Neutral Citation Number: [2004] EWCA Civ 638

Case No: C3/2003/2629 & 2630

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SOCIAL SECURITY COMMISSION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2004

Before :

LORD JUSTICE KENNEDY
LORD JUSTICE JONATHAN PARKER
and
LORD JUSTICE DYSON

- -

Between :

Kola and Mirzajani	**Appellant**
- and -	
Secretary of State for Work and Pensions	**Respondent**

- -
- -

Paul Draycott (instructed by **Community Law Clinic Solicitors**) for the **appellants**
Julie Anderson (instructed by **The Department of Work & Pensions**) for the **respondent**

Hearing date: 18th May 2004

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JUDGMENT

Lord Justice Kennedy:

Background facts.

1. Mrs Kola came to this country from Kosovo, and she arrived here with her husband and two children on 27th November 1998, hidden in the back of a lorry. They were not detected at the port of entry, and eventually the lorry stopped and the family was told to alight. Later they met three Kosovan Albanians who put them in touch with an interpreter, then the interpreter took them to the Home Office Immigration Department at Croydon, where Mrs Kola claimed asylum. That claim was made on the day that the lorry arrived in England.

2. Mr Mirzajani is an Iranian who came to England on 22nd March 1999 via Belgium in the back seat of a Volvo car which came through the Channel Tunnel. After the car emerged from the tunnel in darkness he was set down by the driver, and told to keep walking until he reached the police station. After walking for some distance he encountered a woman in uniform, who was probably a police woman. She called for assistance, and he was then taken by police car to a police station. When interviewed with the assistance of an interpreter he claimed political asylum.

3. So both claimants sought political asylum on the day that they arrived here, but neither made a claim at the port of entry. Both then claimed Income Support, and were refused by adjudication officers. They appealed unsuccessfully to the Income Support Tribunal, and from the Income Support Tribunal to the Social Security Commissioner. The Commissioner, Mr Angus, dealt with both appeals in his decision of 15th July 2003, and on 29th October 2003 he granted permission to appeal to this court.

Statutory Scheme.

4. In November 1998 and March 1999 the right to Income Support was governed by the Income Support (General) Regulations 1987 (S.I. 1967.)as amended. It is common ground that under those Regulations persons from abroad in the position of these two claimants had no right to Income Support unless they qualified as an urgent case under regulation 70. Those recognised by the Regulations as asylum seekers did qualify, and to see whether a person was so recognised it was necessary to look at regulation 70(3A) which, so far as material, provided that a person –

> "Is an asylum seeker when he submits on his arrival (other than on his re-entry) in the United Kingdom from a country outside the Common Travel Area a claim for asylum to the Secretary of State that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom and that claim is recorded by the Secretary of State as having been made…."

The key words for present purposes are "on his arrival". These two appellants were refused Income Support because the adjudicating officers concerned decided

that neither of them had made an application for asylum on arrival, and on appeal neither the Tribunal nor the Commissioner was prepared to interfere with that conclusion. This court can only interfere with it if it was a conclusion which was not open to the adjudicating officers on the evidence which I have outlined, which evidence for present purposes is not in dispute.

The Developing Legislation.

5. In order to put in context some of the submissions made to us by Mr Paul Draycott for the appellants it is worth saying something about the history of regulation 70(3A) and about its subsequent demise. A more detailed history can be found in the dissenting judgment of Neill LJ in R v Secretary of State for Social Services ex parte Joint Council for the Welfare of Immigrants [1997] 1 WLR 275, but for present purposes it is sufficient to say that Income Support was introduced by the Social Security Act 1986, and by the end of 1995 the position was that persons from abroad, including asylum seekers, were not normally entitled to Income Support, but could be treated as urgent cases. If an asylum seeker was so treated he would receive 90% of the normal Income Support Benefit until his claim for asylum was finally determined. Parliament then became anxious because the growing number of claims for asylum, many of which turned out in the end to be unjustified, slowed down the process of considering asylum claims, and imposed a very significant burden on the British taxpayer. To address that problem the Government introduced the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996, which came into force on 5th February 1996. The Secretary of State explained their purpose in a statement to the Social Security Advisory Committee, and part of that statement reads -

> "6. The proposed Regulations mean that persons claiming asylum at the port of entry will continue to be eligible for benefits while their claim is processed by the Home Office. In addition benefits will be available to those who claim asylum after arrival in the UK as a result of a significant upheaval in their home country since their arrival here.
>
> 7. However, 70% of all asylum claims are made by people who entered this country as tourists, students, business people or illegally and subsequently make a claim. The Government will continue to consider such asylum claims. But benefits will no longer be made available to those who enter the country on one basis and subsequently make an asylum claim (except following a significant upheaval in their home country)."

The effect of the 1996 Regulations in relation to Income Support was to exclude from the definition of asylum seekers those who sought asylum otherwise than on arrival in the UK. The validity of the Regulations was challenged in the JCWI case in which the majority of this court held the Regulations to be *ultra vires* because they rendered the rights of asylum seekers under the Asylum and Immigration Appeals Act 1993 nugatory. Either they would be deterred by penury from pursuing their claims or they would be forced to live a life of destitution until their claims were finally determined. But the victory of the appellants in the

JCWI case was short-lived, because the Asylum and Immigration Act 1996 re-instated the amendments which this court had held to be *ultra vires*. Thus the wording of the 1987 Regulations became the wording with which we are concerned, and whatever may be said in relation to subsequent legislation it cannot seriously be contended that the re-instatement was itself either *ultra vires* or ineffective.

