Neutral Citation Number: [2008] EWCA Civ 1229

Case No: C5/2007/2333
& C5/2007/2835

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AA/09921/2006 & AA/09820/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2008

Before :

LORD JUSTICE WARD
LORD JUSTICE HOOPER
and
LORD JUSTICE JACKSON

- -

Between :

NB (GUINEA) **ZD (TURKEY)**	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPT	**Respondent**

- -
- -

Mr Manjit Gill QC and Mr Abid Mahmood (instructed by **Blakemores)** for **NB (Guinea)**
Mr Manjit Gill QC and Mr Christopher Jacobs (instructed by **Howe & Co**) for ZD (Turkey)
Mr Alan Payne (instructed by **HM Treasury Solicitor)** for the **Respondent**
Hearing dates : 22 and 23 October 2008

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Judgment

Lord Justice Jackson:

1. This judgment is in six parts, namely:

Part 1. Introduction

Part 2. NB's appeal

Part 3. ZD's Appeal

Part 4. Ultra Vires

Part 5. The Secretary of State's Breach of Rule 23(5)(a)(i)

Part 6. Whether the AIT erred in law in ordering reconsideration.

Part 1.Introduction

2. In these two appeals the Appellants challenge the validity of reconsideration proceedings which had the effect of reversing earlier decisions that they be allowed to remain in the United Kingdom. The Appellant in the first appeal is NB, a national of Guinea. The Appellant in the second appeal is ZD a national of Turkey. The Respondent to both appeals is the Secretary of State for the Home Department. In this judgment I shall refer to the Asylum and Immigration Tribunal as the "AIT". I shall use the abbreviations IJ and SIJ for Immigration Judge and Senior Immigration Judge respectively. I shall refer to the Nationality Immigration and Asylum Act 2002 as "the 2002 Act". I shall refer to the Asylum and Immigration (Treatment of Claimants) Act 2004 as "the 2004 Act". I shall refer to the Asylum and Immigration Tribunal (Procedure) Rules 2005 as "the procedural rules" or "the 2005 procedure rules". I shall refer to the Civil Procedure Rules 1998, as amended from time to time, as "the CPR".

3. The 2002 Act includes the following provisions:-

S.82(1) "Where an immigration decision is made in respect of a person he may appeal to the Tribunal."

S103A (1) "A party to an appeal under [section 82, 83 or 83A] 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 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 Tribunals decision,

(b) in the case of an application by the appellant whilst he is outside the United Kingdom, within the period of 28 days beginning with the date on which he is treated, in accordance with rules under section 106, as receiving notice of the Tribunal decision, and

(c) in the case of an application brought by a party to the appeal other than the appellant, 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 decision. ”

S. 106 (1) “The Lord Chancellor may make rules –

(a) Regulating the exercise of the right of appeal under [section 82, 83, or 83A by virtue of section 109]

(b) Prescribing procedure to be followed in connection with proceedings under [section 82, 83 or 83A by virtue of section 109.”

(1A) “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.

(2) “In particular, rules under subsection (1)

……

(q) may require the Tribunal to give notice of a determination to a specified person;

(r) may require or enable notice of a determination to be given on behalf of the Tribunal”.

4. Paragraph 30 of Schedule 2 of the 2004 Act provides (1) “ This paragraph shall have effect in relation to applications under section 103 A(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 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 references 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 purposes 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."

5. The Lord Chancellor made the 2005 Procedural Rules pursuant to section s.106 of the 2002 Act. Those rules include the following:

Rule 23

"(1) This rule applies to appeals under section 82 of the 2002 Act where-

a) The appellant is in the United Kingdom; and

b) The appeal relates, in whole or in part, to an asylum claim."

"(4) The Tribunal must serve its determination on the respondent-

a) if the appeal is considered at a hearing, by sending it not later than 10 days after the hearing finishes; or

b) if the appeal is determined without a hearing, by sending it not later than 10 days after it is determined.

(5) The respondent must-

a) serve the determination on the appellant-

(i) if the respondent makes a section 103A application or applies for permission to appeal under section 103B or 103E of the 2002 Act, by sending, delivering personally serving the determination not later than the date on which it makes that application; and
(ii) otherwise, not later than 28 days after receiving the determination from the Tribunal; and

b) as soon as practicable after serving the determination, notify the Tribunal on what date and by what means it was served.

