Neutral Citation Number: [2009] EWCA Civ 415

Case No: C3/2008/2547

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SOCIAL SECURITY COMMISSIONER
MR COMMISSIONER ROWLAND

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2009

Before :

LORD JUSTICE PILL
LADY JUSTICE SMITH
and
LORD JUSTICE WALL

- -

Between :

Gulhanim Yesiloz (formerly known as Gulhanim Aykac)	**Appellant**
- and -	
London Borough of Camden	**Respondents**
- and -	
Secretary of State for Work and Pensions	**Intervener**

- -
- -

Mr Adrian Berry (instructed by Messrs Fisher Meredith) for the Appellant
Mr Paul Stagg (instructed by **Head of Legal Services, London Borough of Camden**) for the Respondents
Ms Emma Dixon (instructed by **the Solicitor to the Department for Work and Pensions**) for the Intervener

Hearing date : 01 May 2009

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Judgment

Lord Justice Pill :

1. This is an appeal against a decision of the Social Security Commissioner, Mr Commissioner Rowland, dated 23 June 2008, by which he allowed an appeal by the London Borough of Camden ("the respondents") against a decision of an Appeal Tribunal dated 24 January 2007. Permission to appeal was granted by Mummery LJ on a consideration of the papers on the ground that there were compelling reasons for doing so.

2. The Tribunal had held that Ms Gulhanim Yesiloz (formerly known as Gulhanim Aykac) ("the appellant") was entitled to housing benefit under the claim she made on 11 April 2006. The Secretary of State for Work and Pensions ("the Secretary of State") was granted leave to intervene in the appeal to the Commissioner and has also been represented in this court.

The facts

3. The appellant is a Turkish national who came to the United Kingdom at some time in the late 1990s and claimed asylum. She was granted temporary admission under paragraph 21 of schedule 2 to the Immigration Act 1971. A further grant of temporary admission was issued on 18 July 2005. Her partner having left her, the appellant moved into premises in Camden and in April 2006 claimed housing benefit. She indicated that she was in receipt of support under Part VI of the Immigration & Asylum Act 1999 ("the 1999 Act"). She was still an asylum seeker.

4. The claim for housing benefit was rejected on the ground that the appellant had no right to reside in the United Kingdom. She was a person from abroad who was to be treated as not liable to make payments in respect of her home by virtue of regulation 10 of the Housing Benefit Regulations 2006 ("the 2006 Regulations") (SI 2006/213) and therefore not entitled to housing benefit.

5. On a reconsideration, that refusal was maintained and the appellant appealed to the Appeals Tribunal. The appeal was allowed but not on the grounds now advanced to support the claim for housing benefit.

6. On 14 February 2008, the appellant was given exceptional leave to remain in the United Kingdom and a new claim for housing benefit was successful, with effect from 21 February 2008. The present appeal is therefore concerned with entitlement for the period from April 2006 to February 2008.

The statutory scheme

7. Entitlement to housing benefit is regulated by section 130 of the Social Security Contributions & Benefits Act 1992 ("the 1992 Act"). Entitlement is subject, amongst other things, to a liability to make payments in respect of a dwelling in Great Britain which the claimant occupies as her home.

8. Section 115 of the 1999 Act excludes entitlement to benefits, under the 1992 Act, including housing benefit (section 115(1)(j)), to a person to whom the section applies. The section provides, in so far as is material:

> "(3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed.
>
> (4) Regulations under subsection (3) may provide for a person to be treated for prescribed purposes only as not being a person to whom this section applies.
>
> . . .
>
> (9) 'A person subject to immigration control' means a person who is not a national of an EEA State and who-
>
> (a) requires leave to enter or remain in the United Kingdom but does not have it."

On behalf of the appellant, Mr Berry accepted that the appellant was a person subject to immigration control within the meaning of the section. At the material time, she required leave to remain and did not have it.

9. Regulation 2(1) of the Social Security (Immigration & Asylum) Consequential Amendments Regulations 2000 (SI 2000/636), made in exercise of powers conferred by section 115 of the 1999 Act, provides that "a person falling within a category or description of persons specified in part 1 of the schedule is a person to whom section 115 of the Act does not apply". Four categories of persons are specified in paragraphs in part 1 of the schedule. The first three paragraphs may be paraphrased:

(1) A person with limited leave to enter or remain on the basis of there being no need for recourse to public funds but who is temporarily without funds because remittances from abroad have been disrupted and there is a reasonable expectation that the supply of funds will be resumed.

(2) A person with leave to enter or remain upon an undertaking by another person to be responsible for his maintenance and accommodation and the person who gave the undertaking has died.

(3) A person with leave to enter or remain upon such an undertaking who has been resident for at least 5 years from the date of entry or the date on which the undertaking was given, whichever date is the later.

