HOUSE OF LORDS SESSION 2007–08
[2007] UKHL 54
on appeal from [2004] EWCA Civ 638

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Kola (FC) and another (FC) (Appellants) v Secretary of State for Work and Pensions (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Richard Drabble QC
Paul Draycott
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Respondents:
Ashley Underwood QC
Julie Anderson
(Instructed by Department of Work and Pensions)

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[2007] UKHL 54

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood, with which I am in complete agreement.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree that your Lordships are not constrained by the language of regulation 70 (3A) to say that asylum must be claimed immediately upon arrival at the port of entry if the asylum seeker is physically unable there and then to make contact with an immigration officer or has been dissuaded by his or her agent or courier from doing so. So long as the asylum seeker can show that asylum was claimed at the first available opportunity, the requirements of the regulation will have been satisfied. For the reasons Lord Brown gives, with which I am in full agreement, I would allow this appeal.

BARONESS HALE OF RICHMOND

My Lords,

3. For the reasons given in the opinion of my noble and learned friend, Lord Brown of Eaton–under–Heywood, with which I agree, I too would allow this appeal and proceed as he suggests.

LORD CARSWELL

My Lords,

4. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood. For the reasons which he has given I would allow the appeal and make the order proposed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

Introduction

5. The legislative arrangements for the support of asylum seekers have altered many times down the years. This appeal concerns the regime in force between 24 July 1996 and November 1999. It is convenient to refer to this as the 1996 Act regime although it is important to note that it had first been introduced with effect from 5 February 1996 by Regulations (the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996 (SI 1996/30)) which were then struck down as ultra vires by the Court of Appeal on 21 June 1996 in *R v Secretary of State for Social Services, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 ("JCWI"). The Court of Appeal held the 1996 Regulations to be of such draconian

effect as to conflict with certain statutory rights previously conferred upon asylum seekers by the Asylum and Immigration Appeals Act 1993: a significant number of asylum seekers would either be "driven by penury to forfeit" their claims or be forced into "utter destitution." The Court concluded that only primary legislation could achieve that.

6. Put shortly, the effect of the 1996 Regulations was to exclude from benefit two main categories of asylum-seeker, described in JCWI as "(1) in-country (as opposed to on-arrival) claimants; and (2) all claimants pending appeal from an adverse determination of the Home Secretary". Before that all asylum seekers had been entitled to what were known as "urgent cases payments" amounting to 90% of normal income support benefit and, in addition, housing benefit and various other benefits accessed through income support.

7. The Government's response to JCWI was that the identical regime should indeed be re-enacted by primary legislation, the Asylum and Immigration Act 1996. The 1996 Act made only two concessions: one was to continue any benefit entitlement up to the determination of the appeal process; the other was to confer on ultimately successful asylum seekers a retrospective entitlement to whatever benefits they had forfeited through not having made their claims on arrival.

8. The central provision around which this appeal turns is regulation 70(3A) of the Income Support (General) Regulations 1987 (SI 1987/1967) (as inserted by regulation 8 of the 1996 Regulations):

> "For the purposes of this paragraph, a person (a) 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..."

To qualify for benefits, therefore, an asylum seeker had to have made his asylum claim "on his arrival"; if he failed to do so, he was not an asylum seeker for the purposes of the urgent cases payment provision and was thus disqualified from all benefits however genuine his asylum

claim and howe ver destitute his situation. What precisely was meant by the phrase "on his arrival"? That critically is the issue for determination on this appeal.

The facts concerning these two appellants

9. The outcome of this appeal, arising as it does out of a now historic benefits regime, can affect only these two appellants: section 27 of the Social Security Act 1998 specifically precludes your Lordships' determination having retrospective effect with regard to any other claimant. The particular circumstances in which these appellants came to make their asylum claims is, therefore, the all-important context in which the words "on his arrival" fall to be applied.

10.
(1) Davida Kola, the first appellant
Mrs Kola is a Kosovan of Albanian ethnicity who arrived in the UK with her husband and two children on 27 November 1998 having travelled all the way from Kosovo hidden in the back of a series of lorries. In England the lorry eventually stopped, the back was unlocked and the family were released. They then met three Kosovan Albanians and shortly after were taken by an interpreter to the Home Office Immigration Department at Lunar House, Croydon where they claimed asylum. The claim was made on the same day as they reached England.

