Case No: QBCOF 1999/1119/C

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD CROWN OFFICE
(HOOPER J.)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 13 June 2000

B e f o r e :

LORD JUSTICE ROCH
LORD JUSTICE MUMMERY
and
LADY JUSTICE HALE

ASIFA SALEEM	**Applicant/ Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPTARTMENT	**Respondent/ Appellant**

_____

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Ian Burnett QC (instructed by the Treasury Solictor for the Appellant)
Andrew Nicol QC & Mark O'Connor (instructed by Messrs Param & Co. for the Respondent)

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Judgment
As Approved by the Court

LORD JUSTICE ROCH:

The decision the subject of the appeal

On 1 October 1999 Mr Justice Hooper, on an application for judicial review of a decision of the Immigration Appellate Authority contained in a letter of 6 March 1998 written by the Tribunal clerk, granted the application for judicial review and quashed that decision. In his judgment Mr Justice Hooper said:

> "I have reached the conclusion that section 22 of the 1971 Act does not by necessary implication authorise a rule of such draconian consequences as rule 42(1)(a). Alternatively I find the rule not to be "within the reasonable range of responses which Parliament could have intended the Lord Chancellor to make to the grant of the rule making power."

The judge was referring to section 22 of the Immigration Act, 1971, and rule 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996.

The facts

The facts are that the applicant was born in Pakistan on 13 August 1958. The applicant came to the United Kingdom from Pakistan with four of her children on 29 April 1996. Applications for asylum were made on 23 May. Those applications were refused, the refusal letter being dated 12 September 1996. On 21st of that month removal directions were given. On 26 September Mrs Saleem appealed against the removal directions. That appeal was received by the Immigration Appellate Authority on 27 September 1996. That notice gave Mrs Saleem's address as 54 Pine Road, Cricklewood and Messrs Chesham & Co., Solicitors, as her representative; the person dealing with the matter was stated to be Mr E. R. Shulman. On 29 October 1996 the Special Adjudicator sent out notices of the hearing of the appeal to Chesham & Co. and to Mrs Saleem. Mrs Saleem admits receiving a copy of that notice of hearing but claims that she received that copy through her solicitors and not directly from the Immigration Appellate Authority. The appeal was fixed for Tuesday 10 February 1998. That notice contained the standard directions under rule 23 of the Asylum Appeals (Procedure) Rules 1996 (I shall refer in this judgment to those rules as "the Rules"). The appellant was required to complete the reply to directions and warned that a failure to return that form as directed could lead to the Special Adjudicator proceeding with the appeal, treating the party who failed to comply as having abandoned the appeal or determine the appeal without a hearing under rule 35, pursuant to rule 24 of the rules.

On 10 April 1997 the Immigration Appellate Authority sent notice to Chesham & Co. that they had failed to comply with the directions and warning that if the directions were not complied with within 21 further days the appeal might be treated as abandoned. On 6 May 1997 Mrs Saleem moved from 54 Pine Road, Cricklewood, to 207 Cricklewood Broadway. The Immigration Appellate Authority was not notified of Mrs Saleem's change of address. Mrs Saleem has deposed that she informed her solicitors of that change of address. On 12 June 1997 the Immigration Appellate

Authority sent a notice of a hearing on 11 July 1997 for Mrs Saleem to show cause why her appeal should not be treated as abandoned. Two copies of that notice were sent, one to Chesham & Co. and one to Mrs Saleem herself, albeit that that was addressed to 54 Pine Road.

On 11 July 1997 there was no appearance by or on behalf of Mrs Saleem. The Special Adjudicator, Mr Grant, made a determination in which he said:

> "I am satisfied that notification of the hearing and notice as to failure to comply with directions have been served upon the parties and their representatives in accordance with the Asylum Appeals (Procedure) Rules 1996. I am further satisfied that having regard to the conduct of the first appellant and her failure to appear or otherwise prosecute her appeal or those of the other appellants, that the appeals have been abandoned: see rule 35(4)(b). The appeal is dismissed."

Copies of the Special Adjudicator's determination were sent to Chesham & Co. and to Mrs Saleem at 54 Pine Road on 24 July 1997, according to the witness statement of Mark Benney, a barrister employed by the Treasury Solicitor, made on 3 June 1999 and based on "the material on the Immigration Appellate Authority's file in relation to the applicant's appeal". The notice accompanying the Special Adjudicator's written determination informed the addressee of a party's right to apply for leave to appeal against the Special Adjudicator's notice of determination to the Immigration Appeal Tribunal and the form of application was enclosed. The notice then went on:

> "In accordance with rule 13(2) and 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 any application for leave to appeal to the Immigration Appeal Tribunal must, together with all grounds of appeal, be made at the following address WITHIN 5 WORKING DAYS of the deemed receipt date 28 July 1997."

