Appeal No. HX/59757/00 (STARRED)
(01/TH/00096)

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 18/01/2001
Date Determination notified: 23/2/2001

Before

The Honourable Mr Justice Collins (President)
Mr C M G Ockelton
Mr M W Rapinet

Between

DANY GEORGES GREMESTY
APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
RESPONDENT

DETERMINATION AND REASONS

1. The appellant, a citizen of Lebanon, entered the United Kingdom on 25 July 1993 with a valid entry clearance and was granted six months leave to enter. He obtained extensions of leave to remain as a student until 30 November 1996. On 6 November 1996 he applied for asylum. After a quite appalling delay, he was requested on 28 June 2000 to complete and return within fourteen days a Statement of Evidence. He failed to do so. On 27 July 2000 his application was refused.

2. On 2 August 2000 he lodged an appeal against the refusal. His representative was and is Mr David Grand who is, according to his notepaper, a non-practising barrister. On 11 September 2000 the appellant and his representative were sent copies of the usual notice in respect of a hearing on 4 October 2000. There was attached the usual form which required notification by 20 September 2000 of details which would enable the length of the trial and evidence to be called to be ascertained. If the form was returned in time, there would be no need for the appellant or his representative to attend on 4 October and the full hearing would be fixed for a later date. The notice contained the following warning:

> 'If this direction is not complied with and if the appellant or his representative does not attend the hearing the adjudicator may determine the appeal in the absence of the appellant unless there is a satisfactory explanation of his absence.'

3. The appeal was to be heard at Hatton Cross and so the reply was to be sent there. On 12 September Mr Grand sent a reply by recorded delivery. The envelope post-marked 12 September has been produced and the copy of the covering letter from Mr Grand's file has affixed to it the recorded delivery number. For some reason which can only be a slip-up in the administration the reply was not put on the file and so was not before the adjudicator when the case was called on 4 October 2000. The original letter shows a Hatton Cross stamp dated 9 October 2000.

4. In the circumstances, the adjudicator decided to treat the appeal as abandoned pursuant to Rule 32 of the Immigration and Asylum Appeals (Procedure) Rules 2000. Rule 32(1) reads:

> '32. (1) Where a party has, without a satisfactory explanation, failed:
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> (a) to comply with a direction given under these Rules;
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> (b) to comply with a provision of these Rules; or
>
> (c) to appear at a hearing of which he had notice in accordance with these rules;
>
> and the appellate authority is satisfied in all the circumstances, including the extent of the failure and any reasons for it, that the party is not pursuing his appeal, the appellate authority may treat the appeal as abandoned.'

The appellant has appealed on the ground that he has (as now clearly is established) returned the reply form and the appeal has not been abandoned.

5. This appeal has been starred because the adjudicator did not expressly dismiss the appeal but recorded that it had been abandoned. It has been suggested that in those circumstances there is no right of appeal to the Tribunal. When the appeal was called on before the Tribunal, neither the appellant nor Mr Grand attended. Mr Grand had informed the Tribunal in writing that he would not attend. He enclosed the evidence which confirmed that he had submitted the reply on 12 September 2000 and asked that the case be remitted to an adjudicator for a fresh hearing.

6. Mr Harper, who appeared on behalf of the respondent, had not appreciated the Tribunal's concern to establish whether there was a right of appeal and asked for the opportunity to take instructions. The Tribunal accordingly gave him fourteen days to submit any written argument and Mr Grand was to have seven days thereafter to submit any reply. Mr Harper has put before the Tribunal written

submissions in which he accepts that leave to appeal can and should in this case be granted and that the Tribunal has jurisdiction.

7. We must nevertheless, albeit briefly, explain why we are satisfied that Mr Harper is correct. The relevant statutory provisions are contained in s.58 of the Immigration and Asylum Act 1999 which came into force on 2 October 2000. This provides, so far as material, as follows:

> 's.58(5) For the purposes of the Immigration Acts an appeal under this Part is to be treated as pending during the period beginning when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned.
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> (6) An appeal is not to be treated as finally determined while a further appeal may be brought.
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> (7) If such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned.
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> (8) A pending appeal under this Part is to be treated as abandoned if the appellant leaves the United Kingdom.
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> (9) A pending appeal under any provision of this Part other than section 69(3) is to be treated as abandoned if the appellant is granted leave to enter or remains in the United Kingdom.
>
> (10) A pending appeal under section 61 is to be treated as abandoned if a deportation order is made against the appellant.'

Paragraph 1(3) of the Immigration and Asylum Act 1999 (Commencement No. 6, Transitional and Consequential Provisions) Order 2000 provides that s.58(5) to (10) shall apply to pending appeals under (inter alia) s.8 of the 1993 Act. This appeal is made under s.8(2) of the 1993 Act.

8. As is apparent from s.58(5), a distinction is drawn between determination, withdrawal and abandonment and s.58(6) could be said to imply that an appeal can only be brought against a determination rather than an abandonment. And paragraph 22 of Schedule 4 to the 1999 Act (which deals with appeals to the Tribunal) gives a right of appeal to an appellant 'if dissatisfied with [the adjudicator's] determination'.

9. In this case, the adjudicator decided that she should treat the appeal as abandoned because of the failure to attend and to comply with the directions. She accordingly determined on the material put before her that the appeal had been abandoned. Although her decision is described as a notice, it is in reality a determination and her

failure to call it a determination or to state in terms that the appeal is dismissed does not affect that reality.

10. Appeals can only be abandoned within the meaning of s.58(5) if they are actually abandoned or if s.58(8), (9) or (10) apply. It is to be noted that Rule 33 provides for alternative methods of dealing with failures to comply with directions or any rule. One of these is to dismiss the appeal without considering the merits. It would be absurd if to act under Rule 33 would but to act under Rule 32 would not, allow a right of appeal.

11. If an adjudicator is persuaded that a failure to comply with a direction or a rule merits dismissal of an appeal, we would suggest that he acts under Rule 33 rather than 32. If the appeal has not in fact been abandoned, the Tribunal may be in difficulty in refusing leave to appeal. In any event, the additional requirement in Rule 32 to be satisfied that the party is not pursing his appeal need not be fulfilled. It is in fact difficult to see the point of permitting a decision that an appeal should be treated as abandoned rather than that it should be dismissed.

12. Since leave to appeal was properly granted and the Tribunal has jurisdiction, it is clear that the case must be remitted so that the appellant can have the hearing which has been denied to him. This appeal is therefore allowed and the case is remitted for a fresh hearing before an adjudicator other than Mrs F.C. Bremner.

C M G OCKELTON
DEPUTY PRESIDENT