I cite paragraph 4 verbatim: "A person who is a national of a state which has ratified the European Convention on Social and Medical Assistance (done in Paris on 11th December 1953) ["ECSMA"] or a state which has ratified the Council of Europe Social Charter (signed in Turin on 18th October 1961) and who is lawfully present in the United Kingdom".

10. Since it is not claimed that it applies directly, the provisions of ECSMA need not be fully set out. Article 1 provides:

> "Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention

> applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance (hereinafter referred to as 'assistance') provided by the legislation in force from time to time in that part of its territory."

11. Turkey has ratified ECSMA and it follows that the appellant is not disentitled to housing benefit by the provisions of section 115 of the 1999 Act. However, as Mr Berry accepts, persons within part 1 of schedule 1 are not thereby necessarily entitled to state benefits. The effect of paragraph 4 is to disapply an exclusion from receiving such benefits which would otherwise apply to ECSMA nationals lawfully present. It does not confer eligibility to benefit, which is determined under the 1992 Act.

12. Entitlement to housing benefit at the material time was determined by the 2006 Regulations, made pursuant to the 1992 Act. Regulation 10 provides, in so far as is material:

> "(1) A person from abroad who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable . . .
>
> (2) In paragraph (1), 'person from abroad' means, subject to the following provisions of this regulation, a person who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.
>
> (3) No person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless he has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3A).

13. Paragraph (3A) has no application in the present case. Paragraph (3B) of regulation 10 specifies many categories of persons who are not "persons from abroad" within the meaning of the regulation. The categories deal with a variety of personal characteristics, including, for example, categories of persons within council directive 2004/38/EC, categories of persons qualifying under the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219), persons who left Montserrat because of the effect of the volcanic eruption there, and refugees. Persons nationals of ECSMA states do not appear in paragraph (3B) in the categories of persons who are not "from abroad".

14. What is in issue is whether the appellant has a right to reside within the meaning of the 2006 Regulations. It is conceded by the respondents that the appellant is "lawfully present" in the United Kingdom *[Szoma v Secretary of State for Work and Pensions [2006] 1 AC 564]*. Mr Berry accepted that the right to reside is a concept different from lawful presence and that he has to establish that the appellant has a right to reside.

15. The concept of right to reside was introduced in the Social Security (Habitual Residence) Amendment Regulations 2004 ("the 2004 Regulations") (SI 2004/1232) which came into force on 1 May 2004. We were told that they were not materially different from the 2006 Regulations. To establish habitual residence within the meaning of the Regulations, a right to reside must be established. Mr Berry submitted that the right to reside, in regulation 10, should be read so as to include persons with the appellant's characteristics, that is lawful presence, status as an asylum seeker and Turkish nationality.

The Commissioner's decisions

16. The submission by the appellant on which the present appeal turns was also made to the Commissioner, who dealt with it at paragraph 15 of his determination:

> "Mr Berry also submitted that, even if I was against him on his first point, an asylum-seeker in the position of the present claimant does have a right to reside in the United Kingdom. He accepted that not all those lawfully present in the United Kingdom would have such a right and he gave as one instance an overstayer given temporary admission pending deportation who, he accepted, would not have a right of residence. The present claimant he distinguished on the basis that (i) he had a right to remain until his refugee status was determined, that (ii) he had been granted temporary admission (unlike most EEA nationals not exercising rights of residence), that (iii) he was lawfully present as a person who had been temporarily admitted and that (iv) express provision was made in the 2000 Regulations in respect of nationals of states that had ratified ECSMA. Ms Dixon [counsel for the Secretary of State], on the other hand, relied upon *Abdirahman* [*Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657; [2008] 1 WLR 254]. In that case, the Court of Appeal clearly drew a distinction between rights of residence and rights of admission. The latter clearly imply rights to be present (see *Szoma*) and I do not accept that any relevant distinction is to be drawn between asylum-seekers granted temporary admission and EEA nationals exercising rights of admission under EC law and the EEA Agreement. If the former receive more formal decisions from immigration officers, that is only because in the absence of such decisions they do not have any rights of presence without being detained and so they need the decisions as evidence of their rights to be at liberty in the United Kingdom. The rights to be admitted possessed by EEA nationals arise from their possession of an appropriate identity card or passport and so no further evidence or decision is required. The 2000 Regulations are irrelevant because they are concerned with rights to benefit rather than the immigration status of those affected by them. Nothing Mr Berry has submitted has persuaded me to resile from what I said in CIS/1794/2007 (to be reported as R(IS) 3/08). I am quite satisfied that the

> claimant had no right of residence in the United Kingdom before she was granted leave to remain in the United Kingdom."