(6) If the respondent does not give the Tribunal notification under paragraph (5)(b) within 29 days after the Tribunal serves the determination on it, the Tribunal must serve the determination on the appellant as soon as reasonably practicable thereafter."

Rule 25. **Procedure for applying for a review**

"Where paragraph 30 and Schedule 2 to the 2004 Act has effect in relation to a section 103A application, the application ,must be made in accordance with the relevant rules of court (including any practice directions supplementing those rules)."

Rule 59. **Errors of procedure**

(1) "Where, before the Tribunal has determined an appeal or application, there has been an error of procedure such as a failure to comply with a rule-

(a) subject to these Rules, the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders; and

(b) the Tribunal may make any order, or take any other step, that it considers appropriate to remedy the error."

6. In relation to Rule 25 of the 2005 Procedure Rules the relevant rules of court are to be found in Part 54 of the Civil Procedure Rules at Rule 54.29. Rule 54.29 includes the following provisions:

"(1) Subject to paragraph (5), an application for an order for reconsideration must be made by filing an application notice-

(a) during a period in which the filter provision has effect with the Tribunal at the address specified in the relevant practice direction; and

(b) at any other time, at the Administrative Court Office.

(4) Where the applicant-

(a) was the respondent to the appeal; and

(b) was required to serve the Tribunal's determination on the appellant, the application notice must contain a statement of the date on which, and the means by which, the determination was served."

7. During the course of argument there was brief debate as to whether Rule 3.10 of the Civil Procedure Rules was also incorporated by reference into the Rules governing reconsideration by the AIT. Rule 3.10 of the CPR is in substantially the same terms as Rule 59(1) of the Civil Procedure Rules. Both counsel have based their submissions on Rule 59(1) of the 2005 Procedure Rules. They treat that as being the applicable Rule. Both counsel have also submitted that if they are wrong in this regard and rule 3.10 of the CPR somehow supersedes Rule 59(1) of the 2005 Procedure Rules, that makes no difference because the two rule are substantially the same. I agree with that submission; I shall therefore, like counsel, take Rule 59(1) of the 2005 Procedure Rules as being the operative provision. After these introductory remarks I must now turn to the facts of both appeals.

Part 2. NB's Appeal

8. NB is a National of Guinea, now aged 29, who arrived in the United Kingdom on 22 July 2006 and claimed asylum. The basis of her claim was that she was a supporter of the opposition UFR party. After being involved in a strike and demonstration she had been detained, tortured and raped. She had subsequently escaped from prison and fled the country. The Secretary of State disbelieved NB's account of events and rejected her request for asylum. NB appealed to the AIT. I.J Hobbs heard the appeal on 30 October 2006. On 15 November 2006 I.J Hobbs promulgated his decision in which he allowed NB's appeal on asylum grounds and human rights grounds. The precise sequence of events at this point is partly a matter of inference. However, I am satisfied from the documents that what happened was as follows. On Wednesday 15 November the AIT dispatched I.J Hobbs' decision to the Secretary of State. On Thursday 16 November the Secretary of State received that decision. On Thursday 23 November the Secretary of State filed with the AIT an application for reconsideration of I.J Hobbs' decision. On 23 November the AIT sent a letter to NB stating that the Secretary of State had applied for a review of I.J Hobbs' determination. This letter was received by NB on Monday 27 November and came as something of a surprise. NB had not yet received a copy of I.J Hobbs' decision and no-one had troubled to inform her that her appeal had been successful. NB's solicitors immediately wrote to the AIT asking for a copy of the appeal decision. On 29 November NB's solicitors received from the AIT a copy of I.J Hobbs' decision. On 13 December 2006 some 20 days late the Secretary of State served I.J Hobbs' decision on NB. On 11 June 2007 the Secretary of State's application for reconsideration came on for hearing S.I.J Eshun. S.I.J Eshun concluded that I.J Hobbs had erred in law in a number of respects and ordered reconsideration on all issues. That reconsideration duly took place at a hearing on 2 October 2007 before I.J Cheales. I.J Cheales heard oral evidence from NB and considered a body of written evidence including a medical report. The upshot was that I.J Cheales came to the opposite conclusion from I.J Hobbs. She disbelieved substantial parts of NB's evidence. She dismissed NB's appeal on both asylum and human rights grounds.