(2) Ibrahim Mirzajani, the second appellant
Mr Mirzajani is a 57-year old Iranian national who reached Belgium by lorry and was then transferred to the back seat of a Volvo car in which he was driven via France and the Channel Tunnel (with instructions from the driver to keep his head down) to England, arriving at night on 22 March 1999. Having left the Tunnel terminal he was set down by the driver and told to keep walking until he reached a police station. He duly did so and at the police station claimed asylum that same day .

11. Both appellants were assisted in their clandestine travel here by agents who ensured that they remained hidden until after leaving their respective ports of entry. Each of them, as stated, made their claim for asylum on the very day of their arrival in the UK. (Both, it may be noted, were ultimately granted, not asylum, but indefinite leave to remain.)

12. Both, I should add, thereafter submitted claims for income support, the first appellant four days after arrival, the second appellant 16 days after arrival. Each of these claims was rejected, first by an Adjudication Officer, then by an Appeal Tribunal, then by a Social Security Commissioner (Mr Commissioner Angus who heard both appeals jointly), and finally by the Court of Appeal (Kennedy, Jonathan Parker and Dyson LJJ) on 21 May 2004: [2004] EWCA Civ 638. The reason for rejecting the claims (and dismissing the subsequent appeals), was that, even accepting everything the appellants said, they had not made their asylum claims "on [their] arrival".

The rival contentions as to meaning

13. The Secretary of State submits that the claims were rightly rejected. He contends that the phrase "on his arrival" requires in this context that the asylum claim be made to an immigration officer on duty at the port of entry. Nothing else will do. If the asylum seeker reaches the country otherwise than at an immigration-staffed port of entry—for example at a beach or an undesignated port or a private airfield—he cannot satisfy the requirement. Nor can he do so if the immigration staff have gone off duty. Nor if he is so ill on landing that he has to be rushed to hospital. Nor if language difficulties prevent his communicating his claim. Nor if the agent who has secured his entry (whether with false entry documents or clandestinely as in the case of these two appellants) has instructed him not to claim until he has passed through the port of entry, not even if that instruction is backed by physical threats (whether to himself or to his family left behind) or if he is locked into the vehicle transporting him.

14. The appellants submit to the contrary that the words "on his arrival" are imprecise and admit of some flexibility, sufficient certainly to encompass their particular situations. Each claimed asylum at what was effectively the first opportunity: they could not reasonably have been expected to claim it earlier.

The background to the legislation

15. Regulation 70(3A) was, as stated, originally introduced as secondary legislation, purportedly under powers conferred on the Secretary of State by the Social Security Contributions and Benefits Act 1992. Before making the regulation, however, the Secretary of State

sought advice on the proposal from the Social Security Advisory Committee (SSAC), as provided for by the Social Security Administration Act 1992. In their Explanatory Memorandum to the SSAC the Government referred to abuses in the asylum system which they proposed to address "by curtailing entitlement to benefits for those who claim asylum after entry to the UK". Some 70% of asylum applications, the Memorandum stated, "are after entry applications with the remaining 30% making their applications at ports of entry."

16. The SSAC's report of 8 December 1995 recommended that the proposal should not proceed. As it observed at para 38:

> "There are many valid reasons why people do not make their asylum claim immediately on arrival. Lack of knowledge of the procedures, arriving in a confused and frightened state, language difficulties or fear of officialdom may all be insuperable barriers to making any kind of approach to the authorities at port of entry. Many intending applicants will quite reasonably want to get help and advice before making their claim. We were told by refugee organisations that there is a common fear that making an asylum application while still in port is more likely to result in immediate deportation, or being held in detention. For these and other reasons, it is easy to see why for the majority of asylum seekers it appears much safer to make their claim from inside the UK."

17. Paragraph 42 too should be noted:

> "It appears to us also that linking benefit entitlement to port applications will lead to considerable operational problems. To avoid doubt about whether an asylum application should be treated as having been submitted 'on arrival in the United Kingdom' a comprehensive definition of meaning would be needed in regulations. As presently drafted, it is not clear whether, for example, someone brought through a port by a courier and not permitted to make a claim until reaching their final destination, would be regarded as having applied on arrival. Many other circumstances may be imagined which would give rise to confusion and dispute as to exactly when the application was made. In addition, we understand from the Home

> Office that a 24 hours continuous immigration presence is not guaranteed at smaller ports and airports."