On 9 February 1998 Mrs Saleem contacted the Immigration Appellate Authority at Wood Green to say that she would not be able to attend the hearing fixed for 10 February 1998 as she was having a baby. Mrs Saleem was told that her appeal had been dealt with. Mrs Saleem consulted fresh solicitors, Messrs Param & Co. Those solicitors acted with commendable expedition and by 5 March 1998 had obtained a copy of the Special Adjudicator's determination of 24 July 1997. The following day those solicitors made application for leave to appeal to the Immigration Appeal Tribunal. The Immigration Appeal Tribunal declined jurisdiction as the application for leave was out of time under rule 13(2) of the Rules. That sub-rule provides:

> "An application for leave (to appeal to the Tribunal) shall be made not later than five days after the person making it (the appellant) has received notice of the determination against which he wishes to appeal."

It is common ground in this appeal that the Immigration Appeal Tribunal, unlike the Special Adjudicator, have no power to extend the time limit for applying for leave to appeal. Under rule 41 the Special Adjudicator does have a limited power to extend

the time for giving notice of appeal where it is in the interests of justice to do so and he is satisfied that the party in default was prevented from complying with the time limit by circumstances beyond his control, see rule 41(2). Thus an application for leave to appeal to the Tribunal cannot be made more than five days after the would-be appellant has received notice of the Special Adjudicator's determination. The receipt of notice of the determination is governed by rule 42 of the Rules. That rule provides:

> "(1) Subject to paragraph (2) any notice or other document that is sent or served under these rules shall be deemed to have been received (a) where the notice or other document is sent by post from within the United Kingdom, on the second day after which it was sent regardless of when or whether it was received, ...(c) in any other case, on the day on which the notice or other document was served.
>
> (2) Where under these rules a notice or other document is sent by post to the appellate authority, it shall be deemed to have been received on the day on which it was in fact received by the authority."

The stringency of rule 42(1)(a) is alleviated to a small extent by sub-rule (4) which provides that the period should be calculated from the expiry of the day on which the event occurred, sub-rule (5) where the time is extended where the period expires on a Saturday, Sunday or Bank holiday, Christmas Day or Good Friday to the next working day, and sub-rule (6) where if the period in question is a period of 10 days or less then Saturdays, Sundays, Bank holidays, Christmas Day or Good Friday occurring within the period are to be excluded. In fact in this case the 26/27 July 1997 were a Saturday and Sunday which is why the five day period started to run from 28 July.

In affidavits by Mrs Saleem and Mrs Patel of Param & Co. it is said that no notice addressed to Mrs Saleem at 54 Pine Road was received by her directly from the Immigration Appellate Authority and that none of these notices were received by Chesham & Co. Insofar as non-receipt by Chesham & Co. is concerned the evidence is of doubtful validity in that it is information which has been given to Mrs Patel in a telephone conversation by a person who is not identified as being the person handling Mrs Saleem's case at Chesham & Co. The facts that Param & Co. have been told by Chesham & Co. that they have no file for Mrs Saleem and Param & Co. have on three occasions written to Chesham & Co. seeking further information about their handling of Mrs Saleem's appeal, all of which have remained unanswered, cast further doubt on the value of the assistance rendered by that firm to Mrs Saleem in her quest for asylum.

The fact of the matter is that Mrs Saleem and her children are now faced with the prospect of being removed in consequence of the Secretary of State's decision of 12 September 1996 without having had the opportunity to put the merits of the application either before the Special Adjudicator or before the Immigration Appeal Tribunal. Mrs Saleem is being shut out from an appeal to the Tribunal by the combined effect of rule 13(2) and rule 42(1)(a).

<u>The grounds of the Secretary of State's appeal</u>

The Secretary of State's appeal has two grounds. First that Mr Justice Hooper was wrong to decide that rule 42(1)(a) was beyond the rule-making power granted by Parliament to the Lord Chancellor under section 22 of the 1971 Act. Second, if the appeal were to fail on that ground, then the receipt of the notice of determination, which starts the five day period in which an application for leave to appeal to the Tribunal has to be made, would be governed by section 7 of the Interpretation Act 1978 which provides:

> "Where an Act authorises or requires any document to be served by post.....then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

By rule 38 any notice sent or given to a person representing a party to an appeal should be deemed to have been sent or given to that party. Further any document served on a party to an appeal at the address provided by that party to the appellate authority as that party's address for service shall be deemed to have been served on that party. The Secretary of State claims that in the light of those rules and taking account of the evidence that is available in the form of two affidavits from Mrs Saleem, an affidavit from Mrs Patel of Param & Co., the affidavit of Mr Wood and the witness statement of Mr Benney, both members of the Treasury Solicitor's Department who exhibit documents from the Immigration Appellate Authority's file relating to Mrs Saleem's case, there is no prospect of Mrs Saleem proving that the copy of the Special Adjudicator's determination was served neither upon her nor upon her then solicitors, Chesham & Co., so as to defeat the presumption of service arising from section 7 of the 1978 Act.

<u>The second ground</u>

Initially I held the provisional view that this second ground would enable this appeal to succeed. I have been persuaded by Mr Nicol QC, counsel for Mrs Saleem, that it would be wrong for this court to attempt to resolve the factual issues which will arise if section 7 of the 1978 Act is to be applied and that the proper course, if the Secretary of State fails on his first ground of appeal, is to direct that the matter goes back to the Immigration Appeal Tribunal who have the power to order an oral hearing and to receive oral evidence on the question of service.