9. NB's subsequent appeal to the Court of Appeal has had a chequered procedural history into which I need not venture. Suffice it to say that NB now appeals with permission on three grounds. These are:

    1. Rules 23(4) and 23(5) of the 2005 Procedure Rules are ultra vires.

    2. The Secretary of State's failure to serve I.J Hobbs' decision on NB within the times specified in Rule 23 (5) renders void all subsequent proceedings.

    3. S.I.J Eshun erred in law in holding that there were material errors of law in I.J. Hobbs' decision.

Having summarised the outline of NB's appeal I must now turn to ZD's appeal.

Part 3. ZD's Appeal

10. ZD is a citizen of Turkey who is now aged 44. She arrived in the United Kingdom on 15 November 2002. Both she and her husband claimed asylum. The husband's claim was refused on 27 January 2004. ZD's claim was refused on 31 August 2005. The basis of ZD's claim was that she was of Kurdish ethnicity and had supported both the PKK and HADEP. As a result of her political activities ZD had been detained and ill-treated in Turkey. She feared persecution in the event of her return to Turkey. She asserted that she had developed mental illness as a result of her experiences in Turkey. ZD appealed to the AIT against the Secretary of State's rejection of her claim. The appeal was heard before I.J Birkby on 27 October 2005. ZD gave oral evidence. I.J Birkby directed that an updated psychiatric report be prepared. This report was duly prepared and considered by the immigration judge. On 4 January 2006 I.J Birkby prepared his decision. He dismissed ZD's asylum appeal, however, because of ZD's mental state he held that there was a real risk of suicide if ZD were returned to Turkey. Accordingly I.J Birkby allowed ZD's appeal on human rights grounds, holding that removal of ZD to Turkey would breach her rights under Article 3 of the European Convention on Human Rights. The date when I.J Birkby's decision was promulgated is not apparent from the face of that decision. However, it appears from the correspondence file that the AIT served the decision on the Secretary of State on 13 January 2006. On 18 January 2006 the Secretary of State applied for reconsideration of I.J Birkby's decision. That application was sent by fax at 2.05pm in the early afternoon. On the following day 19 January 2006, the Secretary of State sent I.J Birkby's decision by post to ZD. On 24 January 2006 S.I.J Chalkey held that there may be an error of law in I.J Birkby's decision and that there should be reconsideration. There then followed a one year delay. On 7 February 2007 I.J Ward held that there was an error of law and there should be a further hearing to consider a) whether Article 3 was breached through suicide risk and b) the question of humanitarian protection.

11. The reconsideration hearing took place on 27 July 2007 before I.J Lane. I.J Lane first considered whether the AIT still had jurisdiction. He noted that the Secretary of State had failed to serve I.J Birkby's decision on ZD on 18 January 2006 as required by Rule 23.5 (a)(i) of the 2005 Procedure Rules. I.J Lane decided not to follow the AIT's decision in *HH v SSHD* [2007] UK AIT 00036. He held that the AIT had jurisdiction to proceed with the reconsideration. I.J Lane duly proceeded with the reconsideration. He considered further medical reports which had not been available to I.J. Birkby. He concluded that there was not a real risk of ZD attempting suicide if she were returned to Turkey. Accordingly he dismissed ZD's appeal against the Secretary of State's original decision. ZD now appeals to the Court of Appeal on the ground that the AIT did not have jurisdiction to proceed with the reconsideration because the Secretary of State had failed to serve I.J Birkby's decision within the time specified in Rule 23(5)(1)(i). The Court of Appeal ordered that ZD's appeal be heard at the same time as NB's appeal because of the overlap of issues between those two cases.

