Home Office of the actual date of sending, and the actual date of sending often did not correspond with the date of promulgation.

iv. Reading CPR 2.8 on its own there is no reason to construe it as precluding actual service by fax on the Tribunal at 18.30 hours as being effective service within the 5 days. Such service by fax on the AIT under rule 55 (1) and (5)(c) would count as effective service if it was received by the end of the last day for service and there is no requirement for it to be received in office hours. CPR 54.28 only incorporates CPR 2.8 and not the provisions of CPR 6.7 into the scheme of service.

v. In any event where the appellant relied on the actions of his solicitors who were misled by the previous practice and some lack of clarity in the rules, the AIT should have concluded that it was not reasonably practicable to have served the notice some 3 hours earlier.

30. The Tribunal's detailed reasons for reaching its conclusions and the summary grounds for opposing this application submit as follows:

i. CPR 2.8 (and *a fortiori* Rule 57) cannot have the meaning for which the claimant contends because the deemed date of receipt of the determination is not determined by calculation of the period of time for which something is to be done. The deemed date of receipt is determined by Rule 55(5)(a) and is not a period of time in which something has to be done by the claimant. This reading is confirmed by the decision of the Court of Appeal in *Anderton v Clwyd County Council* [2002] EWCA Civ 933; [2002] 1 WLR 3174.

ii. The date the solicitors say they received the decision does not prove that the determination was not received by the appellant in accordance with Rule 55(5)(a). It is service on the appellant that counts. Although the fact that there is no postal service on the Sunday is a matter to which judicial notice can be attached to rebut the presumption in Rule 55(5)(a); the presumption is only rebutted to the extent of presuming that the decision arrived on Monday 25th July .

iii. A fax sent after 4.00pm on a working day is not to be treated as having been received on that day because, once it is, the rules of court that apply to the construction of this question, CPR 54.28 and CPR 2.8 itself must be read as subject to CPR 6.7 (2) that provides that a personal service after 4.00 on a business day or a weekend or a holiday will be deemed to be received on the next business day.

iv. On the state of the evidence before it, the AIT was entitled not to be satisfied that service within time was impracticable.

<u>The fresh evidence</u>

31. These are issues of some complexity. It does not help that the court has had no oral submissions from either the AIT or the SSHD in response to the refined submissions deployed by the claimant and the fresh evidence that was served by him shortly before the hearing of this application. Since there was some doubt as to whether this material had been received in good time before the hearing by the defendant and interested party, I afforded the Treasury Solicitors 7 days from the date of the hearing to comment on it if they so wished. The court did subsequently receive a letter dated 29th January 2009 in response to this material, for which it is grateful, that has been carefully considered in this judgment.

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:

> "[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 Rule 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.

Conclusions:

i. Do the rules relating to deemed service exclude non-business days?

36. I am satisfied that the first argument deployed by the claimant fails for the reasons given by the AIT. Where the rule-maker has deemed service to be effective two days after sending a document there is no room to imply a disregard of non-business days pursuant to CPR 2.8. There is even less room to import Rule 57 of the AIT Procedure Rules 2005 into the question as that rule relates to where time for doing something is specified in the 2005 Rules themselves (see Rule 57(1)). The five days for making an application are specified in the statute and not the 2005 Rules. Whilst it is clear that CPR 54. 28 expressly refers to CPR 2.8 in respect of calculating the time for making an application, that cross-reference can readily apply to the period of five days from the deemed date of service, rather than the calculation when service is deemed.

37. It is clear from the language of CPR 2.8 and the decision of the Court of Appeal in *Anderton v Clwyd County Council* (above) at [37]-[45] that these rules only relate to the calculation of the period of time for doing something and have no application to the calculation of when the rule-maker deems service by post to have been effective. I acknowledge that the context of *Anderton* was very different to the present case, and the court's strict construction of CPR 6.7 without subordinating it to CPR 2.8 enabled it to conclude that originating process had been served within the limitation period by reference to the deemed receipt provisions. However, the difference in context does not enable the provisions being considered in *Anderton* to mean something different in asylum cases. The rule-maker must have incorporated CPR 2.8 into CPR 54.28 with knowledge of the decision in *Anderton*. Just as the Court of Appeal did in that decision, I conclude if it had been intended that deemed service should only operate on business days the rules would have said so.

ii. Do the deemed service rules under rule 55 apply ?

38. The answer to the first question only defeats the claimant's application in this part of the claim if the deemed service rules actually apply. However, in order for the deemed service provisions to be engaged, in my judgment it is necessary for the AIT to know when the document that is the subject of the service provisions has actually been sent. Before the AIT it seems to have been assumed that the date stamped on the decision by the Home Office unit as the date of promulgation was the date of sending.

