IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 24th February 2004
Date Determination notified: 23rd June 2004

Before:

Mr C M G Ockelton (Deputy President)
Mr J Barnes (Vice President)
Mr R Chalkley (Vice President)

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Appearances

For the Appellants:	Mr P Jorro, instructed by Gill & Co (AK)
	Mr P Jorro, instructed by Elder Rahimi (SS)
	Ms D O'Rawe, instructed by Nag & Co (KT)
For the Respondent:	Mr D Saville, Home Office Presenting Officer

DETERMINATION AND REASONS

1. We have before us three cases in each of which the Secretary of State was granted permission to appeal against a determination of an Adjudicator, despite the fact that his application was late.

2. Rule 18 of the Immigration and Asylum Appeals (Procedure) Rules 2000, which were the Rules in force at the time that each of the grants of permission was purportedly made, reads as follows:

> "**Leave to appeal**
> **18.**-(1) An appeal from the determination of an adjudicator may be made only with the leave of the Tribunal.
> (2) An application for leave to appeal shall be made no later than 10 days, or in the case of an application made from outside the United Kingdom, 28 days, after the appellant has received written notice of the determination against which he wishes to appeal.
> (3) A time limit set out in paragraph (2) may be extended by the Tribunal where it is satisfied that because of special circumstances, it is just for the time limit to be extended.
> (4) An application for leave to appeal shall be made by serving upon the Tribunal the appropriate prescribed form, which shall-
> (a) be signed by the appellant or his representative (if he has one);
> (b) be accompanied by the adjudicator's determination;
> (c) identify the alleged errors of fact or law in the adjudicator's determination which would have made a material difference to the outcome, together with all the grounds relied on for the appeal; and
> (d) state whether a hearing of the appeal is desired.
> (5) When an application for leave to appeal has been made, the Tribunal shall notify the other parties.
> (6) The Tribunal shall not be required to consider any grounds other than those included in that application.
> (7) Leave to appeal shall be granted only where-
> (a) the Tribunal is satisfied that the appeal would have a real prospect of success; or
> (b) there is some other compelling reason why the appeal should be heard.
> (8) An application for leave to appeal shall be decided by a legally qualified member without a hearing.
> (9) When an application for leave to appeal has been decided, written notice of the Tribunal's decision on the application shall be sent to the parties and, if granted, the grounds upon which the appellant may appeal.
> (10) Where the application for leave to appeal is refused, the notice referred to in paragraph (9) shall include, in summary form, the reasons for the refusal.
> (11) Subject to section 77 [of the 1999 Act], where evidence which was not submitted to the adjudicator is relied upon in an application for leave to

> appeal, the Tribunal shall not be required to consider that evidence in deciding whether to grant leave to appeal, unless it is satisfied that there were good reasons why it was not submitted to the adjudicator."

AK

3. The Claimant is a citizen of Bulgaria. She appealed to an Adjudicator against a decision made on 14th April 2000 refusing her leave to enter and refusing her asylum. The Secretary of State certified the asylum claim under paragraph 5(2) of Schedule 2 to the 1993 Act (as amended). An Adjudicator, Mrs Clayton, dismissed the appeal and agreed with the certificate. The effect of her agreement with the certificate was that there was no right of appeal to the Immigration Appeal Tribunal, but Mrs Clayton's determination was set aside by a Consent Order made in proceedings for Judicial Review. The matter then came before another Adjudicator, Mrs P Monro. She allowed the appeal on Refugee Convention grounds. Because the date of the Secretary of State's decision was before 2nd October 2000, there was no human rights appeal before her.

4. The Secretary of State applied to the Tribunal for permission to appeal against Mrs Monro's decision. The Secretary of State's notice of appeal had, it is now conceded, two features which might cause it to be regard it as defective. First, it was not signed, with the effect that the statement of truth (which forms part of the prescribed form) was not completed. Secondly, it was out of time. It should have been submitted by 24th April 2002, but was not submitted until 25th April.