Part 4. Ultra Vires

12. The argument that rules 23(4) and 23(5) are ultra vires is pursued only by NB, the appellant in the first appeal. ZD, the appellant in the second appeal, does not directly challenge the validity of those two rules. Rule 23(4) requires the AIT to serve decisions relating to asylum appeals upon the respondent, who is in practice the

Secretary of State. Rule 23(5) required the respondent to serve those decisions on appellants within specified time limits. Mr Gill contends that it is contrary to the rule of law, unconstitutional and contrary to the basic principles of fairness and access to courts or tribunals for decisions, particularly judicial decisions which are supposed to be made independently and impartially, for the relevant judicial body to be put in a position where it is required to serve its decision on one party before it serves it on the other, absent certain types of exceptional situations which are specifically provided for, principally in the criminal field. Mr Gill contends that if Parliament is to enable the relevant rule-maker to place a judicial body in such a position it must give a clear and express authority to do so. Parliament has not done so in this case.

13. I agree with Mr Gill that Rules 23(4) and 23(5) are unpalatable. It is undesirable that a litigant should receive or appear to receive preferential treatment from a court or tribunal even in relation to administrative matters such as the promulgation of judicial decisions. It is also undesirable that one party should habitually act as agent for the court or tribunal in relation to matters of service. However, in relation to asylum claims there are powerful pragmatic and policy reasons why appeal decisions should be delivered to the Home Office and served by the Home Office upon appellants. First, the Home office has the resources to perform this task. Secondly, the risk of absconsion by unsuccessful appellants is such that the Home Office must be in a position to take a prompt and appropriate action after appellants have received AIT decisions. Similar issues were considered by the Court of Appeal in *Bubaker v Lord Chancellor* [2002] EWCA Civ 1107. In that case the claimant challenged the validity of paragraph 15 of the Immigration and Asylum Appeals (Procedure) Rules 2000 as amended. Paragraph 12 of that Rule provided:

> "(2) Where a determination is, in whole or in part, in relation to a claim for asylum and
>
> (a) the claim has been certified by the Secretary of State under paragraph 9(1) of Schedule 4 to the 1999 Act,
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> *(b)* the adjudicator has agreed under paragraph 9(2) of Schedule 4 to the 1991 Act, that it is a claim to which paragraph 9 of that Schedule applies, and
>
> (c) the adjudicator has dismissed the appeal,
>
> Written notice of the adjudicator's determination shall be sent to the Secretary of State who shall arrange for it to be sent to, or served personally on, the other parties and the appellant's representative (if he has one)."

14. The Administrative Court and the Court of Appeal dismissed that challenge. The Court of Appeal noted the practical purpose which the Rule was intended to serve. The Court of Appeal had regard to the provisions of the enabling statute and rejected the proposition that paragraph 15 was ultra vires. Nevertheless both Laws LJ and Clarke LJ stressed that the Secretary of State must not exercise his powers under

paragraph 15 in a way which may infringe the other party's right of access to the courts or legal process.

15. In the present case, as Mr Gill emphasized in oral argument, Rule 23 of the 2005 Procedure Rules is wider than paragraph 15 of the earlier Procedure Rules. It encompasses both adverse and favourable decisions on appeals. On the other hand it seems to me that section 106 of the 2002 Act (which I have set out in part 1 above) is drafted in sufficiently broad terms to encompass Rule 23. See in particular section 106(2)(q) and (r). I do not accept the proposition that Rules 23(4) and 23(5) are so broad in their scope that they should be struck down as irrational or disproportionate to the aim which is being pursued. These Rules support the policy of maintaining contact between the Home Office and asylum seekers.

16. Let me now draw the threads together. For the reasons set out above I am quite satisfied that Rule 23(4) and 23 (5) are not ultra vires. Mr Gill, in his oral submissions, very wisely did not place emphasis on NB's first ground of appeal. Instead he concentrated his fire on his best point which is the second ground of appeal namely the Secretary of State's breach of Rule 23(5)(a)(i) of the 2005 procedure Rules. I must therefore turn to that issue.

Part 5. The Secretary of State's Breach of Rule 23(5)(a)(i)

17. NB's second ground of appeal and ZD's sole ground of appeal is that the Secretary of State failed to comply with the requirements of Rule 23(5)(a)(i). In NB's case the Secretary of State was 19 days late in sending the Immigration Judge's decision to the appellant. In ZD's case the Secretary of State was 1 day late in doing so. Mr Gill contends on behalf of both appellants that this non-compliance on the part of the Secretary of State renders invalid the entire reconsideration proceedings. Accordingly, in each case the original favourable decision obtained by the appellant must stand. In support of this submission Mr Gill relies upon two decisions of the AIT which came to that very conclusion, namely *HH v Secretary of State for the Home Department* [2007] UKAIT 00036 and *RN v Secretary of State for the Home Department* [2008] UKAIT 00001. In *HH* the AIT explained the reasons for the tribunal's decision as follows at paragraphs 6-7:

> "If r 23 applies to this appeal, The Home Office failed in its duty to send the determination to the appellant on the day the application for reconsideration was made. In those circumstances the question arises whether the application can be considered to be validly made. This is not easy to answer; but two things are clear. The first is that the terms of r 23 are intended to give the respondent an advantage not normally available to a party to litigation. The second is that r 23(5)(i) is intended to ameliorate the appellant's position in a case where the respondent seeks to challenge a decision in favour of the appellant. Before the appellant even knows it has been made. Strictly speaking, the appellant is unlikely to be prejudiced by knowing about the reconsideration application only later, because the next possible act by him for which a time is fixed

> would be the service of a 'reply' under r 30, which does not have to be done until a week before the hearing of the reconsideration. Nevertheless, the possibility that the respondent will challenge a determination in favour of the appellant without notifying the appellant of the determination or the challenge is not clearly envisaged by the Rules and could only add to the apparent unfairness of r 23. In these circumstances we incline to the view that the requirements of r 23(5)(a)(i) are mandatory, and compliance with them is a precondition of a valid application for reconsideration at the instance of the respondent. Mr Walker did not dissent from that view. We should emphasise that we do not mean to indicate any similar view in respect of sub-subparagraph (a)(ii) or subparagraph (b) of r 23(5), where the unfairness is significantly less apparent. It follows from the foregoing that if r 23 applies to this appeal, our view is that the respondent's application for reconsideration was not validly made."

18. I am bound to say that initially I saw some force in Mr Gill's submissions and in the reasoning of the AIT in *HH*. Rule 23(5)(a)(i) extends an enviable degree of latitude to the Secretary of State. He is permitted to make his application for reconsideration (in practice by fax to the AIT) on the same day that he posts the appeal decision to the appellant. This has the consequence that as a matter of routine the Secretary of State will commence his challenge to appeal decisions which he loses a day or two before the other party becomes aware of those decisions. My first inclination was to say that no further latitude should be extended to the Secretary of State. If the Secretary of State fails to send an appeal decision to the appellant on the due date, then the Secretary of State should forfeit his right to apply for reconsideration. However, in the course of argument over the two day hearing, I have been driven to the conclusion that this analysis is not correct. Rule 59 was not considered by the AIT in *HH* or in *RN*. Rule 59(1) prevents the Secretary of State's breach of rule 23(5)(a)(i) from having the automatic consequence for which Mr Gill contends.

19. I have set out the provisions of rule 59(1) in part 1 above. There can be no doubt that the Secretary of State's failure to comply with rule 23(5)(a)(i) constitutes an 'error of procedure' within the meaning of rule 59(1). Rule 59(1)(a) expressly provides that such an error does not invalidate any step taken in the proceedings unless the tribunal so orders. The inexorable consequence of rule 59(1) is that the Secretary of State's failure to serve the immigration judge's decision on the date when he applied for reconsideration does not automatically invalidate the reconsideration proceedings. In my view the correct analysis of rule 59(1) is that in the case of procedural error, save where the rules expressly provide otherwise (e.g rule 35), the AIT has a discretion as to whether or not subsequent steps in the proceedings are invalidated. Some procedural errors plainly will not have that Draconian consequence. However, a breach of rule 23 (5)(a)(i) (the rule in issue in these proceedings) may well attract such a consequence. In each case the AIT must carefully consider the nature and extent of the Secretary of State's breach of rule 23 (5)(a)(i) and the effect of that breach upon the appellant. It will undoubtedly be relevant if the appellant has suffered prejudice as a result of late receipt of the appeal decision. For example, he may lose the opportunity to protest that the Secretary of

State's application for reconsideration is out of time (even though the rules do not confer upon him the right to make submissions in respect of the Secretary of State's application for reconsideration). However, mere absence of prejudice does not automatically give the Secretary of State a licence to delay serving the appeal decision. The proposition that the Secretary of State can pursue for any prolonged period his challenge to an AIT decision without the victorious party being aware of that decision is repugnant. The AIT should take that repugnance into account when deciding whether a) to allow reconsideration proceedings to go ahead or b) to declare those proceedings invalid.