<u>The first ground</u>

Turning to the first ground of appeal, the rule-making power is to be found in section 22 of the 1971 Act:

> "(1) The Lord Chancellor may make rules (in this Act referred to as "Rules of Procedure") (a) for regulating the exercise of the rights of appeal conferred by this part of this Act; (b) for prescribing the practice or procedures to be followed on or in connection with appeals thereunder, including the mode and burden of proof and admissibility of evidence on such an appeal; and (c) for other matters preliminary or

> incidental to or arising out of such appeals, including proof of the decisions of the adjudicators or the Appeal Tribunal."

Sub-section (2) sets out the three matters which such rules may include and sub-section (3) requires the rules of procedure to provide that any appellant should have the right to be legally represented.

The right of appeal from an Adjudicator to the Tribunal is to be found in section 20(1) of the Act which provides:

> "Subject to any requirement of the Rules of Procedure as to leave to appeal, any party to an appeal to an Adjudicator may, if dissatisfied with his determination thereon, appeal to the Appeal Tribunal, and the Tribunal may affirm the determination or make any other determination which could have been made by the Adjudicator."

As was pointed out by My Lord, Mummery LJ during argument, the precondition to the right to an appeal that the party should be dissatisfied with the Adjudicator's determination, presupposes that the party is aware that there has been a determination and the nature of that determination.

An appeal to the Immigration Appeal Tribunal can be on fact or on law or both. An Immigration Appeal Tribunal can receive further evidence oral or documentary. An Immigration Appeal Tribunal considers the situation in the country of origin at the time they hear the appeal. The Tribunal can affirm the Special Adjudicator's decision or make any such determination as the Special Adjudicator could have made. For an asylum seeker who is the subject of an adverse decision by the Secretary of State and who has failed to have that decision reversed by the Special Adjudicator, the right to have access to the Tribunal is a very important right. The nature of the proceedings before the Tribunal if leave to appeal is granted, is akin to proceedings before a court. The importance and the nature of the proceedings before the Tribunal are reflected by the provision in the Act that legal representation for the asylum seeker before the Tribunal is to be assured. In my judgment, the right created by section 20 of the Act is a basic or fundamental right, akin to the right of access to courts of law.

If it is correct that the section 20 right is a fundamental or basic right akin to the right of unimpeded access to a court, then there is this consequence that infringement of such a right must be either expressly authorised by Act of Parliament or arise by necessary implication from an Act of Parliament, see *Raymond v Honey* (1983) A.C. 1 in the speech of Lord Wilberforce at p.12H - 13C, a speech with which Lord Elwyn-Jones, Lord Russell and Lord Lowry agreed. Lord Bridge went further saying at page 14G:

> ".....I would add a third principle, equally basic, that a citizen's right to unimpeded access to the courts can only be taken away by express enactment."

This decision was applied by this court in *R v Secretary of State for the Home Department ex parte Leech* [1994] Q.B.198. That case was an application for judicial review by a prisoner who suspected that correspondence with his solicitor was being subjected to censorship under the Prison Rules 1964 promulgated by the Home Secretary under section 47(1) of the Prison Act 1952. This court held that a convicted prisoner, in spite of his imprisonment, retained all civil rights which were not taken away by an Act of Parliament either expressly or by necessary implication. This court went on to say that it was obvious that a power to make rules to regulate prisons must include a power to make some rules about prisoners' correspondence. By necessary implication section 47(1) of the Act had conferred a power of rule making which might limit a prisoner's civil rights in respect of the confidentiality of correspondence. This court went on to say that there was a presumption against statutory interference with vested common law rights which entailed a presumption against a statute authorising interference with vested common law rights by subordinate legislation. This court concluded that the rule of which complaint was made, rule 33(3) of the Prison Rules of 1964 was "extravagantly wide". This court made a declaration that rule 33(3) was *ultra vires* so far as it purported to apply to correspondence between prisoners and their legal advisers. The statements of principle are to be found at pages 209-210 of the report. This court in that case stressed the fundamental nature of the right of access to a court and right of access to a solicitor for the purposes of instituting court proceedings.

It follows that infringement of such a right must be either expressly authorised by a provision in an Act of Parliament or arise by necessary implication. Even where it can be said that the making of a rule under powers to make rules by subordinate legislation arise by necessary implication, it will still be in question whether the rule formulated is reasonable. Even where the need for such a rule does arise by necessary implication either because the purpose of Parliament cannot be achieved without it or the function of Parliament has laid on a person or body cannot be discharged without it, the rule will be *ultra vires* the rule-making power if the rule as framed is unreasonable: if it is wider than is necessary; if it infringes the fundamental right to a greater extent than is required.

The issue is whether rule 42(1)(a) is a rule for regulating the exercise of rights of appeal conferred by this part of this Act or does it go further than regulating the exercise of the right of appeal and, in certain circumstances, deny a party that party's right to appeal? The issue can be put in a different way; does rule 42(1)(a) go further than is reasonably necessary "to secure the just, timely and effective disposal of appeals" to borrow from the wording of rule 23.

