**S.S. Home Department v Athiroobasingham Ravichandran 1997/1496**
**R v S.S. Home Department ex parte Singarajah Jeyeanthan 1998/0563**

CA on appeal from QBD, (Mr Justice Sedley) before Lord Woolf MR. Judge LJ. May LJ. 21st May 1999

**LORD WOOLF, MR:**

***The background***

1. This judgment relates to two appeals. There is an appeal by the Secretary of State for the Home Department against the decision of Mr Justice Sedley on 3 April 1998 to grant an application for judicial review by Mr Singarajah Jeyeanthan ("J"). The application for judicial review relates to a decision of an Immigration Appeal Tribunal which had allowed an appeal of the Secretary of State against a decision of a Special Adjudicator. The Special Adjudicator, Professor Counter, had allowed J's application for asylum.

2. The other appeal is by Mr Athiroobasingam Ravichandran ("R"). R appeals to this court against the decision of the Immigration Appeal Tribunal to allow the Secretary of State's appeal against a decision of a Special Adjudicator. In R's case, like J's case, the Special Adjudicator had decided to uphold R's application that he was entitled to asylum. The decision of the Immigration Appeal Tribunal in R's case was given on 11 November 1996. Again the Tribunal had allowed the Secretary of State's appeal. R has been given permission to appeal to this Court.

3. The reason why it was necessary for J to make an application for judicial review rather than to appeal as R has done to this court is that in J's case the Immigration Appeal Tribunal allowed the Secretary of State's appeal only to the extent of remitting J's case to a Special Adjudicator for re-hearing. There is no appeal against this category of decision.

4. Both appeals raise the same issue. The issue is the consequence, if any, of the Secretary of State failing to use the prescribed form for applying for leave to appeal from the Special Adjudicator to the Tribunal. Although the prescribed form was not used it is accepted that the only practical omission is the absence of a declaration of truth. In J's case the Tribunal decided this issue in favour of the Secretary of State. Sedley J took a different view from that of the Tribunal and held that the failure to use the prescribed form meant the Tribunal's decision was a nullity. Accordingly, subject to the outcome of the Secretary of State's appeal to this Court, J is entitled to the benefit of the Special Adjudicator's decision in his favour.

5. In R's case the issue as to the validity of the application for leave to appeal to the Tribunal was not canvassed before the Tribunal. It was only when R's legal advisors became aware of Sedley J's decision in J's case that they sought to appeal on the nullity issue. R had previously obtained leave to appeal the Tribunal's decision on 6 July 1997. That appeal was due to be heard on 24 April 1998. Prior to the hearing of the appeal the parties had agreed that R's appeal to this court should be allowed and the case remitted by this court to the same Special Adjudicator for further consideration. On the hearing on 24 April 1998 R obtained leave to amend his notice of appeal so as to rely on the decision of Sedley J. The appeal was then adjourned to enable the two appeals to be heard together by this court. However, the Secretary of State is still prepared if the appeal succeeds to give effect to the agreement.

6. In J's case as well, the Secretary of State accepts that if his appeal succeeds J's case must be remitted to the Tribunal for re-hearing because of other defects in the first decision of the Tribunal.

7. The position can therefore be summarised by saying that, if this court decides the point of principle in favour of the Secretary of State, J and S will still be entitled to have their applications for asylum reconsidered. On the other hand if the point is decided the other way, J and S will be entitled to asylum without having to be the subject of further proceedings.

***What Should Be The Approach to Procedural Irregularatories***

8. The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as ***"shall"*** or ***"must"*** is used.

9. A requirement to use a form is more likely to be treated as a mandatory requirement where the form contains a notice designed to ensure that a member of the public is informed of his or her rights, such as a notice of a right to appeal. In the case of a right to appeal, if, notwithstanding the absence of the notice, the member of the public exercises his or her right of appeal, the failure to use the form usually ceases to be of any significance irrespective of the outcome of the appeal. This can confidently be said to accord with the intention of the author of the requirement.

10. There are cases where it has been held that even if there has been no prejudice to the recipient because, for example, the recipient was aware of the right of appeal but did not do so, the non-compliance is still fatal. The explanation for these decisions is that the draconian consequence is imposed as a deterrent against not observing the requirement. However even where this is the situation the consequences may differ if this would not be in the interests of the person who was to be informed of his rights.

11. Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances (see ***Brayhead (Ascot) Ltd v Berkshire County Council*** [1964] 2 QB 303, applied by the House of Lords in ***London & Clydeside Estates Ltd. v Aberdeen District Council*** [1980] 1 WLR 182).

12. By contrast, a requirement may be clearly directory because it lays down a time limit but a tribunal is given an express power to extend the time for compliance. If the tribunal grants or refuses an extension of time the position is clear. If the time limit is extended the requirement is of no significance. If an extension is refused the requirement becomes critical. It may, for example, deprive a member of the public of a right to appeal which if exercised in time would have been bound to succeed. In the latter situation a directory requirement has consequences which are as significant as any mandatory requirement.

13. A far from straightforward situation is where there is a need for permission to appeal to a tribunal but this is not appreciated at the time. The requirement is mandatory in the sense that the tribunal or the party against whom the appeal was being brought would have been entitled to object to the appeal proceeding without the permission and if they had done so the appeal would not have been accepted. However, what is the position if because they were unaware of the existence of the requirement no objection is made and the appeal is heard and allowed? Is the appellant, when the mistake is learnt of, to be deprived of the benefits of the appeal? If the answer is yes the result could be very unjust. This would be especially so, if in fact the tribunal in error had told the appellant that permission is not needed and he would have been in time to make the application if he had not been misinformed. Could it have been the intention of the author of the requirement that the requirement should have the effect of depriving the appellant of the benefit of his appeal? Clearly not. In such a situation the non-compliance would almost inevitably be regarded as being without significance. It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable reservation.

14. These comments are relevant to R's case. R was unaware of there being anything which was inappropriate about the Secretary of State's successful application for leave to appeal to the Tribunal. R took a full part in the hearing. He exercised his statutory right to appeal from the decision of the Tribunal to the Court of Appeal. He then agreed the outcome of that appeal with the Secretary of State. At the last moment, having learnt of Sedley J's decision, he contends he is entitled to treat the decision of the Tribunal and everything that followed as being a nullity. As a matter of principle this should not be the position. In his case, if he were entitled to succeed the only consequence would be that he is entitled to asylum notwithstanding that if the issue had been properly determined, this might not have been the result. However, if the position had been the other way around and he had obtained from the Tribunal a decision which was more favourable to him than that of the Special Adjudicator, it would be most unfortunate if he could be deprived of the benefit of that decision because of the non-compliance with a procedural requirement.

15. An examination of the relevant authorities, the leading text books and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see Wade and Forsyth: ***Administrative Law*** 7th Ed. p255, Supperstone and Goudie: ***Judicial Review*** 2nd Ed. Chapter 4 and de Smith, Woolf and Jowell: ***Judicial Review of Administrative Action*** 5th Ed. p.265-271). Frequently the investigation involves doing no more than deciding the sense in which the word ***"shall"*** has been used as part of a particular procedural requirement. As the word ***"shall"*** is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement. Here it is desirable to remember the wise words of Lord Hailsham of St Marylebone LC in his speech in ***London & Clydesdale Estates Limited v Aberdeen District Council*** [1980] 1 WLR 182 at pp.188 90. They are so important that it is desirable to set out the passage verbatim:

> *"The contention was that in the categorisation of statutory requirements into* ***"mandatory"*** *and* ***"directory"****, there was a subdivision of the category* ***"directory"*** *into two classes composed (i) of those directory requirements* ***"substantial compliance"*** *with which satisfied the requirement to the point at which a minor defect of trivial irregularity could be ignored by the court and (ii) those requirements so purely regulatory in character that failure to comply could in no circumstances affect the validity of what was done. The contention of the respondents was that, even on the assumption against themselves that the requirement of the Order that the certificate should include a notification of*

*the appellants' rights to appeal to the Secretary of State, the rest of the certificate was so exactly in accordance with the provision of the Order that the remaining defect could be safely ignored.*

*I do not consider that this argument assists the respondents in the present appeal. I have already held that the requirement in relation to notification of the appellants' rights of appeal was mandatory and not directory in either sense contended for by the respondents. But on the assumption that I am wrong about this, a total failure to comply with a significant part of a requirement cannot in any circumstances be regarded as* ***"substantial compliance"*** *with the total requirement in such a way as to bring the respondents' contention into effect.*