20. Let me now consider how those principles should be applied to the two cases before this court. In NB's case there was a delay of 20 days between the Secretary of State applying for reconsideration and NB receiving a copy of the appeal decision from the Home Office. That probably means that the Home Office posted the appeal decision 19 days too late. That period of delay on the part of the Home Office cannot simply be brushed aside as immaterial. First of all the Secretary of State's application for reconsideration included the following statement:

> "the determination of the AIT was served on the appellant by first class post on 23 November 2006"

That statement was incorrect on the evidence available to us. Secondly, during the course of the 20 day period NB received a letter from the AIT informing her that the Secretary of State had applied for reconsideration. She did not know what was the decision under reconsideration. On 27 November her solicitors wrote to the AIT in the following terms:

> "our client has received a letter confirming the acknowledgement of an application for a review of the tribunal's determination. Nevertheless neither ourselves nor our client has received a copy of the tribunal's determination".

It is, in my view, unfortunate that those solicitors needed to send this letter on a date four days after the Secretary of State had lodged his application for reconsideration. On 29 November NB's solicitors sent an email to the Home Office expressing similar concerns to those previously expressed in their letter to the AIT dated 27 November. It is clear from this correspondence that the Home Office and the AIT were well aware that the requirements of rule 23(5)(a)(i) had not been complied with. It therefore behoved the Secretary of State to draw this breach of rule 23 and the misstatement in his application for reconsideration to the attention of the AIT in the course of his ex parte application for reconsideration. In this regard see the decision of Mr Justice Maurice Kay in *R (Cindo) v The Immigration Appeal Tribunal* [2002] EWHC246 (Admin) at paragraph 11. Even if the Secretary of State did not do so, it behoved the AIT as a specialist tribunal alerted to the relevant facts, to consider the matter. See rule 4 of the Procedure Rules. The AIT should have considered how to exercise its discretion under rule 59(1). The AIT did not order so. It simply proceeded to make an order for reconsideration.

21. Mr Payne for the Secretary of State submits that neither party raised the breach of rule 23(5)(i)(a) at the reconsideration hearing and it is now too late to take the point. He submits that in the absence of any order by the AIT under rule 59(1) of the Procedural

Rules the error had automatically been cured. In support of this submission Mr Payne relies upon the decision of the Court of Appeal in *R v Secretary of State for the Home Department ex parte Jeyeanthan* [2000] 1 WLR 354, in particular at page 366. I do not accept this argument. The original order for reconsideration was made on the basis of an erroneous statement in the Secretary of State's application. The AIT must now consider this matter on the correct factual basis. In my view this case should now be remitted to the AIT so that the tribunal can consider how to exercise its discretion in relation to the breach of rule 23(5)(a)(i) which has occurred.

22. Let me now turn to ZD's case. In this instance the Secretary of State's delay in dispatching the appeal decision to ZD was only one day. However, the Secretary of State's application for reconsideration contained a misstatement namely the proposition that the determination of I.J. Birkby had been served on the appellant by first class post on 18 January 2006. The Secretary of State's breach of rule 23(5)(a)(i), was drawn to the attention of the AIT. The breach of rule 23(5)(a)(i) was considered by the tribunal at the reconsideration hearing on 27 July 2007. I.J Lane considered the IAT's decision in *HH* and declined to follow it. However, he did not go on to consider rule 59(1) of the Procedure Rules and how his discretion under that rule should be exercised. He did not weigh up the competing considerations. On the one hand there is the repugnance factor mentioned earlier and the erroneous statement in the Secretary of State's application for reconsideration. On the other hand the delay was only one day and no specific prejudice has been demonstrated. In my view the case of ZD like the case of NB should be remitted to the AIT so that the tribunal can consider how to exercise its discretion under rule 59(1).