There is no doubt that the purpose of rule 42(1)(a) and rule 13(2) is to ensure the expeditious determination of whether there will be an appeal from the Special Adjudicator to the Tribunal. It is to be noticed that in rule 13(4) the application for leave has to be decided within 10 days after its receipt by the Tribunal, and if the Tribunal fails to decide the application within that time, the application is deemed to have been granted. As the circumstances of this case demonstrate rule 42(1)(a), although it does not deprive the asylum seeker of her opportunity to appeal to the Tribunal where the failure to receive the notice of the Special Adjudicator's

determination is the fault of the asylum seeker or her representatives, can and does do so if the notice of the determination of the Special Adjudicator goes astray. Such a notice might go astray for many reasons, one of which could be that the envelope was wrongly addressed. If that happens, the addressee may never be able to prove that that is what has occurred and be deprived of her chance to appeal due to a clerical error of an employee of the Immigration Appellate Authority. Even if the asylum seeker could establish that she received the notice on, for example, the 7th day after it was sent by reason of it being misdelivered by the Post Office, the rule as formulated coupled with rule 13(2) would prevent her from making an application for leave to appeal to the Tribunal.

We have not been shown any other rule of this severity. It is significant that in Schedule 4 of the Immigration and Asylum Act 1999 in respect of service of notices given under regulations made under paragraph 1 of the Schedule such notices are to be taken to have been received on the 2nd day after the day on which they were posted, "unless the contrary is proved".

A submission made on behalf of the Secretary of State is that rule 42(1)(a) has to be considered in the context of all the procedures available to the asylum seeker. Because there are other remedies open to an asylum seeker, rule 42(1)(a) is a permissible way to secure the timely and effective disposal of appeals. The alternative remedies referred to are section 21 of the 1971 Act which gives the Secretary of State power, where the Adjudicator has dismissed an appeal and there has been no further appeal to the Tribunal, to refer for consideration any matter relating to the case which was not before the Adjudicator or Tribunal. Where such a reference is made the Adjudicator or Tribunal reports their opinion to the Secretary of State. The second alternative remedy is a further application. The third is the continuing obligation of the Secretary of State to keep cases under review until the asylum seeker leaves the country. Finally there is the remedy of judicial review of the decisions of the Secretary of State or the Special Adjudicator where, these being asylum cases, the courts give anxious consideration to applications for judicial review.

I accept Mr Nicol's submission that the existence of these alternative remedies does not change the nature of rule 42(1)(a). These alternative remedies are not as effective as an appeal to the Tribunal. The Tribunal represents an independent review of the decision of the Secretary of State and of the Special Adjudicator. The Tribunal has the power to make a determination which will secure for the asylum seeker asylum. The Tribunal or Special Adjudicator on a reference under section 21 has no such power. Section 21 is intended to be in addition to an appeal to the Tribunal and not in substitution for it.

A fresh application will not assist the asylum seeker unless she can show a new claim which is sufficiently different from the original claim. In any event the asylum seeker may have a good claim for asylum based on her original claim. Finally, although an asylum seeker can apply for judicial review of the decisions of the Secretary of State or of a Special Adjudicator, the courts will only quash a decision that is flawed on relatively narrow grounds.

Conclusion

The conclusion I have reached is that rule 42(1)(a) is not expressly authorised by the 1971 Act. The rule goes beyond regulating rights of appeal to the Tribunal in that it can deny a party her chance to appeal where the party has, through no fault of her own, failed to comply with the 5 day rule. A rule of such severity is not reasonable because it is not necessary to achieve the objective of timely and effective disposal of appeals and may well deny an asylum seeker "the just disposal" of her appeal which is another objective identified in rule 23. The rule, in the circumstances which have arisen in this case, goes beyond regulating the right of appeal and is destructive of that right. I would declare the rule invalid insofar as it purports to determine conclusively the moment at which an asylum seeker receives notice of the Special Adjudicator's determination for the purpose of starting the 5 day period for applying for leave to appeal. I would express no view on the validity of the rule for determining the date on which other notices have been received by parties to asylum appeals. The operation of the rule in respect of other notices has not been the subject of evidence or argument before us.

For those reasons I would dismiss this appeal and refer the matter back to the Immigration Appeal Tribunal to consider whether, applying section 7 of the Interpretation Act 1978 in place of rule 42(1)(a) Mrs Saleem's application for leave to appeal was out of time.

LORD JUSTICE MUMMERY

I agree with the judgments of Roch LJ and Hale LJ which I have read in draft. I wish to add some comments on the construction of the relevant statutory provisions.

The construction of section 20 (1) of the Immigration Act 1971 is central to this case. It is in Part II of the Act- " APPEALS". It confers on a party to an appeal to an adjudicator a right of appeal from his determination to the Appeal Tribunal. That right is "Subject to any requirement of rules of procedure as to leave to appeal." Mrs Saleem was an unsuccessful party to an appeal to an adjudicator. She wishes to appeal from the adjudicator's determination to the Appeal Tribunal. She invokes section 20 (1). The Appeal Tribunal held that she could not apply for leave to appeal in consequence of the combined effect of rules 13 (2) and 42 (1) (a) of the 1996 Rules. The Rules are subordinate legislation made by the Lord Chancellor under section 22 of the 1971 Act "for regulating the exercise of the rights of appeal conferred by this Part of this Act."