17. In an earlier case (CIS/1773/2007), the Commissioner had rejected a submission that the claimant was entitled to income support by virtue of article 1 of ECSMA, to which both the United Kingdom and Turkey are parties. The Commissioner concluded that the claimant derived no assistance from ECSMA. The claimant in that case was a failed asylum seeker and the claim was for income support, which falls within the scope of ECSMA (though housing benefit does not).

18. In CIS/1773/2007, the Commissioner accepted that domestic legislation will, where possible, be construed so as not to conflict with the United Kingdom's international obligations. He referred to the conclusion in *Abdirahman* that "a right to reside is more than a mere right to be present". He stated:

> "It is quite impossible to imply an exception in relation to nationals of states that have ratified ECSMA. It is simply wrong to assert, as the claimant's former representatives have in this case, that the purpose of restricting entitlement to those with a right to reside in the United Kingdom was to limit entitlement in relation to those coming from the "A8 states" who acceded to the European Union in 2004. Separate provision was made for them through the Accession (Immigration and Worker Registration) Regulations 2004 (S.I. 2004/1219). The legislation introduced in 2004 had a much wider purpose and was not confined solely to those from within the EEA, although I accept that much of the memorandum published with a report of the Social Security Advisory Committee in Cm 6181 refers to EU citizens, which is no doubt because it was necessary to justify or explain the new legislation in terms of the rights of EU citizens. As Ms Dixon submitted, had it been intended to confine the new legislation to EU citizens, or to exclude from its scope nationals of states that had ratified ECSMA, express provision to that effect would have been made."

Submissions

19. Mr Berry's general submission was that the 2000 Regulations and 2006 Regulations should be considered together as a single regime for regulating benefits such as housing benefits. That is demonstrated, he submitted, by the reference back to the 2000 Regulations, in regulation 10(4) of the 2006 Regulations, when considering the position of a person temporarily without funds within the terms of paragraph 1 of part 1 of the schedule to the 2000 Regulations.

20. That being so, submitted Mr Berry, persons, such as the appellant, identified in paragraph 4 of part 1 to the schedule ("paragraph 4 persons") should have the right to remain which is recognised for persons in paragraphs 1, 2 and 3. Those persons have a right to reside and paragraph 4 persons, lawfully present in the United Kingdom,

should be treated in the same way as those in paragraphs 1, 2 and 3, and regulation 10 of the 2006 Regulations read accordingly.

21. Mr Berry did not rely on the Convention directly. (Since it does not apply to housing benefit, it is difficult to see how he could). His submission was that it follows from inclusion of nationals of ECSMA countries, as reinstated for the purposes of the 1999 Act, with categories of persons now accepted as having the right to reside, that such nationals should have the right to reside within the meaning of regulation 10.

22. There is an entitlement to reside of sufficient strength to entitle the appellant to housing benefit, it was submitted. It was further submitted that a failure to include paragraph 4 persons as persons with a right to reside under regulation 10 of the 2006 Regulations would render paragraph 4 pointless. The exclusion of ECSMA nationals from the categories of persons not regarded as from abroad in regulation 10 must have been accidental. There was no public policy reason, it was submitted, to exclude paragraph 4 persons from having a right to reside.

23. In support of the submission that paragraph 4 persons have a right to reside within the meaning of article 10 of the 2006 Regulations, Mr Berry relied on the consultation documents which emerged from the statutory procedure the Secretary of State was obliged to follow under section 174 of the 1992 Act when making the 2004 Regulations and introducing the requirement of right to reside. Mr Berry submitted that the target was not nationals of non-EEA states that have ratified ECSMA. The concern expressed by the Department for Work and Pensions when promoting the Regulations was the possibility of abuse of the benefits system by nationals of the countries that were to accede to the European Union on 1 May 2004. All the case studies mentioned in the memorandum involved nationals of EEA member states and the existing habitual residence test was not thought to be a sufficient safeguard.

24. In its report under section 174(1) of the 1992 Act, the Social Security Advisory Committee (constituted under section 9 of the Social Security Act 1980) considered that the change would constitute "a major, universal change to the conditions of entitlement for the income-related benefits, affecting not merely A8 nationals [nationals of the accession states] but all potential recipients". They were doubtful whether the existing habitual residence test was "demonstrably ineffective" (paragraph 47).

25. In persisting with the proposals, the Secretary of State acknowledged the relevance to the change of requirement of the accession of new states to the European Union (paragraph 9). However, the Government response, at paragraph 17, provided:

> "The Government believes that it is not unreasonable to expect that, whatever their nationality, people should show that they have a right to reside in the UK before being entitled to benefits funded by the UK tax payer; . . . "

The requirement of a right to reside was, in the event, included in the Regulations.