5. It appears that the delay and the defect of form were not, at that stage, detected either administratively or judicially. A Vice President granted permission to appeal on the grounds, which he regarded as clearly arguable. The appeal then came before the Tribunal (Mr J Freeman, Vice President, sitting with Mr C A N Edinboro and Mr M G Taylor CBE). The procedural points were taken before that Tribunal. So far as the time point was concerned, Mr Freeman indicated that his practice when dealing with leave applications was merely to consider whether the application "*is roughly in time or not*", and asserted that, if that was the case, a Vice President who granted permission "*should be deemed to have granted the necessary extension*".

6. On the point about formal compliance, the Tribunal cited the decision of the Court of Appeal in Ravichandran & Jeyeanthan v SSHD [2000] Imm AR 10, and the substantial re-enactment of Rule 38 of the 1996 Procedure Rules (which are the subject of reference in that decision) by Rule 49 of the 2000 Procedure Rules. An applicant's failure to comply with the formal requirements of an application for leave to appeal did not render the application a nullity but was an irregularity capable of being cured by the Tribunal. We should point out that as Judge LJ (with whom the other members of the Court agreed) indicated, the decision whether to afford a cure is a matter of the exercise of a discretion by the Tribunal; and we

should note also that Lord Woolf MR indicated his view that, in the case of the Appellant Ravichandran, "*by taking part in the hearing of the appeal, he had effectively impliedly waived the requirement*".

7. The Tribunal had also heard an argument that section 72(3) of the 1999 Act was of some relevance. Although the matter was not raised before us, it is perhaps worth dealing with that point here. Section 72 is within Part IV of the Act, headed "*Appeals*". The section itself is headed "*Miscellaneous*" and subsection 3 is in the following terms:

> "No appeal under this Part may be made in relation to a decision made on an application if-
>
> (a) the application was required to be made in a prescribed form but was not made in that form; or
>
> (b) the applicant was required to take prescribed steps in relation to the application, or to take such steps at a prescribed time or within a prescribed period, but failed to do so."

8. In our view, there is no doubt at all that "*decision*" in that section refers to the initial decision of the Secretary of State (or an Immigration Officer or Entry Clearance Officer) not to judicial decisions, which are apparently consistently called "*determinations*" in that Act. The purpose of section 72(3) was to prevent the appeal system being invoked at all by a person whose application to the relevant Government Officer had been rejected because it was not made in the proper form.

9. The Tribunal's conclusion was, therefore, that time had been impliedly extended and that the formal defect could be and should be cured. It thus went on to hear the Secretary of State's appeal substantively and allowed it.

10. There was then an appeal to the Court of Appeal, which was settled by consent, although the Court gave a considered judgment on the process before it: [2003] EWCA Civ 804. The Tribunal's determination was quashed and the appeal was remitted to the Tribunal:

> "… for reconsideration of the following questions:-
>
> (a) whether the Secretary of State can now make an application for extension of time, and if so,
>
> (b) whether he should be granted an extension of time on that application to pursue his appeal to the Tribunal from the determination of the adjudicator promulgated on 8th April 2002 and if such extension of time is granted, for a hearing of the appeal before a different Tribunal."

11. It is thus that the appeal comes before us, the procedural issue now being limited to the question of time.

SS

12. SS appealed against the decision of the Secretary of State on 12th April 2002 to give directions for his removal as an illegal entrant to Iraq, the country of which he is a national. An Adjudicator, Mr D A Kinloch, allowed his appeal on asylum and human rights grounds. The Secretary of State made an application for leave to appeal to the Tribunal against that decision. His application was one day late. The lateness was noticed by a member of the Tribunal's staff, who sent the Secretary of State a letter in form TRIB06, in the following terms:

> "I have to inform you that according to the evidence now before the Tribunal, the application for leave to appeal to the Tribunal was not submitted by 31 October 2002, the required date in accordance with the Procedure Rules. Subject to any representations you may make within 7 days of the receipt of this notice, the case must therefore be regarded as closed."

No further representations were made, and a Vice President granted leave to appeal, giving no indication that he had noticed that the application was out of time or that he was exercising any discretion in relation to time.

KT

13. KT appealed against the decision of the Secretary of State on 24th April 2002 to direct his removal as an illegal entrant to Sri Lanka, the country of which he is a national. His appeal was heard by an Adjudicator, Miss C M Bell, and allowed on asylum and human rights grounds. The Secretary of State applied for leave to appeal, being in this case also one day late. Again, the letter in form TRIB06 was served on him. Again, no further representations were received and a Vice President granted leave to appeal, making no reference to any problem in relation to time.