Mr Nicol QC contends, on behalf of Mrs Saleem, that it was beyond the power of the Lord Chancellor to make rules which have the effect of depriving a party of the right of appeal in the circumstances described in the judgments of Roch and Hale LJJ. As I pointed out in the course of argument section 20 (1) expressly provides that a party to an appeal to an adjudicator may appeal "if dissatisfied with his determination thereon." That expression is a clear and powerful indication that Parliament contemplated that the aggrieved party would, in the ordinary course of events, actually receive notification of the determination of his appeal by the adjudicator. If the party

could prove that he had not actually received notification of the determination, it would follow that it was impossible for him to consider whether or not he was dissatisfied with it or to consider whether or not to exercise his right of appeal.

Rules 13 (2) and 42 (1) (a) preclude Mrs Saleem from appealing, even if she can prove to the satisfaction of the Appeal Tribunal that, through no fault of her own, she had not actually received the determination. This result is clearly inconsistent with the express presupposition of Parliament in section 20 (1) that a party would be dissatisfied with a determination before deciding whether or not to exercise the right of appeal.

Mr Burnett QC for the Secretary of State relied on the qualifying opening words of section 20 (1) that the right of appeal is "Subject to any requirement of rules of procedure as to leave to appeal." He submitted that rules 13 (2) and 42 (1) (a) were rules of procedure as to leave to appeal and were made " for regulating the exercise of the rights of appeal conferred by this Part of this Act" : section 22 (1) (a).

I agree that section 22 (1) (a) gives the Lord Chancellor power to make rules laying down time limits for appealing; setting procedures for the service of documents, including the determination of the adjudicator, by post on parties or their representatives; and putting upon parties the obligation to provide details of their address and to notify changes of address. Rules covering such topics may fairly and reasonably be regarded as regulating the exercise of the right of appeal.

But the combined effect of rules 13 (2) and 42 (1) (a) of the 1996 Rules is a very different matter. By a process of deeming those rules produce a mandatory and irrefutable result that a party to whom a determination has been posted may irretrievably lose the right of appeal to the Appeal Tribunal "regardless of when or whether it was received". So the party is prevented from appealing, even if he can establish as a fact that, without fault on his part, he never actually received the determination; that it was accordingly impossible for him,for the purposes of section 20 (1), to be "dissatisfied with" the determination; and that it was impossible for him to exercise his right of appeal under that section.

Rules which extinguish the right of appeal in such circumstances cannot fairly and reasonably be regarded as "regulating the exercise of the rights of appeal." The combined effect of these two rules in these circumstances is to remove the right of appeal conferred by section 20(1) rather than to regulate the exercise of that right in a manner consistent with the nature and extent of the right conferred. This result is outwith the rule making power conferred on the Lord Chancellor by section 22.

LADY JUSTICE HALE:

The issue

The principal issue in this appeal is whether rule 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996 is ultra vires the rule making power contained in section 22 of the Immigration Act 1971. Under rule 42(1)(a) any notice or document sent by post is deemed to have been received on the second day after it was sent regardless of when or whether it was in fact received. Under rule 13(2) of those same rules an application for

leave to appeal to the Immigration Appeal Tribunal from the determination of a special adjudicator must be made no later than five days after receipt of the determination. There is no discretion to extend time. In this case, therefore, the IAT refused leave simply on that account. In a reserved judgment handed down on 1 October 1999 Hooper J decided that rule 42(1)(a) was ultra vires, made a declaration to that effect (which for some reason unknown to us was not incorporated in his order) and granted certiorari of the IAT's decision. He gave the Secretary of State permission to appeal to this Court.

The background

Mrs Saleem and her four children arrived in this country from Pakistan on 29 April 1996. She claimed asylum on 23 May 1996. Her application was refused and directions given for her removal on 21 September 1996. She consulted solicitors and appealed to a special adjudicator. They are named in the appeal notice dated 26 September 1996 as her representatives. On 29 October 1996 they were sent notice of a hearing date on 10 February 1998, together with directions to supply certain information. Those directions were not complied with.

On 10 April 1997, the solicitors were sent notice that this failure would be considered by a special adjudicator on or before the hearing date. There was no response. On 12 June 1997 they were sent notice of a hearing fixed for 11 July 1997 to show cause why the appeal should not be treated as abandoned and warned that if there was no appearance then the adjudicator might determine the appeal on the evidence before him. It is not entirely clear whether that notice was also sent to Mrs Saleem. If it was sent, it would probably not have reached her because she had changed her address in May without informing the Immigration Appellate Authority.

There was no appearance by or on behalf of Mrs Saleem on 11 July 1997 and the special adjudicator dismissed her appeal. His determination was promulgated on 24 July 1997. Two copies of the accompanying notice are on file: one addressed to the solicitors bearing a stamp recording that it was issued on 24 July 1997 and sent by first class post, the other addressed to Mrs Saleem at the address given in her original notice of appeal but not bearing such a stamp. That notice clearly states that an application for leave to appeal to the tribunal must be made within five working days of the deemed receipt date of 28 July 1997.