18. Notwithstanding the SSAC's report, the Secretary of State duly re-enacted the regulation. In his statement pursuant to section 174(2) of the Social Security Administration Act 1992 he gave his reasons for doing so. All of this, including what I may call the argument on the merits, is explained at some length in the judgments in JCWI. For present purposes it is sufficient to note, first, that the Government made clear their intention that the regulation would indeed exclude from benefit all "in-country" applicants, namely all those who failed to claim asylum "at the port of entry"; secondly, that despite the SSAC's suggestion that the proposal would require "a comprehensive definition" of what was meant by the words "on his arrival", no such definition was in fact provided by the regulation. None, submits Mr Underwood QC for the Secretary of State, was needed.

19. The regulation was, as stated, struck down in JCWI before its reinstatement by primary legislation in the 1996 Act. But the circumstances of the asylum seeker (B)'s claim in JCWI must be noted. They are not dissimilar to those of the appellants here. B, having arrived by Eurostar at Waterloo, made her claim for asylum the same day at Lunar House, Croydon (instead of on the train itself, where border controls were then operating). It seems never to have occurred to anyone to argue that B ought properly to have been regarded as having made her asylum claim "on her arrival". Rather it was assumed by everyone that she had not. That, then, was the context in which regulation 70(3A) finally came to be enacted.

The case law on regulation 70(3A)

20. Different social service commissioners took different approaches to the phrase "on his arrival". Mr Commissioner Rowland (in decision R(IS) 14/99, a reported decision approved by the majority of the commissioners) accepted a submission that "the relatively vague term 'on his arrival' was used deliberately instead of any more precise term, in order to maintain a level of flexibility".

21. Mr Commissioner Angus, however, consistently took the view (repeated in his decision on these appeals) that the phrase "on his arrival" required that the asylum claim be made within the "port

perimeter", and that "the only flexibility intended in the expression [was] the extension to the perimeter of a designated port of arrival".

22. The only Court of Appeal decision on the point prior to that in the present case was *Shire v Secretary of State for Work & Pensions* [2003] EWCA Civ 1465. The claimant there, a Somali woman, had arrived at Gatwick Airport from Yemen at 10.30 pm on 29 August 1999 and not claimed asylum until 31 August (the intervening day being a bank holiday). Her reason for not claiming at Gatwick was that she was accompanied by an agent who unsurprisingly was concerned that nothing be done which might occasion his arrest for facilitation. Lord Woolf CJ (with Chadwick and Buxton LJJ's agreement) said (at para 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....The person who uses an agent [to obtain access to this country] 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."

Clearly this was an extempore judgment: Lord Woolf had already noted that the case was only of historic interest and that the law had since been changed at least twice (a reference plainly to the Immigration and Asylum Act 1999 (the 1999 Act) and the Nationality Immigration and Asylum Act 2002 (the 2002 Act)).

23. Kennedy LJ (giving the only reasoned judgment in the Court of Appeal in the present case) at para 8, cited the above passage from *Shire*, noted counsel's acceptance that neither appellant had acted under duress, suggested that therefore "they must each be regarded as having been in control of what was happening", and concluded that both had accordingly failed to claim on arrival "because each of them left their port of entry without having done so". It had to be recognised, he said, "that if agents were involved the appellants cannot shelter behind the actions of their agents."

The post-1996 Act regime

24. The draconian impact of the 1996 Act regime upon asylum-seekers who had failed to make their claim on arrival was to some extent mitigated by the decision of the Court of Appeal in *R v Westminster City Council, Ex p M* (1997) 1 CCLR 85 which held that those worst affected by the regulation were entitled to seek relief from their local authority under section 21(1)(a) of the National Assistance Act 1948. This enabled residential accommodation to be provided for those "who by reason of age, illness, disability or other circumstances are in need of care and attention which is not otherwise available to them."

25. The 1999 Act introduced a new regime, to be administered by the National Asylum Support Service (NASS), whereby the Secretary of State was instead to take over the responsibility for supporting those destitute or likely to become so.

26. Following the continuing rise in the number of those claiming asylum, however, Parliament once more sought to reduce the cost. Section 55 of the 2002 Act provides that an asylum seeker shall not be supported unless his asylum claim "was made as soon as reasonably practicable after the person's arrival in the United Kingdom". The correct approach to this provision was the subject of a four-day hearing and a reserved judgment given by the Court of Appeal (Lord Phillips of Worth Matravers MR, Clarke and Sedley LJJ) on 18 March 2003 in *R (Q) v Secretary of State for the Home Department* [2004] QB 36. The Court concluded (at para 37) that the test of whether the asylum seeker has claimed "as soon as reasonably practicable" is as follows:

> "On the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity for claiming asylum and to the asylum seeker's personal circumstances, could the asylum seeker reasonably have been expected to claim asylum earlier than he or she did?"