The proceedings before the Tribunal

14. These three appeals evidently raise similar procedural issues and we heard them together. In AK's case, there was before the Tribunal a formal written application for extension of time. That application referred to the Court of Appeal's direction that the Tribunal consider the question whether such an application could now be made and, assuming that that issue was to be decided in the Applicant's favour, gave the following reasons for the extension of time:

> "The application was only one day out of time, this due solely to an administrative error on the part of the Home Office in respect of calculating the period allowed for appealing. Such delay is de minimis;
>
> With the benefit of hindsight, the Secretary of State's appeal must have had strong merit in that the Tribunal's quashed determination could not be faulted by the Court on its approach to the merits of the case;
>
> There is no prejudice to AK as a result of the delay."

15. It was assumed, for the purposes of these appeals, that the Secretary of State's submission in support of an extension of time in the other two cases was or would be in similar terms.

16. We heard oral argument from Mr Jorro, Ms O'Rawe and Mr Saville: we are grateful to them all for their help. During the course of argument, reference was made to Akewushola v SSHD [1999] Imm AR 594, R v IAT ex parte Nelson [2001] Imm AR 76, R v IAT ex parte Mehta [1976] Imm AR 38, and R v Bloomsbury and Marylebone County Court ex parte Villerwest Limited [1976] 1 WLR 362.

When can an application for extension of time be made?

17. The first question we have to consider is whether the Secretary of State's application for an extension of time can be entertained now and, more generally, what are the restrictions on the time at which such an application can be made. It is in the nature of things, particularly in a jurisdiction such as this one, where formal steps have to be taken by the parties within very short time limits, that any application for an extension is likely to be made, if at all, after the expiry of the time limit in question. No process is envisaged, within Rule 18, for an application for the extension of time to be made separately from the application for leave to appeal itself. It is thus extremely likely, indeed virtually axiomatic, that the application for extension of time would be an accompaniment to an application for permission to appeal which was out of time. It has not been suggested to us that an application for extension of time can be made only when the time in question has not expired, and we know of no authority suggesting that that is the case.

18. It appears to us, therefore, that an application for the extension of time is not excluded by the fact that the original time limit has already expired. Is there, then, any other period outside which such an application cannot be made? Given the variety of reasons that there may be for the original time limit having been exceeded, it would be extremely dangerous, in the absence of any clear authority, to lay down any rigorous rule. What is clear is that the later the application is made, the better the reasons for the lateness will have to be. In particular, a party who ignores an invitation (whether in form TRIB06 or not) to supply reasons supporting an application for extension of time is extremely unlikely to be able to show at a later date that he should be heard advancing such reasons.

What reasons can there be for extending time, and how should a decision on this issue be made?

19. It would of course be impossible to provide a list of what might be "*special circumstances*" making it just for the time limit to be extended. We do, however, take the view that the strength of grounds of appeal cannot by itself be a ground for extending time. If it could, a person who had strong grounds of appeal would never need to comply with any time limits. That

is not to say that the strength of the grounds is always irrelevant. Where there is some "*special circumstance*" having some relevance to the passage of time or the missing of deadlines, the strength of the grounds of appeal advanced will be clearly relevant in deciding whether, in all the circumstances, it is right for time to be extended.

20. The extension of time is an exercise of discretion by the member of the Tribunal determining the issue. It is difficult to see that failing to notice that the application was out of time could be regarded as exercising that discretion. It is even more difficult to see how (if a resultant grant of leave was to be challenged) the member of the Tribunal could be deemed to have exercised his discretion and done so on reasonable grounds.

What is the effect of a grant of leave on an out-of-time application?

21. This is a matter of some difficulty, for two reasons. The first is that the Tribunal has no inherent power to set aside its own decisions (Akewushola, Nelson). The second is that a situation in which a final determination of the Tribunal (or perhaps of a higher Court on appeal from the Tribunal) could be set aside, perhaps after many months, on the ground that the application for leave to appeal to the Tribunal was out of time, would be, to say the least, very inconvenient.