*Nevertheless I wish to examine the contention itself. In this appeal we are in the field of the rapidly developing jurisprudence of administrative law, and we are considering the effect of non-compliance by a statutory authority with the statutory requirements affecting the discharge of one of its functions. In the reported decisions there is much language presupposing the existence of stark categories such as* ***"mandatory"*** *and* ***"directory", "void"*** *and* ***"voidable",*** *a* ***"nullity,"*** *and* ***"purely regulatory".***

*Such language is useful; indeed, in the course of this opinion I have used some of it myself. But I wish to say that I am not at all clear that the language itself may not be misleading in so far as it may be supposed to present a court with the necessity of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments, compartments which in some cases (e.g.* ***"void"*** *and* ***"voidable")*** *are borrowed from the language of contract or status, and are not easily fitted to the requirements of administrative law.*

*When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like* ***"mandatory," "directory," "void," "voidable," "nullity"*** *and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."*

These comments of Lord Hailsham were made in a case where a mandatory requirement was not complied with and this resulted in a document being set aside. It was not, however, held to be a nullity in the sense that it was not capable of being the foundation of valid proceedings. This was the position even though the requirement involved informing the subject of his right to question a decision. Lord Keith of Kinkel considered a different result ***"totally unrealistic"*** (p202H).

16. Bearing in mind Lord Hailsham's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows :
    (a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (***The substantial compliance question.***)
    (b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (***The discretionary question.***) I treat the grant of an extension of time for compliance as a waiver.
    (c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (***The consequences question.)***

17. Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

***The Rules***

18. Any consideration of the significance of not complying with a procedural requirement commences with the language of the instrument containing the requirement. The procedure governing asylum appeals is contained in rules now made by the Lord Chancellor under s.22 of the Immigration Act 1971. Section 22 also contains the power to make procedural rules for other immigration appeals which do not involve asylum seekers. The power (which prior to 1987 was exercised by the Secretary of State) is a power to make rules *"regulating the exercise of the rights of appeal"*. At the relevant time the rules were the Asylum Appeals (Procedure) Rules 1993. Rule 13(1) confines appeals to those brought with leave of the Tribunal. Rule 13 also provides:

> *"(2) An application for leave to the Tribunal 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.*
> *(3) An application for leave shall be made by serving upon the Tribunal the Form prescribed in the Schedule of these Rules (Form A2) which shall be accompanied by the document (or copy of the document) recording the special adjudicator's determination.*
> *(4) An application for leave shall be determined not later than 5 days after its receipt by the Tribunal.*
> *(5) An application for leave shall be determined without a hearing unless the Tribunal considers that there are special circumstances making a hearing necessary or desirable.*
> *(6) When an application for leave has been determined, the Tribunal shall forthwith send to the parties to the appeal a notice recording the determination of the application for leave and, where leave to appeal is refused, the reasons for the refusal."*

19. In his helpful submissions Mr Pleming QC on behalf of J and R drew attention to the manner in which over the years the language of what is now Rule 13 has become more restrictive. He also drew attention to the fact that the courts have adopted a strict approach to the time requirements for applying for leave to appeal. The courts have rejected any implied power to extend the short period of 5 days which is laid down (see ***R v Immigration Appeal ex parte Armstrong*** [1977] Imm AR 80, Div. Court and ***Ashrafi v Immigration Appeal*** [1981] Imm AR 34, CA). As to time limits this approach is readily understandable because there are obvious administrative reasons why it is important that asylum claims are finally determined as soon as practical. It is significant that notwithstanding those decisions, when new rules were introduced in 1993, no attempt was made to give a power to extend the time limits. The same point can be made as to the 1996 Rules now in force. In addition it is to be noted that Rule 13 (4) contains an almost identically worded time limit for the determination of the application for leave and this is given real bite by Rule 30 which provides that if the application is not decided within that period it is deemed to be granted. There is also the fact that in relation to other time limits there is a power to extend time under Rule 31.