39. This assumption has to be revisited in the light of the AIT's observations in *EY* above and the fresh evidence served in the case. As that decision observed, the respondent Secretary of State has no business in "promulgating" a judicial decision. It is now clear from the Treasury Solicitor's evidence that the decision passes through two different sections of the Home Office before being put in the post. It is the first section that stamped the determination itself before being sent to the post room. The date of posting may have been later. The respondent's duty was to serve the decision by whichever route it chose, and inform the AIT of the method and date of service pursuant to its duty under Rule 23 (5)(b) of the 2005 Rules. The decision of *EY* was given in 2006 and suggests that even at that date this duty was not being performed. It was not performed merely by date stamping the determination as the date of promulgation. 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.

40. As I understand the evidential position whether considered in 2005, 2007 and 2009, there was no evidence of the date of sending other than the date-stamp on the decision which does not necessarily correspond to the date of sending. Moreover the subsequent practice apparently adopted by the Home Office of date stamping an envelope as the date of sending had not yet been adopted and when it was adopted discrepancies between the two dates came to light. The present practice of sending documents by recorded delivery is very recent. Accordingly there is no evidence before the court of the respondent informing the AIT of the date of sending of the determination to the appellant or his representatives. The date that White Ryland actually received the decision is indicative of the likelihood that the determination was not actually sent out to either until the next working day after Friday 22nd July, ie Monday 25th July.

41. In my judgment, the presumption as to the date of service can only arise where there is evidence of the date that the document was sent. In the absence of any evidence of the date of sending, the date of service can only be the date of receipt. Service on the solicitors is good service on the appellant, and the only evidence before the AIT as to service on either the solicitors or the appellant was the evidence from White Ryland of the date they received the document. The possibility that the appellant may have been sent the document on an earlier date can be ignored as the date of sending has not been established by the Home Office and in any event would be improbable.

42. On this basis, in my judgment the appellant had five clear days to serve his application from the date of receipt by his solicitors, Tuesday 26th July. It is plain that CPR 2.8 counts to discount the non-business days of the intervening weekend and so the last date for service was Tuesday 2nd August 2005. This application had been served by fax on the evening before and even if the fax is to be treated as having been received on the Tuesday, the application was therefore made within the time prescribed by the rules.

iii. Rebutting the presumption of receipt

43. Even if there had been evidence that the determination was sent by post on Friday 22nd July, Rule 55 (5)(a) is not a conclusive presumption of deemed service after 2 days. There is accordingly a contrast between this rule and CPR 6.7 considered in *Anderton* where the presumption was irrebuttable by proof of either actual earlier receipt by post or the impossibility of receipt on the deemed day because there was no postal delivery on that day. As the AIT observes, since the decision of the Court of Appeal in *R (Salem) v SSHD* [2001] 1 WLR 443, it has been held that the right of access by an asylum seeker is of such importance that there should be no determinative fiction of deemed service that causes that loss of such an appeal right. In *Anderton* the fact that service was deemed to have been effected over a weekend or a Sunday caused no particular hardship to the defendant and the defendant's lawyers as there was ample time thereafter to enter an appearance and a defence. In fact the writ had been received by the defendant on the Friday, but that was irrelevant as the presumption could not be rebutted. In the absence of deeming the service to have been effected over the weekend, the defendant would have had a good limitation defence.

44. In 2005 the SIJ had a statement from a solicitor in White Ryland that the "decision is received on the 26th July" supported by a statement of truth. That seems to have been

an inelegant way of stating the date the document was received rather than reference to an argument about a deemed date of receipt. At least by 2007, the evidential position before the AIT as to the date of receipt was clear. There was Mr. White's statement as to the practice in his firm, the fact that he date stamped the post on the 26th July and the firm's date stamp on the covering letter in support. This was before Beatson J and the court has been informed that it was before the AIT. There was no reason to reject this evidence in amplification or clarification of what had been stated to be the case in 2005. It is puzzling why this evidence did not resolve the matter by 2007 on the basis that the presumption had been rebutted by proof of the contrary.

45. In my judgment three errors were made by the AIT:-

i) It unilaterally varied the presumption of the 2005 Rules by assuming that if the Sunday could not have been the effective date of service then the Monday must have been. If the presumption is not to apply then there should be some evidence of when service was effected. There was no evidence before the AIT that anything had been received by anyone on the Monday and it was not open to it to amend the rules by creating a new presumption.