6. Turning to what happened after the arrival of the two appellants, as Miss Anderson for the respondent pointed out, section 95 in Part VI of the Immigration and Asylum Act 1999 enabled the Secretary of State to provide or arrange for the provision of support for asylum seekers or their dependants who appeared to the Secretary of State to be destitute or to be likely to become destitute, and thus local authorities were relieved at least to some extent of their burdens under the National Assistance Act 1948. But it is clear from section 55 of the Nationality Immigration and Asylum Act 2002 that the Secretary of State cannot provide or arrange for the provision of support if -

> "(a) The person makes a claim for asylum which is recorded by the Secretary of State, and
>
> (b) The Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom."

So, when considering eligibility, the Secretary of State will now be looking to see whether the claim for asylum was made "as soon as reasonably practicable" after the claimant's arrival in the United Kingdom, and not, as in these two cases, whether it was made "on his arrival".

Shire v Secretary of State for Work and Pensions [2003] EWCA Civ 1465.

7. In relation to the wording which has now been superceded there have been a number of decisions of the Social Security Commissioners, and one of those decisions, by Mr Commissioner Rowland on 11th June 1998, was reported as R (IS) 14/99. The fact that it was reported is significant because, as was recognised by Mr Commissioner Angus in the present case, a reported decision "has the approval of the majority of Commissioners". In the case before him Mr Commissioner Rowland concluded that the words "on his arrival" had been used deliberately to allow adjudicating officers some limited degree of flexibility, the extent of which could be considered on a case by case basis. He declined to accept that a person necessarily failed the test if he cleared immigration control or left the port of entry before he claimed asylum, but for the purposes of that case it was not necessary for him to reach any conclusion as to the precise geographical or temporal limits conveyed by the words used. Not all of the Commissioners agreed with Mr Commissioner Rowland, and it is clear from what he said in the present case Mr Commissioner Angus was one of the dissentients.

8. On 13th October 2003, three months after Mr Commissioner Angus gave his decision in the present case, this court, differently constituted, gave judgment in Shire, and that decision, as it seems to me, determines the outcome of this appeal. The appellant was, we were told, a Somali, who arrived at Gatwick Airport from

Yemen at 10.30 pm on 29th August 1999, and did not claim asylum until 31st August 1999. She was accompanied on arrival by an agent, and in order to explain her delay in seeking asylum she said that she was under the control of the agent who was anxious to ensure that she did nothing that might cause the agent to be arrested and charged with facilitating her entry. However, as was pointed out by Lord Woolf CJ at paragraph 11 of his judgment, from her personal point of view there was no advantage in her not claiming asylum on first landing. Plainly she did not make her claim "on her arrival", if those words should be read literally, but Mr Nicholas Blake QC, on her behalf, submitted that the requirement would be satisfied if the claim were made at the first effective opportunity. In support of that submission he pointed out that a person (like Mrs Kola in our present case) brought into this country in the back of a container lorry cannot claim asylum until released. As to that Lord Woolf said at paragraph 15 -

> "I do not accept Mr Blake's submission that the appellant should be treated as someone who made a claim at the first effective opportunity, if that is the right test to apply. In my view the position of a person who employs an agent to obtain access to this country is quite distinct from the situations to which Mr Blake refers. The person who uses an agent must be regarded as putting themselves under the control of that agent so that they are responsible for the actions of the agent. Unless there is clear evidence of some form of physical duress being applied to the claimant, he or she must be regarded as continuing to be in control of what is happening."

In the present case Mr Draycott accepts that there is no evidence that either Mrs Kola or Mr Mirzajani were acting under duress, so, as I see the position, they must each be regarded as having been in control of what was happening. It follows inevitably, as it seems to me, that neither of them claimed asylum on their arrival, because each of them left their port of entry without having done so.

Before the Commissioner.

9. Before the Commissioner the case for the appellants was advanced on the mistaken basis that the appellants did not have to accept responsibility for steering past immigration controls, and Mr Draycott submitted that if the Commissioner were to follow Mr Commissioner Rowland's interpretation of the words used in Regulation 70(3A) the appellants could be said to have claimed asylum on arrival. For the reasons I have given it seems clear to me that in these two cases, once it is recognised that if agents were involved the appellants cannot shelter behind the actions of their agents, even the approach adopted by Mr Commissioner Rowland cannot assist them.

10. In an attempt to argue in favour of what he regarded as a more liberal interpretation of Regulation 70(3A) Mr Draycott drew attention to the reasoning of Simon Brown LJ in the JCWI case, and the need, so far as possible, to interpret legislation in such a way as not to interfere with fundamental rights. He also, as an aid to construction, drew attention to Articles 3 and 31 of the 1951 United Nations Convention relating to the status of refugees, a letter written by the

UNHCR on 13th September 2002 and certain academic commentaries. But none of that can be of any assistance if the facts show that, however liberal the interpretation, the appellants still failed the test. It follows that the decision of the Commissioner dealt with a number of matters which we did not find it necessary to consider.

Conclusion.

11. The reasons set out above are my reasons for the decision which we announced at the end of oral argument, namely that the appeal of these two appellants fails and is dismissed.

12. Mr Daycott has submitted a written application for leave to appeal to the House of Lords. That application has been considered, and is dismissed.

Lord Justice Jonathan Parker:

13. I agree.

Lord Justice Dyson:

14. I also agree.