20. Mr Pleming submits that as the time limits in Rule 13 are applied strictly so the other requirements should be applied in the same way. However there are no policy or other reasons why it should be assumed that a requirement of Rule 13(3) not dealing with time limits but the form of the notice of the application for leave is to be given a particularly restrictive interpretation. The application is served on the Tribunal and not on the proposed respondent to the appeal. If leave is granted it becomes the notice of appeal but there is still no express requirement in the 1993 Rules that it should be served on the respondent though in practice it is served. It may *"as such notice of appeal"* be amended under Rule 14 of the 1993 Rules. It is also relevant to refer to Rule 45 of the Immigration Appeals (Procedure) Rules 1984 which by Rule 22 of the 1993 Rules are to apply to Part V (headed "General Procedure") of the 1993 Rules. Rule 45 of the 1984 Rules states; *"The forms set out in the Schedule to these Rules or forms substantially to the like effect may be used with such variations as the circumstances may require."*

21. It is accepted that this provision applies to the requirement to use form A2 contained in Rule 13(4) of the 1993 Rules. It imports a degree of flexibility as to the use of form A2. In addition Rule 38 of the 1984 Rules is applied to the 1993 Rules by Rule 22. Rule 38 deals with irregularities. It provides: *"Any irregularity resulting from failure to comply with these Rules before an appellate authority has reached its decision shall not by itself render the proceedings void, the appellate authority may, and shall if it considers that any person may have been prejudiced, take such steps as it thinks fit before reaching its decision to cure the irregularity, whether by amendment of any document, the giving of any notice or otherwise."*

    The purpose of this Rule is to prevent technical points interfering with the jurisdiction of the Tribunal. There is therefore ample reason for saying that unlike the provisions as to time the requirement to use form A2 is not to be regarded as a strict requirement.

***Why the Secretary of State Failed To Use Form A2***

22. The language of the form is more suitable for use by an asylum seeker than the Secretary of State. It has five Parts. Part 1 requires information to be inserted such as the date of birth, citizenship and address and telephone number of the applicant. It also asks for details of other appeals, which is hardly an appropriate question for the Secretary of State to answer. Part 2 requires information about the person, if any, helping the applicant. Part 3 is relevant to an appeal by the Secretary of State since it ask for the grounds of appeal to be entered. Part 4 requires a declaration to be completed. It starts by saying "*You, not the person helping you, should sign this form*". It then sets out the following statements: *"I declare that the information I have given is true and complete to the best of my knowledge and belief." "I appeal for leave to appeal to the Immigration Appeal Tribunal against The Special Adjudicator's decision."*

23. There is then a place for a signature. Part 5 requires information as to the documents accompanying the application. The remainder of the document is for the use of the Tribunal.

24. Because the document was considered not appropriate for his use, the Secretary of State did not use the form. Instead, as in these cases, he adopted the practice of making the application by letter which contained all the relevant information but lacked the declaration of truth. As to the declaration he contends there is nothing to which the declaration could sensibly relate and the signature of the Secretary to the letter is perfectly adequate verification of its contents. The Secretary of State has however redesigned a form A2 for his use which contains a declaration in the prescribed form.

***Sedley J's Judgment***

25. There were two grounds of challenge relied on in support of the application for judicial review. Sedley J. did not need to deal with the second because it was conceded. The first was that the notice of appeal was a nullity. As to this ground the judge only dealt with the substantial compliance question. The counsel who represented the parties before this court are not the same as those in the court below and it is possible that it was accepted that the answer to the substantial compliance question was conclusive. No reference was made to the irregularity point.

26. On substantial compliance the Secretary of State relied on the decision of Latham J in ***ex parte Nichalapillai*** [1998] Imm AR 232. In that case Latham J considered that a declaration by the Secretary of State in form A2 would be of no materiality and therefore decided (although he did not find the question easy) that the *"form does just fall within"* substantial compliance.

27. Sedley J declined to follow Latham J. He pointed out that he had been referred to authorities (two landlord and tenant cases) not cited to Latham J and he also relied on the London and Clydeside Estate case which had not been cited by counsel. Sedley J indicated that it was important that there should be equality of treatment between the immigrant and the minister. Sedley J determined the substantially to like effect point in favour of J.

***Conclusions***

28. As to the substantial compliance question. I have no doubt that the decision of Sedley J. is correct. I would however express my reasons somewhat differently. In this context landlord and tenant cases concerning the requirements on landlords for the protection of tenants only provide marginal assistance. I regard a form with a declaration of truth and a form without such a declaration as being very different documents. Most importantly the answer to the question must be the same for the asylum seeker and the Secretary of State. If the document is substantially to the like effect then it fulfils the requirements of Rule 13. I consider it is inconceivable that the asylum seeker and thus equally the Secretary of State was intended to be able to dispense with the declaration even if this was required by the Tribunal. Yet this would be the effect of answering this question in favour of the Secretary of State. ***Ex parte Nichalapillai*** is wrongly decided.