ii) The AIT appeared to have ignored the only evidence that was before them of when service was effected, even though it came from a reliable source, reflected good practice management methods and was supported by the firm's date stamp. Although the witness statement and photocopy envelope were not before the AIT in 2005, this was a question of jurisdictional fact. The AIT was not confined to the evidence that had been before the original SIJ to determine the answer. It could consider all the evidence then available which included the material before Beatson J. I am satisfied that it included the date stamp on the Home Office letter as well as the statement of Mr. White, although the statement would have been sufficient to make the point. It is particularly puzzling that the AIT did not rely on this evidence as to the date of service when it assumed that the Home Office date of sending could be deduced from the date stamp of the date of promulgation.

iii) The fact that there was no evidence before the AIT in 2007 as to when the appellant personally had received the document did not prevent it from relying on the solicitors' evidence in the case. Unless there was positive evidence that the documents had been sent out on different days (which there was not) the solicitor's evidence of receipt was likely to be the best evidence of when either they or the appellant received the document. Indeed, evidence from a competent solicitor's firm is inherently more likely to carry weight than that of an appellant personally. An asylum seeker is unlikely to appreciate the significance of date of receipt and either keep the envelope or make any other record of date of receipt. For that reason, even an assertion in correspondence or the application from a solicitor submitting the application is some evidence as to the date of receipt. In the vast majority of cases in the interests of speed, efficiency and fairness, I would expect the SIJ to accept what the representative of the appellant says is the date of receipt. If there is reason to challenge it, there would need to be an opportunity to be afforded for relevant evidence to be submitted, such as the date stamp on correspondence. In my judgment, what is asserted as the facts of the case in such an application cannot simply be rejected as inaccurate without more.

46. Accordingly, in my judgment, on the evidence before the AIT any presumption that might have existed on the basis of the stamping of the date of promulgation was rebutted by the evidence as to the date of receipt. For this reason also, the 26th July was the relevant stamp date and the application was made within time.

iv. The time limit for personal service by fax

47. This issue only arises if the last day for service had been Monday 1st August rather than the Tuesday 2nd August as I have concluded is the case. The competing arguments are set out above and are neatly balanced. The AIT submits that CPR 6 has to be read into CRP 2.8 because it governs the service of documents under the CPR generally.

48. CPR 6(1) provides that the rules in this Part apply to service of documents except where any other enactment, a rule in a different Part or practice directions makes a different provision or the court otherwise orders. CPR 6.7 (1) under the heading "deemed service" sets out a deemed date of receipt in respect of documents submitted by fax as being on the day of service if served before 4.00pm but on the next day if served thereafter. CPR 6 (2) requires personal service to be before 5.00pm on a business day.

49. In my judgment, some assistance in reaching conclusions as to which submission is to be preferred is drawn from the purpose of the rule and applying the policy considerations of the overriding objective. In a private law case, notice of an application to a court has to be served on another party in order to give them an opportunity to respond to the application, or seek an adjournment. Notice given late in the working day may undermine the actual period of notice that is given to that other party.

50. In asylum appeals the considerations are different. There needs to be a defined cut off beyond which the application is considered out of time and reasons why it was not practicable to serve it earlier would need to be given. However the AIT does not need notice of an application to prepare itself for a court hearing as would the opposing party in private law claims. It is the tribunal itself that will determine the application within the time fixed by the rules, 10 days time being the period afforded to the claimant to make the application. The application is unlikely to be determined within moments of the arrival of the fax containing the application. It will need to be assigned to the SIJ and connected to the relevant file. Receipt of the application by fax whether hours before or after 4.00pm makes little substantive difference to when it is considered and determined.

51. As previously noted, Rule 55 of the AIT rules does not require personal service by fax on the AIT to be before a specified time. It suffices if the service is effective before the end of the last day for service. I can see no reason why a more restrictive rule would be deliberately selected for the purpose of the CPR 54.28 where the subject matter is asylum and immigration. It would be extremely confusing if the regime as to service on the AIT by fax was different under the 2005 Rules and CPR 54.28. It would be particularly confusing to expect an unrepresented appellant to have

constructive knowledge of the whole of the CPR and to have found his or her way to CPR 6.7 unguided by anything in CPR 54.28.

52. It is in that context that the claimant's observation that CPR 54.28 specifically refers to CPR 2.8 but makes no reference to CPR 6.7 has significance. If it is read as a complete code it would exclude the deeming provisions of CPR 6.7 Further the provisions of CPR 6.1 recognise that they can be displaced by another rule of practice direction or order of the court. The procedure established for these statutory reconsiderations is complex enough, requiring the inquisitive applicant to switch between the 2005 Rules and the rules of court in order to know what is required. It becomes further complicated if the applicant is misled as to the time of service by fax by the absence of reference to CPR 6.7 in CPR 54.28. Given the very strict constraints on time and the work that needs to be done between receipt of a determination and the making of a cogent application, I can see no reason why a few hours at the end of a busy day should be denied to the applicant or his representatives. An applicant in person may be making the application from a detention centre where access to a fax machine may be rationed. A solicitor may need to consult with counsel returning from court before an application is finalised.