Nothing then happened until 9 February 1998, the day before the original hearing date, when Mrs Saleem contacted the Immigration Appellate Authority to request an adjournment. She was told that her case had already been heard. New solicitors acted very swiftly on her behalf in obtaining a copy of the adjudicator's determination from the immigration authorities which was received on 5 March 1998 and lodging an application for leave to appeal on 6 March 1998. The Tribunal refused the application that same day on the ground that it had not been submitted by 4 August 1997. These proceedings were then launched.

Mrs Saleem's case is that she did not in fact receive any of the notices sent by the Immigration Appellate Authority. She knew of the hearing date on 10 February 1998 because she was informed of the first notice by her then solicitors. There is nothing to suggest that the April notice was sent to her. It is not clear whether the June and July

notices were sent to her but in any event she had moved by then. Her communication with the Authority on 9 February 1998 is powerful evidence that she knew nothing of earlier events.

Her present solicitor has made inquiries of her previous solicitors who eventually said that they had no file for Mrs Saleem but had not received the adjudicator's determination.

The legislation

The right of appeal from a special adjudicator to the IAT is provided by section 20 of the Immigration Act 1971 (applied to asylum appeals by paragraph 4 of schedule 2 to the Asylum and Immigration Act 1993):

> '(1) Subject to any requirement of rules of procedure as to leave to appeal, any party to an appeal to adjudicator may, if dissatisfied with his determination thereon, appeal to the Appeal tribunal, and the Tribunal may affirm the determination or make any other determination which could have been made by the adjudicator.'

The 1996 Rules are made under the power contained in section 22 of the Immigration Act 1971. As amended this reads:

> 'The Lord Chancellor may make rules . . . -
> (a) for regulating the exercise of the rights of appeal conferred by this Part of this Act;
> (b) for prescribing the practice and procedure to be followed on or in connection with appeals thereunder, including the mode and burden of proof and admissibility of evidence on such an appeal; and
> (c) for other matters preliminary or incidental to or arising out of such appeals, including proof of the decisions of adjudicators or the Appeal Tribunal.'

Under rule 13(1) of the 1996 Rules, all appeals to the Immigration Appeal Tribunal require leave and there is no power to grant an extension of time.

Rule 13(2) provides:

> '(2) An application for leave shall be made not later than 5 days after the person making it (the appellant) has received notice of the determination against which he wishes to appeal.'

Rule 38 provides:

> '(1) Any notice or other document required or authorised by these Rules to be sent or given to any person or authority may be sent by post or FAX . . . and if sent or given to a person representing a party to an appeal in accordance with rule 26(1), shall be deemed to have been sent or given to that party.'
> '(2) A party to an appeal shall inform the appellate authority of the address at which documents addressed to him may be served on him ('his address for

service') and, until he gives notice to the authority that his address for service has changed, any document served at that address shall be deemed to have been served on him.'

Rule 42(1)(a) provides:

> '(1) Subject to paragraph (2), any notice or other document that is sent or served under these rules shall be deemed to have been received -
> (a) where the notice or other document is sent by post from within the United Kingdom, on the second day after which it was sent regardless of when or whether it was received; . . . '

Clearly, the combination of rules 13(2), 38 and 42(1)(a) is capable of having a 'draconian effect'. Mr Nicol QC, on behalf of Mrs Saleem, does not argue that either rule 13(2) or rule 38 is ultra vires. A tight timetable can properly be imposed upon these proceedings, as can an obligation upon appellants to keep the appellate authority informed of their representation and address. The problem lies with rule 42(1)(a) which deems service to have taken place within a set time with no possibility either of proving the contrary or of a discretion to extend time. A would-be appellant is deprived of any chance of pursuing an appeal on the merits even though he has had no actual notice of the decision against which he wishes to appeal or of when it was made. He is also deprived even though neither he nor his representatives is in any way to blame: for example, the notice may simply have been lost or delayed in the post, there may have been a postal strike, or it may have been misappropriated by a negligent or dishonest postman or other people living at the same address.

If rule 42(1)(a) does not apply, section 7 of the Interpretation Act 1978 (which also applies to subordinate legislation by virtue of section 23(1) of that Act) provides the default position:

> 'Where an Act authorises or requires any document to be served by post . . . then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

<u>The decision below</u>

The reasoning which led Hooper J to conclude that rule 42(1)(a) is ultra vires was as follows. First, applying the principles stated by this court *in R v Home Secretary, ex parte Leech* [1994] QB 198, by Steyn LJ giving the judgment of the court at p 208B-C, section 22 does not expressly authorise such a rule. The question, therefore, is whether it does so by necessary implication. The court went on to state, at p 209D, that 'the more fundamental the right interfered with, and the more drastic the interference, the more difficult becomes the implication'. In that case, the right of a would be litigant to unimpeded correspondence with his legal advisers was of fundamental importance. An objective need for governors of prisons to have a wide power to read and withhold such correspondence between prisoners and their legal advisers had not been shown. Hence rule 33(3) of the Prison Rules 1964 was ultra vires the power given by section 47(1) of

the Prisons Act 1952. In *R v Lord Chancellor ex parte Witham* [1998] QB 575, the Divisional Court declared ultra vires changes to the rules governing court fees on the ground that access to the courts was a constitutional right which could be abrogated only by a specific statutory provision in primary legislation or by delegated legislation expressly authorised by statute to do so.