29. This is however by no means the end of this appeal. It does not follow that the application, although it does not have the required declaration, is a nullity. It is still necessary to answer the second and third questions I have identified.

30. It is convenient to deal with the discretion and consequences questions together in this appeal. The absence of the declaration does not contaminate the leave to appeal which was given, so depriving the Tribunal of jurisdiction to hear the appeal. This could not be the position having regard to the express discretion granted to the Tribunal to vary the notice of application when it becomes a notice of appeal after leave to appeal has been given. An application for leave was made. The Tribunal could have required the application to be varied to include the declaration either before or after it was considered, but they could not refuse to consider the application, at any rate, once it was accepted. J was perfectly entitled to raise the absence of a declaration but it would not be a proper exercise of the Tribunal's powers to do more than give the Secretary of State time, possibly a very short amount of time, to rectify his default. Although it appears the Tribunal was not happy about the Secretary of State's practice they were under protest accepting it and thus waiving the requirement. The waiver was on their part and not on the part of J, but his position would be fully protected by his being able to raise the matter before the Tribunal. He did so, but took the point of jurisdiction and did not require a declaration to be completed. This was probably because he appreciated that the completion of a declaration would be of no benefit to him.

31. R's position is different. By taking part in the hearing of the appeal he had effectively impliedly waived the requirement. His position to that extent is less strong then that of J.

32. I turn to the power contained in Rule 38 of the 1984 Rules. The existence of this power to deal with irregularities confirms that the Tribunal is not intended to allow technicalities to interfere with its responsibility to determine the merits of appeals. Because of a lack of familiarity with English and the procedures of tribunals in this country asylum applicants are likely to make many procedural errors. If they are not to be caused injustice Rule 38 should be given a wide interpretation. I do not accept Mr Pleming's submission that a stricter approach should be adopted than was adopted to the wide power contained in Order 2 r.1 of the Rules of the Supreme Court (see ***"The Goldean Mariner"*** [1990] 2 Ll.R. 215). The procedures of tribunals should normally be less and not more strict than the procedures of the High Court. The absence of a declaration would be an irregularity which could if necessary be dealt with under Rule 38.

33. If in these appeals you concentrate on what the Rules intend should be the just *consequence* of non-compliance with the statutory requirements as to the contents of an application for leave to appeal I would suggest the answer to

these appeals is obvious. Neither J nor R have in any way been affected by the omission. It was as far as they were concerned a pure technicality. Other than to discipline the Secretary of State there could be no reason well after the event to treat his successful applications for leave as a nullity. Both the discretion and consequences questions should be answered in the Secretary of State's favour. I agree with Judge LJ's judgment which I have seen in draft and I would dismiss R's appeal, allow the Secretary of State's appeal and, in those circumstances make the agreed orders.

**LORD JUSTICE JUDGE:**

34. I agree with Lord Woolf's illuminating analysis of the dangers of over rigidly seeking to pigeon hole requirements of the kind under consideration in these appeals by the application of a single descriptive and apparently all embracing word, whether ***"mandatory"*** or ***"directory"*** or ***"regulatory"***, to them. I nevertheless venture to express the hope that counsel will not seek in argument hereafter to reanalyse his analysis, or restate the principles using slightly different language, with the unlooked for consequence that the argument itself will become laboured and over elaborate. The true focus for attention, assisted by Lord Woolf's analysis, remains the relevant statutory framework considered as a whole.

35. The issue addressed in this judgment in detail is whether the application for leave to appeal the decision of the special adjudicator contained in the letter dated 10th July 1996 written on behalf of the Secretary of State in the case of Jeyeanthan was a nullity. If it was not, Ravichandran's appeal will fail.

36. I agree with Lord Woolf MR that, in the absence of the requisite declaration of completeness and truth, the letter did not comply with the form prescribed in the Schedule to the Asylum Appeals (Procedure) Rules 1993 (the 1993 Rules) nor fall within the margin of acceptable variation permitted by rule 45 of the Immigration Appeals (Procedure) Rules 1984 (the 1984 Rules).