As was then made clear in paragraphs 40 and 43, in determining that question the Secretary of State had to have regard to the asylum seeker's state of mind at the time, including the effect of anything which he might have been told by an agent who had facilitated his entry.

27. It may be noted that in construing section 55 of the 2002 Act the Court of Appeal had regard to the Divisional Court's decision in *R v Uxbridge Magistrates Court, Ex p Adimi* [2001] QB 667 concerning the correct approach to take to article 31 of the 1951 Refugee Convention. This provides:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

28. Mr Adimi himself was prosecuted for entering the country on a false passport, a fact discovered at the point of entry whereupon he was detained, only then claiming asylum. Concluding that the prosecution contravened article 31, I said in the Divisional Court, at p 679, with regard to the requirement that refugees "present themselves without delay to the authorities":

> "If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached this condition."

29. Having cited *Adimi*, Lord Phillips continued (at para 28 of *Q*):

> "The Attorney General rightly submitted that this decision had no direct bearing on the issue of construction in the present case. It does, however, demonstrate the degree of delay in claiming asylum that may be acceptable where the object of the exercise is to distinguish between the person who enters this country bent on seeking asylum and the person who intends to remain without doing so."

Rather oddly, although decided some seven months after *Q*, *Shire* made no mention of it. Perhaps it was thought that the words "as soon as reasonably practicable after the person's arrival" necessarily meant

something different from "on his arrival" and required a different approach too to the part played by facilitating agents.

The rival arguments

30. The Secretary of State submits that the words "on his arrival" are plain and unambiguous and that no further definition, as suggested by the SSAC in paragraph 42 of their report, was necessary. Indeed, he argued, it would have been inappropriate to use words like "immediately" or "at the port of arrival"; rather these requirements were necessarily implicit in the term "on his arrival" having regard to the provisions of section 11(1) of the Immigration Act 1971:

> "A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under [specified powers]".

Section 11 is the rock upon which the Secretary of State founds his argument as to the unambiguous character of regulation 70 (3A).

31. However, he relies in addition on the legislative history of the regulation; it was, as already explained, re-enacted notwithstanding the assumption by all concerned in JCWI that it was to apply just as uncompromisingly as the Secretary of State now contends: to exclude from benefit all those who entered the country clandestinely or on false documents.

32. In advancing these submissions, one may note, Mr Underwood rejects the reasoning adopted by the Court of Appeal both in *Shire* and in the present case. Whether or not agents are used to facilitate entry and, if so, whether those gaining entry are subject to duress, are, on his argument, immaterial considerations: the asylum claim either is or is not

made immediately on arrival at the point of entry (Mr Commissioner Angus's approach).

33. Mr Drabble QC for the appellants submits to the contrary that the phrase is far from unambiguous and that to construe it as the Secretary of State contends would not merely involve instances of conspicuous unfairness as suggested at para 9 above, but also run counter to the policy underlying article 31 of the Geneva Convention, if not, indeed, directly breach it. Section 11 of the Immigration Act 1971, he submits, in truth affords the Secretary of State no assistance whatever.

Conclusions

34. Section 11 of the 1971 Act is a highly technical provision which for the purposes of immigration control introduces into the legislative scheme a necessary fiction as to what constitutes entry to the UK—see the decision of the House in *Szoma v Secretary of State for Work and Pensions* [2006] 1 AC 564. Whilst, however, section 11 says everything about *entry*, it says nothing about *arrival*. Its only reference to arrival is in the opening words—"a person arriving in the United Kingdom..."—and in that context it necessarily encompasses a time even before disembarkation. Section 11 really does not help. It cannot provide regulation 70 (3A) with the unambiguous meaning for which the Secretary of State contends.

35. The Secretary of State's better argument to my mind lies in the regulation's provenance: the assumption by all concerned in JCWI that asylum had to be claimed at the "port of entry" and the Minister's evident intention, despite the SSAC's report, that this should be so. But I remain unpersuaded that in simply re-enacting the regulation as he did, the Secretary of State managed to achieve his intention. Here lies the significance of paragraph 42 of the SSAC's report. Nothing could be plainer than that the Committee regarded the regulation as unclear in its existing form, not least as to how it would affect those, like the present appellants, who came in clandestinely with the help of agents.