Part 6. Whether the AIT erred in law in ordering reconsideration in the case of NB

23. The third ground of appeal in NB's case is that S.I.J Eshun erred in law when ordering reconsideration. S.I.J Eshun's error was to hold that I.J Hobbs had erred in law. This ground of appeal is specific to the facts of NB's case. ZD advances no similar ground of appeal in relation to her case. S.I.J Eshun found that I.J Hobbs had made four errors of law in assessing NB's credibility. These errors were as follows:

> "1. The I.J accepted at para.18 that the appellant was arrested in 2003 and again in 2006; that she was taken to the Conakry prison where she was ill-treated and sexually abused and interrogated about the strikes. It was not clear on what basis the I.J accepted this evidence. At para. 16 the I.J had recorded that Dr. Gill's report consisted of a repeat of what the appellant told her concerning what happened to her in Guinea and Dr. Gill had diagnosed PTSD brought on by the rape. It was not clear whether the I.J accepted the appellant's account because it was consistent with what she told Dr. Gill. The I.J should have identified his reasons for accepting the appellant's account.
>
> 2. At para. 19 the I.J said that he had no evidence of the respondent's assertion that political detainees were only kept for a few days. The I.J's finding was wrong, because Ms

> Meher drew my attention to evidence contained in USSD report that the detainees were kept for a few days.
>
> 3. The I.J at para. 19 found that the evidence relied on by the respondent for his assertion above, related to political detainees and opposition parties. It did not relate to people perceived by the authorities as leaders, organisers of the demonstration. However, nowhere in the determination had the I.J found that the appellant was a leader or organiser of the demonstrations.
>
> 4. At para. 20 the I.J noted that the respondent did not believe that the appellant would have been kept in a cell on her own when prison conditions were reported to have vast overcrowding. Whilst accepting this evidence, the I.J found that it was also stated in the USSD report that prisoners of political importance were held in separate cells. Again, there was no finding by the I.J that the appellant was an important political prisoner. I note according to the appellant's evidence recorded at para. 9 that her role in the UFR was in connection with art and sport and enrolling new members. The HOPO below had submitted that the appellant was at the most a low level member of the UFR. The I.J did not make a finding on this issue."

24. S.I.J Eshun went out to conclude that I.J Hobbs had materially erred in law in failing to make findings on key elements of NB's claim and failing to give reasons for the evidence which he accepted. Mr Gill takes issue with each of the four errors of law identified by S.U.J Eshun. As to the first error I see nothing wrong with S.I.J Eshun's conclusions. The primary facts found by I.J Hobbs in conjunction with the objective evidence before the tribunal strongly indicated that NB's account of her experiences in detention could not be correct. In those circumstances it behoved I.J Hobbs to explain how he reached his conclusion. As to the second error of law, as Mr Gill points out, the relevant passage in the US State Department Report reads:

> "In practice political detentions rarely exceeded a few days and those persons were generally extended more protections than other detainees because of the attention to their cases by the NGO's and the media. In high profile detentions the persons were often held separately from other detainees and prisoners and access to them was unrestricted".

I agree with S.I.J Eshun that this passage is contrary to I.J Hobbs' statement in paragraph 19 which reads as follows:

> "the respondent said that political detainees were only kept for a few days but I have no evidence of this".

25. As to the third error of law I agree with the criticism made by S.I.J Eshun. I.J Hobbs considered NB's allegations by reference to the way that leaders and organisers were treated. However, on the immigration judge's findings NB was not a high-profile member of the UFR and did not have a leading role in the teachers' demonstration. Mr Gill submits that it was unnecessary for the immigration judge to find that NB was a leader or organiser of the UFR or the demonstration. I do not agree with that analysis.

26. As to the fourth error of law on I.J Hobbs' findings of fact NB was not a prisoner of political importance. Accordingly he should not have assessed her case by reference to the manner in which such prisoners were treated. I have come to the conclusion that although Mr Gill's criticisms of S.I.J Eshun's decision are skilfully presented, those criticisms cannot be sustained. S.I.J Eshun was quite entitled to conclude that I.J Hobbs had made material errors of law and accordingly that NB's appeal should be reconsidered.

27. Let me now draw the threads together. For the reasons set out above in my view NB's appeal should succeed on the second ground only. The first and third grounds of appeal are dismissed. On that basis NB's case should be remitted to the AIT. Furthermore for the reasons set out in part 5 above ZD's appeal also succeeds on the only ground advanced. That case too must be remitted to the AIT.

Lord Justice Hooper:

28. I agree.

Lord Justice Ward:

29. I also agree.