37. Whether made by the asylum seeker or the Secretary of State for the Home Department, the procedure governing appeals from the special adjudicator to the Immigration Appeal Tribunal (IAT) is governed by Part III (rules 12-19), and is also subject to those provisions in the 1984 Rules expressly identified in rule 22 of the 1993 Rules.

38. Rule 13 of the 1993 Rules reads:

*"(2) An application for leave 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.*

*(3) An application for leave shall be made by serving upon the Tribunal the Form prescribed in the Schedule to these Rules (Form A2) which shall be accompanied by the document (or copy of the document) recording the special adjudicator's determination.*

*(4) An application for leave shall be determined not later than five days after its receipt by the Tribunal.*

*(5) An application for leave shall be determined without a hearing unless the Tribunal considers there are special circumstances making a hearing necessary or desirable.*

*(6) When an application for leave has been determined, the Tribunal shall forthwith send to the parties to the appeal a notice recording the determination of the application for leave and, where leave to appeal is refused, the reasons for the refusal."*

39. Rules 13(2) and 13(4) are concerned with time. The application for leave is to be made not later than five days after receipt of the determination. The decision whether or not to grant leave must itself be made not later than five days after receipt of the application, failing which rule 30 applies and the application is deemed to have been granted. This provides an illustration of the importance attached to adherence to time limits, perhaps inevitable given the practical issues under consideration in asylum cases, and the desirability of resolving them as rapidly as practicable. The express but limited provision made in the Rules for extending time limits in particular circumstances (as in rule 31) leads to the conclusion, not only that time limits should be scrupulously observed, but that extensions of time are impermissible where provision for them is not expressly made within the Rules.

40. In ***R v Immigration Appeal Tribunal ex parte Armstrong*** [1977] Imm AR 80 the Divisional Court rejected the argument that non-compliance with the time limits, incapable of extension within the relevant express provisions, could nevertheless be cured by the application of rule 38 of the Immigration Appeals (Procedure) Rules 1972, subsequently reproduced as rule 38 of the 1984 Rules.

41. This conclusion was followed in ***Ashrafi v Immigration Appeal Tribunal*** [1981] Imm AR 34. This court rejected the contention that a failure to apply for leave within the prescribed period was an "irregularity" within rule 38. Referring to the decision in ***Ex parte Armstrong***, Brandon LJ observed:

*"That court came to the conclusion that failure to apply for leave to appeal within the period of fourteen days was not an irregularity within the meaning of rule 38. In my judgment, that view was a correct view .....*

*The fact that, in relation to appeals to the adjudicator, there are express provisions enabling time to be extended, tends to strengthen the argument that the rules which I have been discussing are not intended to give any comparable power in the case of an appeal from the adjudicator to the Immigration Tribunal."*

The principle is binding on this court. Hardly surprisingly it has continued to be applied in subsequent cases (see for example ***R v Immigration Appeal Tribunal ex parte Hamida Begum*** [1988] Imm AR 199: ***R v Immigration Appeal Tribunal ex parte Secretary of State for the Home Department*** [1990] Imm AR 166). The question is whether the reasoning which led to the conclusion that rule 38 did not empower time extensions for which express provision

was not made in the Rules means that deficiencies in the letter from the Secretary of State, purporting to seek leave to appeal, were similarly incapable of being "***cured***".

42. Rule 38 of the 1984 Rules provides:
*"Irregularities*
*Any irregularity resulting from failure to comply with these Rules before an appellant authority has reached its decision shall not by itself render the proceedings void, but the appellate authority may, and shall if it considers that any person may have been prejudiced, take such steps as it thinks fit before reaching its decision to cure the irregularity, whether by amendment of any document, the giving of any notice or otherwise."*

The ambit of rule 38 in relation to deficiencies in the prescribed forms was addressed briefly, but not conclusively, in ***R v Immigration Appeal Tribunal ex parte Secretary of State*** *[1990] Imm AR 166,* when Lloyd LJ considered a hypothetical case where particulars required in a notice were incomplete. *"Would that be an irregularity which could be cured under paragraph 38? I suspect that it could ..... But I do not attempt to chalk the dividing line."*

This observation is best treated as an illustration of the immediate impression of the width of the power created by rule 38, but no more.