22. Bearing in mind the fact that time can be extended where there are special circumstances, the position must be that a grant of leave to appeal made on an out-of-time application is one which is merely irregular. For that reason, if neither party takes the point about time before the Tribunal issues its final determination, then the irregularity is simply waived and it is too late for an objection to the Tribunal hearing the matter on the ground that the application was out of time. The absence of objection by the Respondent to the appeal proceeding, itself constitutes special circumstances for the Tribunal's implicit extension of time.

23. Where the Respondent does take the point about time, however, the grant of leave to appeal can be seen as conditional upon time being extended. It is an indication of what the decision on the application would be if it were in time. If the applicant demonstrates the existence of special circumstances and persuades the Tribunal to extend time, then the grant of leave to appeal stands. If, on the other hand, there are no special circumstances or the Tribunal declines to exercise its discretion to extend time, the grant of permission is ineffective. But the Respondent cannot waive an irregularity he may now nothing about. So his mere inactivity up to the time of the Tribunal's final determination is unlikely of its own to conclude this point against him.

Decisions on the cases before us

24. We therefore proceed to consider whether time should be extended in any of the appeals before us. In AK, as we have indicated, there has been a

formal application for extension on grounds which we have set out above. Mr Saville made vigorous submissions in support of those grounds. He referred in particular to Mehta, where the Court of Appeal held, in a case where an application was late because of a failure by the Applicant's solicitor, that the Tribunal was wrong in finding that the solicitors' failure could not amount to "*special circumstances*", and wrong in declining to take into account the strength of the grounds of appeal. Mehta, however, was a quite exceptional case. As the Court held, the solicitors' mistake was "*quite understandable*". In particular, although the solicitors may have been ill-advised in not making an in-time application, they were far from inactive. The reason they did not make the application was that they were engaged in a one-sided correspondence with the Home Office: one-sided because the Home Office seems to have found it impossible to reply to their letters. In other words, the solicitors' failure was not a pure failure or a mere failure, it was a failure which could be regarded as special circumstances. It is true that Lord Denning MR observed, in the course of his judgment that, in the Court of Appeal, "*we never let a party suffer because his solicitors make a mistake and are a day or two late in giving notice of appeal. We always treat it as a ground for extending the time*". It seems to us, however, that, in a specialised jurisdiction, where the parties (both claimants and Government) are frequently represented by organisations who have the conduct of immigration appeals as a considerable part of their business, and where the clear intention of the Statute is that matters should be pursued vigorously, any case of failure to observe a proper time limit ought to be considered separately on its merits.

25. We entirely reject the Secretary of State's submission that one day's lateness is to be regarded as de minimis. The time limits in appeals of this nature are very short. Under the 2000 Procedure Rules, the time limit in an asylum appeal is ten days after the Adjudicator's determination. A day's lateness extends the time by ten per cent. Ten per cent cannot be regarded as a minimal amount.

26. The assertion that in AK's case the delay was due to "*administrative error*" adds virtually nothing to the case. Nobody supposed that the delay was deliberate. On the other hand, the Secretary of State does not advance any explanation or excuse for the "*error*".

27. As Mr Saville pointed out, the fact that the Vice President thought that the grounds were arguable shows something of their strength, but, as we have indicated earlier, the strength of grounds cannot by itself be a reason for extending time. The assertion that there is no prejudice to the Claimant as a result of the delay is simply wrong. On the expiry of the time limit, the Claimant's position, as a person whose appeal had been allowed, became very much stronger. The Adjudicator's determination could now only be upset if time were extended. It clearly puts her at a disadvantage if the time limit is essentially to be ignored.

28. For the foregoing reasons, we have reached the view that there is no basis for the extension of time in this case. The Secretary of State has simply asserted that he made a mistake in calculating the time limit. That, without more, is not special circumstances; and without any special circumstances relating to the time limit itself, it would not be right to take the strength of the grounds into account.

29. In the cases of SS and KT, the Secretary of State's position is weaker still. Not only has there been no formal application for the extension of time, but the Secretary of State made no response to the form TRIB06 when it was sent out. If the ground for the extension of time were the same as in K's case, we should have refused the extension for the same reasons, and for an additional reason: no explanation has been given for the failure to deal with the matter at a much earlier stage.

30. In all these cases, therefore, we decide that there is no appeal before the Tribunal. The consequence is that the Adjudicators' determinations stand.

C M G OCKELTON
DEPUTY PRESIDENT