Thus Hooper J asked himself 'Can an objective need for a rule such as rule 42(1)(a) be demonstrated in the interests of regulating asylum appeals?' While accepting the need for speed in processing these appeals, he also accepted that there were other ways in which this could be achieved. In *R v Immigration Appeal Tribunal ex parte Bellache*, 24 April 1997, the Court of Appeal granted a renewed application for leave to apply for judicial review in order to challenge the vires of rule 42(1)(a). Evans LJ said this:

> 'I, for my part, have no hesitation in saying that it is at least arguable that as a matter of general principle such an extreme result does go beyond the permissible scope of the rules such as this. The consequences for an applicant can be so dire that the merits of such a draconian rule seem to me to be questionable indeed. . . . there are less draconian solutions which might well be achieved which could avoid the potential injustices to which the existing rule, interpreted too literally, might lead.'

Neither Evans LJ nor Hooper J in this case were impressed by the arguments that the 'draconian effect' would be suffered only by a small number of people and that they would have the alternative remedies of trying to persuade the Secretary of State to think again, or to refer their case for further consideration by an adjudicator under section 21 of the 1971 Act. Hence, fortified by the views of this Court in *Bellache*, Hooper J concluded that section 22 of the 1971 Act does not by necessary implication authorise a rule of such draconian consequences as rule 42(1)(a).

As an alternative he found the rule not to be 'within the reasonable range of responses which Parliament could have intended the Lord Chancellor to make to the grant of the rule making power', applying the test stated by Lord Russell of Killowen in *Kruse v Johnson* [1898] 2 QB 91 at p 99 -100 (albeit when upholding the by-law in question):

> 'I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A byelaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges think ought to be there.'

In addition to challenging that conclusion, the Secretary of State also appeals on the ground that, even if rule 42(1)(a) is ultra vires, there is no prospect of Mrs Saleem proving non receipt for the purpose of section 7, so that judicial review should be refused in any event.

The arguments in the appeal

Mr Burnett QC for the Secretary of State argues that it was wrong to apply the principles in *Leech* and *Witham* to this case. They dealt with the fundamental common law right of access to a court. Before 1993 asylum seekers had no right of appeal to the immigration appellate authorities at all. It was the responsibility of the Secretary of State to ensure that this country complied with our obligations under the Geneva Convention of 1951. Nor is there a 'right' to asylum in the same way that there are rights and obligations determined in the ordinary courts. It has not, at least as yet, been identified as a 'civil right' for the purpose of the right to a fair trial enshrined in article 6(1) of the European Convention on Human Rights.

I am quite unable to accept that argument. There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.

I also accept that the more fundamental the right interfered with, and the more drastic the interference, the more difficult it is to read a general rule or regulation making power as authorising that interference. Whether that is approached along the route of 'necessary implication' adopted in *Leech* or along the route of 'reasonable contemplation of Parliament' derived from *Kruse v Johnson* may not matter: the result will be the same.

However, Mr Burnett also argues that, seen in its proper context, the interference here is not as drastic as is claimed on behalf of Mrs Saleem. The extraordinary chain of events which had the effect of depriving Mrs Saleem, not only of her chance of appeal to the IAT but also of her right to a substantive hearing before a special adjudicator, could scarcely ever happen and then hardly ever without fault on the part of an appellant or her advisers. In this case, it was triggered by the failure to comply with directions. The small risk of injustice to a small number of people has to be set against the overriding objective of securing the 'just, timely and effective' disposal of asylum appeals (prescribed in rule 23(2) of the 1996 Rules) and the scale of the problems facing the system (acknowledged, for example, by Sullivan J in *R v Immigration Appeal Tribunal, ex parte S* [1998] Imm AR 252, at 260).

Again, I am unable to accept that argument. The effect of this rule is more drastic than the effect of the rules in *Leech* or even in *Witham*. It does not simply interfere with the opportunity of an appeal which Parliament has decided that an asylum seeker should have. It completely deprives her of it, even if she has behaved with complete propriety and done everything required of her, and irrespective of the merits of her appeal.

There is an analogy here with the principles established under article 6 of the European Convention on Human Rights. Immigration and asylum cases have not been held by the European Court of Human Rights to be 'the determination of his civil rights and obligations' for the purpose of article 6. Furthermore, article 6 does not guarantee a right of appeal. But if the State establishes such a right it must ensure that people within its jurisdiction enjoy the fundamental guarantees in article 6. It is for national authorities to regulate the procedures governing the exercise of such rights, but these requirements must not be such that 'the very essence of the right is impaired'. They must pursue a legitimate aim and the means employed must be proportionate to that aim: see, for example, *Tolstoy v United Kingdom* (1995) 20 EHRR 475, para 59. The effect of rule 42(1)(a) is in certain circumstances to destroy 'the very essence of the right'.