43. The starting point therefore is Rule 13(3) of the 1993 Rules. The rule is concerned not with the time within which but with how an application should be brought. Service is required on the IAT itself and not on the proposed respondent. If granted, the application for leave is deemed, by rule 14(1), to be the notice of appeal. Defects or omissions in the notice of appeal may be amended with leave of the IAT. In other words the document served as the application for leave is undoubtedly capable of amendment if and when it becomes the notice of appeal. Without suggesting that the subsequent use of the power to amend the notice of appeal under rule 14(1) may validate an application for leave which is a nullity, rule 14(1) tends to suggest that in the context of notices the requirements for compliance are less rigid than they are in relation to time limits.

44. Turning to the 1984 Rules, the power to cure irregularities provided by rule 38 is one of a number of powers granted to the appellate authority. By rule 37(b) - (e) among other powers the appellate authority may *"give directions on any matter"* and, subject to the statutory framework, may "*regulate its own procedure*". It may not however postpone the time fixed for the hearing of an appeal, and the deliberate omission of this particular power lends emphasis to the necessity for strict adherence to time limits. Like Lloyd LJ, my immediate impression on reading rule 38 was that it would be surprising if an incomplete notice of an application for leave to appeal, or a notice which did not scrupulously comply with the prescribed form, was not an "irregularity" within rule 38. That, on the face of it, is what it is. Moreover in the context of applications in asylum cases it would be wholly unrealistic not to recognise that errors, omissions and simple oversight by individuals, many without any proper grasp of English, or any understanding of the legal processes, are inevitable. To exclude them irrevocably from the appeal process, notwithstanding an application for leave brought in time, on the basis of incurable non-compliance with the mechanics of the appeal procedure, would be entirely inconsistent with a fair and just system for dealing with their cases. If Mr Pleming's argument were correct, and the current application for leave to appeal by the Secretary of State were a nullity, precisely the same conclusion would follow in the case of any asylum seeker whose notice was similarly deficient.

45. Mr Pleming focused attention on rule 45 which provides:
*"Variation of forms*
*The forms set out in the Schedules of the Rules or forms substantially to the like effect may be used with such variations as the circumstances may require."*

This provision, he argued, permitted *"variations"* from the prescribed form. Provided they were "*substantially to the like effect"* as the prescribed form such notices would not be invalid. Accordingly, by analogy with the reasoning in relation to extensions of time, he argued that as the Rules provide their own solution to the problem of non-compliance with the prescribed form, rule 38 has no application.

46. Although rule 45 undoubtedly permits variations from the prescribed forms, in my judgment it is not analogous with the provisions relating to extension of time. By definition these arise only when prescribed time limits have been ignored or overlooked and unless expressly permitted by the Rules there is no power to entertain an application for which the prescribed time has lapsed. The effect of rule 45 is to provide that forms which substantially comply with the prescribed forms are not, and should not be treated as irregularities, or, approaching it another way, any notices which are substantially to the like effect as the appropriate prescribed form are deemed to comply with the prescribed requirements. No question of irregularity arises. The application is in proper order, and valid. The issue of non-compliance does not arise and nothing needs to be cured.

47. Rule 45 does not carry the additional consequence that an application for leave made within the prescribed time, but which fails substantially to comply with the prescribed form is a nullity. Rather it is indeed an "***irregularity***", and the IAT has power to cure it.

48. In my judgment notwithstanding the failure of the letter from the Secretary of State substantially to comply with the requirements of the prescribed form, the notice of application for leave to appeal was not a nullity, but an irregularity, which was capable of being cured by the IAT. As to the exercise of its discretion to do so, no basis for interference has been shown.

49. I therefore agree that the appeal of the Secretary of State in Jeyeanthan should be allowed and that Ravichandran's appeal should be dismissed.

50. **LORD JUSTICE MAY**: I agree.

Order: Appeal in Ravichandran dismissed with costs.
Appeal in Jeyeanthan allowed. No order as to costs.

1997/1496 : MR N PLEMING QC and MS M PHELAN (Instructed by Messrs Saleem Sheikh, London, SW1 1RY) appeared on behalf of the Appellant.
1997/1496 : MR R TAM (Instructed by The Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Respondent.

1998/0563 : MR R TAM (Instructed by the Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Appellant.
1997/1496 : MR N PLEMING QC & MR S COX (Instructed by Messrs Anthony J Paterson, London, SW13 9JS) appeared on behalf of the Respondent