26. Mr Berry submitted that the decision in CIS/1794/2007 should not be followed because it concerned an EEA national and a failed rather than an existing asylum seeker. The other decisions on which the respondents rely can also be distinguished,

it was submitted. The meaning of right to reside depends on the particular statutory context.

27. Mr Stagg, for the respondents, and Ms Dixon, relied on decisions of this court. In *Abdirahman*, cited by the Commissioner, the court considered the concept of the right to reside in the context of the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326). Lloyd LJ, with whom Sir Andrew Morritt, Chancellor, and Moses LJ agreed, stated, at paragraph 19:

> "It seems to me plain that UK law makes a distinction between a right to reside, which is conferred only on British citizens, certain Commonwealth citizens, qualified persons as defined by the Immigration (European Economic Area) Regulations 2000 and the various additional categories mentioned in the definition of "persons from abroad" such as refugees, those with indefinite leave to remain and those to whom exceptional leave to remain has been granted, on the one hand, and any lesser status, in particular that of an EEA national who is in this country having entered lawfully, has committed no breach of immigration law, but is not a qualified person and therefore does not enjoy the benefit of regulation 14 which confers a "right to reside". Logically, if an EEA national has to be a qualified person to have conferred on him a right to reside, it is not a proper reading of a reference to "right to reside" under UK law to extend it to an EEA national who is not a qualified person."

Lloyd LJ accepted, at paragraph 49, that the Secretary of State's response to the Advisory Committee's report was admissible to show the purpose of the Regulations (paragraph 25 above).

28. In *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225, this court considered, in the context of rights and duties under the National Health Service Act 1977, the position of a failed asylum seeker who had been granted temporary admission and had lived in the United Kingdom for at least a year. In a judgment with which Lloyd LJ and Rimer LJ agreed, Ward LJ agreed with the distinction drawn in *Abdirahman* between those who may be lawfully present in the United Kingdom and those who have a right to reside here. The statutory expressions under consideration were whether the claimant was "ordinarily resident" and whether he was "lawfully resident". Ward LJ stated, at paragraph 61:

> "While they [asylum seekers] are here under sufferance pending investigation of their claim they are not, in my judgment, ordinarily resident here. Residence by grace and favour is not ordinary."

At paragraph 65, Ward LJ considered the concepts of lawful presence and lawful residence. He stated:

> "One resides here lawfully when one has the right to do so. An indulgence is granted to a claimant for asylum, not a right, and

> in this context the word 'lawful' means more than merely not unlawful but should be understood to connote the requirement of a positive legal underpinning. Being here by grace and favour does not create that necessary foundation."

Conclusions

29. While the cases cited do not directly impinge on the current statutory scheme, they demonstrate that a clear distinction is to be made between lawful presence on the one hand and a right to reside, or ordinary residence or lawful residence on the other. Lloyd LJ's analysis of the difference between a right to reside and any lesser status is of general application and a transfer is not easily to be inferred. Careful analysis of the appropriate instrument is required to decide whether an applicant has acquired the right to reside.

30. The consultation documents do not, in my view, assist the appellant. Both the Secretary of State and the Advisory Committee clearly considered that the effect of the 2004 Regulations would not be confined to nationals of the accession states. The broader effect of the proposed right to reside requirement was acknowledged.

31. Whether the appellant has a right to reside in the United Kingdom depends on the construction of the appropriate statute or statutory instrument, in this case regulation 10 of the 2006 Regulations. The appellant must establish that she has a right to reside. Otherwise she is a "person from abroad" and not entitled to housing benefit. Regulation 10(3B) specifies many categories of persons who are not "persons from abroad". It was, and was intended to be, a comprehensive list. The need, in this context, for a clear and specific classification is obvious.

32. The categories do not include nationals of states party to ECSMA. In those circumstances, such persons cannot be said to have a right to reside either because of their position in the schedule to the 2000 Regulations, or because the introduction of the concept of right to reside was primarily aimed at nationals of A8 states, or because there is no powerful reason in public policy for depriving them of the right to reside, or by reason of any combination of those factors. The inclusion of paragraph 4 in part 1 to the schedule to the 2000 Regulations, whatever its purpose, does not, in my view, carry for paragraph 4 persons the implication of entitlement to a right to reside.

33. The points relied on are straws in the wind and, well though Mr Berry has attempted to make the most of them, they do not permit the words "right to reside" in regulation 10 of the 2006 Regulations to be construed so as to include the appellant. I agree with the reasoning and conclusions of the Commissioner. Having regard to the authorities, specific provision would be required if a person with the appellant's characteristics is to be held to have a right to reside.

34. I would dismiss the appeal.

Lady Justice Smith :

35. I agree.

Lord Justice Wall :

36. I also agree.