36. I conclude, therefore, that the provision is ambiguous as to what precisely is meant by the phrase "on his arrival." What meaning, then, should be ascribed to it? The strict meaning contended for by the Secretary of State at least has the merit of certainty. In particular, as Mr Underwood explained, it would eliminate all the difficulties that could

otherwise arise in investigating whether the requirement was satisfied. Take this very case. Because asylum was not claimed at the respective ports of entry, neither the respondent nor the various appeal tribunals concerned with the benefit claims were in a position to investigate or verify that the appellants had in fact sought asylum on the day of arrival and not sometime later—or, indeed, the role played by agents in facilitating their entry. Benefits are, of course, dispensed by a different body from that responsible for investigating and determining the asylum claim itself. The difficulty with this part of the respondent's argument, however, is that it involves a substantial element of hindsight: there is not a single mention of this consideration to be found anywhere in the SSAC's report or in the Secretary of State's statement in response to it.

37. The more fundamental difficulty in accepting the respondent's contended for construction is, however, that it would produce such obvious unfairness in so many cases. Some of these were considered in paragraph 42 of the SSAC's report; others are suggested at paragraph 9 above. Not even in cases where clandestine entrants were subject to duress by their facilitating agents would they be able to qualify for benefits. As Mr Underwood recognises, his argument goes further even than was supposed by the Court of Appeal in *Shire's* case and in the present case. It is indeed, to use his own word, "unpalatable."

38. If, then, the Secretary of State's contended for meaning is rejected, what alternative meaning should be given to the "on...arrival" requirement? To my mind it is difficult to find any satisfactory halfway house between the respondent's extreme position and that taken by the Court of Appeal in *Q's* case [2004] QB 36 to the subsequent legislative requirement that asylum be claimed "as soon as reasonably practicable after...arrival" (see paragraph 22 above). If the asylum seeker could not reasonably have been expected to claim asylum any earlier than he did, having regard both to his practical opportunity for doing so and to his state of mind at the time, including the effect on him of anything said by his facilitating agent, then I see no good reason why his claim should not properly be accepted as one made "on his arrival."

39. The approach taken by *Q* to the use of facilitating agents is to my mind altogether fairer and more realistic than that adopted in *Shire* (and in the court below) and, indeed, no one now doubts but that the *Q* approach should be followed in all future cases.

40. It follows that in my judgment the construction of regulation 70(3A) for which the appellants contend is to be preferred. Thus construed and applied, the relevant requirement was to my mind clearly satisfied in their cases.

41. I add a few brief paragraphs regarding the appellants' reliance on article 31 of the Refugee Convention.

Article 31

42. The policy underlying article 31 is, as Mr Drabble asserts, quite clear: it is to ensure that those intent on claiming asylum are not penalised for using false documents or clandestine methods of entry to overcome the increasingly obstructive effect of visa controls and carriers' liability. All this is described in *Adimi's* case [2001] QB 667.

43. As already explained, the Court of Appeal in *Q's* case [2004] QB 36 took account of *Adimi* and article 31 in reaching their decision as to the correct approach to take to section 55 of the 2002 Act. To some extent, therefore, the policy underlying article 31 is seen to be reflected in *Q*. Beyond that, however, it seems to me unnecessary and, as I think, inappropriate to go. Lord Phillips thought that *Adimi* (and implicitly article 31) had "no direct bearing on the issue of construction" in Q (see para 29 above). It is difficult to see how it could have any more direct bearing here.

44. Mr Drabble's problem in attempting to invoke article 31 directly here is not with its requirement that refugees "present themselves without delay to the authorities"; that plainly allows of any reasonable lapse of time before the asylum claim is made and to my mind is, if anything, more favourable to refugees even than the section 55 requirement to claim "as soon as reasonably practicable." Rather it is in establishing that an asylum seeker's disqualification from benefit entitlement if he fails to claim "on his arrival" would constitute the state's imposition of a penalty within the meaning of the article.

45. Your Lordships were treated to extended argument and citation of academic writings on the point. Suffice it to say that the exclusion from benefit (a bonus conferred on asylum seekers by only a very few states) of those failing to claim immediately at the port of entry would

by no means self-evidently amounts to a penalty imposed on account of illegal entry, even putting aside the further difficulty implicit in the French text of article 31(1); "*sanctions pênales*," a term generally thought to connote criminal penalties only. That question should be left for another day.

Result

46. For the reasons given earlier, however, I would allow this appeal by both appellants and make whatever order is accepted by the parties to be appropriate in these circumstances, including an order that the respondent pays the appellants' costs here and below.