Mr Burnett also argues that the effect is not so drastic because of the alternative remedies available to someone such as Mrs Saleem. She can make a fresh application for asylum.She can ask the Secretary of State to exercise his power under section 21 of the 1971 Act, where someone has exhausted their appeal remedies, to refer to an adjudicator any matter relating to the case which was not before the adjudicator or tribunal. She can seek judicial review of the Secretary of State's refusal to do either of these things.

This argument did not impress Hooper J. The intention of the legislature in granting asylum seekers rights of appeal to the immigration appellate authorities was that there should be an binding adjudication of the merits of their case by an independent adjudicator who was able to hear the oral evidence of the appellant. Credibility is a vital issue in many asylum appeals (see *R v Immigration Appeal Tribunal, ex parte S* [1998] Imm AR 252, at 261), yet those making decisions on behalf of the Secretary of State are not those who interview the asylum seekers. The Secretary of State will only consider a fresh application if it raises new material not available before. A reference under section 21 leaves the decision to him. Judicial review can challenge only the legality and not the merits.

Mr Burnett also relied upon the breadth of the rule making power in section 22, the fact that the predecessor rule, in rule 32(1)(a) of the Asylum Appeals (Procedure) Rules 1993 had been construed to the same effect as rule 42(1)(a), and the existence of other irrebuttable presumptions of service, for example in section 196 of the Law of Property Act 1925.

Once again, it is difficult to accept those submissions. The rule making power is, among other things, for 'regulating the exercise of the rights of appeal conferred' in the Act. A power to regulate the exercise of a right does not normally include a power to remove it (see, for example, *Tarr v Tarr* [1973] AC 254). The right in question is a right, subject to

any requirement of rules of procedure as to leave to appeal, to appeal from the adjudicator to the tribunal 'if dissatisfied with his determination'. If deprived of the opportunity of knowing of that determination it is difficult to know whether or not to be dissatisfied with it. The requirement of leave to appeal requires one to submit one's grounds of dissatisfaction for scrutiny to see whether they have sufficient merit to justify an appeal, but that is very different from depriving one of the opportunity of seeking it at all. The fact that the predecessor rule was construed to the same effect in two cases at first instance (see *R v Secretary of State for the Home Department, ex parte Sivanantharajah* [1995] Imm AR 52; and *R v Secretary of State for the Home Department, ex parte Sasiskath* [1997] Imm AR 83) does not help, given that the issue of vires was never raised; nor was the effect of such an irrebuttable presumption in combination with a further rule from which there was no discretion to depart.

For all those reasons, I agree that rule 42(1)(a) is not within the rule making power granted by Parliament to the Lord Chancellor under section 22(1) of the 1971 Act. However, I would confine that conclusion to the particular context in which it arises in this case: that is, to the notification of adjudicators' determinations. It is the combination of the tight time limit, with no discretion to extend whatever the circumstances, with the irrebuttable presumption of receipt whatever the circumstances, which has the effect which Parliament cannot have intended to authorise. Rule 42(1)(a) operates in many other contexts which may or may not have similar effects. We simply have not heard argument upon whether or not the same considerations might apply to them. I would make a declaration to that effect rather than to the wider effect intended (albeit not actually reduced into writing) by Hooper J.

The application of section 7 of the Interpretation Act 1978

If rule 42(1)(a) does not apply, the position is governed by section 7 of the 1978 Act, under which service is deemed to have taken place at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. The burden thus lies upon Mrs Saleem to show that it did not do so. It is argued on behalf of the Secretary of State that in this case there is no prospect of her discharging that burden. Irrespective of the vires of rule 42(1)(a), therefore, judicial review of the decision of the IAT should be refused.

In the case of any communication sent to her personally, she cannot rebut the presumption because she failed to comply with her obligation under rule 38(2) to inform the appellate authority of any change in her address for service. However, it is open to question whether the notice and determination were indeed sent to her because the copy of the notice sent to her retained by the I.A.A. was not stamped to that effect.

In the case of any communication sent to her previous solicitors, she may face difficulties in rebutting the presumption because the solicitors have denied the existence of any file in her case. On the other hand they have also denied receipt of the determination.

These are essentially questions of fact which would normally be decided by the IAT. In this case, the IAT simply did not address their mind to the question because they applied the rules as they were bound to do. The evidence for this application was prepared in

great haste. It may be that further evidence would be forthcoming were the matter to go back to the tribunal. I cannot be so confident that there is no prospect of Mrs Saleem discharging the burden upon her that it would justify the refusal of judicial review in this case.

Order: Appeal dismissed, Tribunal; declaration that Rule 42(1)(a) of the asylum appeals (procedure) rules 1996 is outside the power of the Lord Chancellor under the immigration act 1971, S.22, and is of no effect so far as it concerns the deemed receipt of a Special adjudicator's determination: the applicant's application for leave to appeal to the immigration appeal tribunal be referred back to the tribunal for it to decide whether, applying the interpretation act 1978, S.7, her application was but of time and, if not, whether leave to appeal to the tribunal should be granted: the appellant to pay the applicant's costs with a detailed assessment if not agreed; legal aid taxation or assessment of the applicant's costs.

(Order does not form part of the approved judgment)