53. In the case of *Anderton* itself, to which reference has already been made, the Court concluded that there was no need to read CPR 2.8 into CPR 6.7 even where the latter made a bracketed cross reference to the former. I conclude that there is even less reason to do so where there is no cross reference and the rules of court made for the purpose of s.103A are specific in referring to CPR 2.8 only. It is particularly important that the rules in this anxious area of the administration of justice should be clear comprehensive and readily accessible: "say what you mean and mean what you say".

54. For this reason, even if the 1st August had been the last date for service, I would have concluded that service of the application would have been in time. This is not to encourage such late applications that run the peril of misfortune, a fax machine turned off or disputes or errors on the timing of the respective fax machines. Nevertheless if the applicant can show actual service of the application before the end of the allotted day I can see no good reason why it should not count, and every reason why it should.

v. Not reasonably practicable

55. The AIT's reasoning on the issue seems to have focused on the position of the appellant personally and applied a narrow reading of the words reasonably practicable. Where an appellant in this jurisdiction has legal representation, I would expect the terms of the retainer to include an obligation to scrutinise the determination in question and if there are credible grounds for request for reconsideration to draft the application and send it within the relevant time frame or explain why this could not be done. The appellant is substantially reliant on the efficiency of the representatives for the discharge of this duty.

56. The context for this decision is not private law litigation where failures by solicitors to properly apply the rules may either be cured by leave to give short service or adjourn applications and where they result in a limitation defence accruing may result in negligence liability to the client. The Court of Appeal has pointed to the significance of this distinction in *BR (Iran) v Secretary of State for the Home Department* [2007]

EWCA Civ 198 at [18] and [21]. In the first paragraph cited it endorsed the observation of Sedley LJ in *FP(Iran) v SSHD* [2007] EWCA Civ 13 at [45] to the effect that it is no consolation to tell a person that she can sue her solicitor for his mistake if the mistake is about to lead to her removal from this country; and *a fortiori* if the removal is to a condition of persecution. Sedley LJ had in turn adopted an observation of Lord Denning MR in the case of *R v IAT ex p Mehta* [1976] Imm AR 38 where Lord Denning had concluded for similar reasons that the Court of Appeal would never let a party suffer because his solicitors made a mistake and were a day or two late in giving notice of appeal.

57. Of course, expedition in concluding appellate challenges to Home Office decisions is an important consideration for the Secretary of State as she addresses the historic legacy of delay in this sensitive field of public administration. However, the overriding purpose of the relevant regime is not merely expedition but also fairness. It is an irony that the court is now considering reasons of reasonable practicability that on any view were measured in hours, some three and half years later, with Beatson J, a three person AIT, Wilkie J, and myself all spending time on the point, as well as the cost to the public purse of the funding of this application and the lawyers for the defendant and interested party. "Less haste and more speed" seems an apposite reflection.

58. Even if all the issues previously considered had to be determined adverse to the claimant, there is little reason to doubt that the position in July 2005 was novel and complex and represented a material change in practice from the days when the Tribunal served its own decision and was master of its own procedure rules. In order to comply with the stringent time limits imposed by the rules and the legislation, service on the AIT by post would be a risky enterprise subjecting claimants to even less time to consider and formulate their applications. Here there was effective service by fax some 2 ½ hours after the time specified in a different context by CPR 6 (7) (1) where the solicitors believed that the last date for service was the following day. In so far as that belief was based on a misunderstanding of the terms of CPR 2.8 and the decision of the Court of Appeal in *Anderton* it was mistaken, but given that it was their belief, it is difficult to see how a reasonable SIJ properly directing herself could have concluded that it was reasonably practicable to have served the application earlier. Since the solicitors believed the application was in time, a detailed explanation of why it was not in time could hardly be expected. Immigration judges will know of the great pressure that anyone working in the field of immigration and asylum is under with regard to case load and throughput.

59. Here the appellant was in the fortunate position of having experienced representatives undertaking the advocacy; the unrepresented appellant is in an even more precarious position with respect to lodging such an application, as he or she is unlikely to be able to find a new representative able to take on the case at all or within a time period that would enable them to make pertinent written applications under the rules. The AIT and the designated judges of the Administrative Court are all familiar with home-made hand written representations from appellant that may well be sincere in what they say but are more likely than not to misapprehend the jurisdiction they are seeking to engage and bad points are made and good points missed. If the rules are not too arbitrary and give rise to further problems down the line, they should be applied with an acute sense of practicality.

60. For all these reasons this application for judicial review succeeds and the application for reconsideration made on the 1st August 2005 should now be reconsidered on its merits in accordance with the directions given long ago by Mr. Justice Beatson.