C4/2004/0930

Neutral Citation Number: [2004] EWCA Civ 1239
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
(ADMINISTRATIVE COURT)
(MR JUSTICE COLLINS)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 16 September 2004

B E F O R E:

LORD JUSTICE BROOKE
(Vice President of the Court of Appeal, Civil Division)

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R (ON THE APPLICATION OF THE REFUGEE LEGAL CENTRE)
Claimant/Applicant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant/Respondent

- - - - - - -

(Computer-Aided Transcript of the Palantype Notes of
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MR MICHAEL FORDHAM (instructed by Public Law Project, London, N7 6NE) appeared on behalf of the Applicant
MR ROBIN TAM (instructed by the Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE BROOKE: In this matter Mr Michael Fordham, who appears pro bono for the Refugee Legal Centre, is applying for a protective order in relation to his client's costs, in advance of what is scheduled as a substantive hearing before the full court next week, when it will be determined whether his clients should have a protective order in relation to their costs for the full hearing of the appeal which is, as I understand it, listed before the full court in early October.

2. When Sedley LJ granted the Centre permission to appeal, he said:

> "For the reasons canvassed in the skeleton argument there is a respectable prospect of success. But the issues are in any event such as to merit the Court of Appeal's attention."

I made it clear during the course of argument that I shared that assessment.

3. The underlying litigation relates to a fast track pilot scheme to deal with certain asylum claims which has been running at the Harmondsworth Removal Centre since March 2003. Under this scheme a choice is made of asylum seekers who are considered to have straightforward claims and who could be detained at the Centre pending a quick decision. It is said that there is a sharp focus on high quality decision-making and on site access to legal advice and that, as far as possible, the same case worker and the same legal representative should be involved from start to finish. The converse position has been perceived by many with experience of our asylum arrangements as one of the weaknesses of the previous arrangements. Influential reports have been published from time to time laying stress on the importance of the quality of the initial asylum decision and the way in which that decision should be reached by a process which is much more cooperative than confrontational in contrast to what has unhappily been the past experience in this jurisdiction.

4. For the purposes of the scheme the Home Office has been selecting single male applicants from countries it believes to be those where in general there is no serious risk of persecution. There is a screening process to identify those suitable for the fast-track treatment. Collins J said on the evidence that 58 per cent of them come from the port of entry and 42 per cent are in-country referrals, many of whom are illegal entrants. They include some overstayers and others who have been in this country for some time and claim asylum only when they are discovered in order to avoid their removal.

5. Those applicants who are considered suitable are taken to the Harmondsworth Centre. Before their arrival a duty solicitor, or the applicant's legal representative, if he has one, is told of the estimated time of arrival at Harmondsworth and also the time that the all-important interview will take place. Normally the interview will take place in the afternoon following the day of arrival. The scheme now, which has been refined in the light of experience, is that the representatives can take instructions in the morning when an interpreter is provided, if necessary, as is often the case.

6. When the asylum seeker arrives at the centre there is an induction interview at which he or she is told the time of the interview with the Home Office

representative and that legal representation will be provided free of charge if no representation has already been arranged. The arrangements have been adjusted since July 2003 because it was appreciated that the asylum interview on the day of arrival provided for too tight a timescale.

7. The evidence shows that the Home Office has been picking officials with experience to conduct the interviews, which last between 1¾ hours and 2¾ hours. The officials are given discretion as to how to conduct the interviews and the extent to which breaks may be needed. They are told in their instructions that they must make sure that the asylum seeker is fit and well, adopt a sensitive approach, be prepared to be flexible, accede to any reasonable application for a break or for further time, and be aware that the applicant may have to be taken from the fast track. It may be that medical evidence or other evidence has to be sought, or that the claim turns out to be rather less straightforward than first appeared. From what evidence I have seen so far it is said that, by 5 September 2003, 18 had been taken from the fast-track either by the official conducting the interview or subsequently by the direction of an adjudicator.

8. The asylum seeker arrives on day 1. On day 2 he takes part in the process by which he first has a long interview with a legal representative whom he has probably never met before. Very often there is a problem of a language barrier. The interview with the Home Office takes place on the afternoon of day 2 and the decision is made on day 3. It is usually a refusal. Thereafter there is a telescoped timetable for appeals which the judge set out in his judgment: very rapid appeal to an adjudicator and a fairly rapid process of appeal to the Immigration Appeal Tribunal, if permission to appeal is granted, culminating (if the applicant wishes to take it that far) with a statutory review for which there is a ten day opportunity to make the application. The evidence shows that a High Court judge deals with that application within a week or so. If the refusal is repeated throughout the system, the procedure may take five weeks and then the asylum seeker will be deported.

9. Ninety beds were originally allotted to the scheme. Since October 2003 there have been 120 beds. The evidence before the judge showed that out of 529 cases there have been 528 refusals. That does not include those who are removed from the fast track. Out of 418 appeals adjudicators have dismissed 412, and out of 182 applications for permission to appeal to the Immigration Appeal Tribunal 172 were refused. The judge formed the view that these statistics showed that the scheme was working as well as intended, and that the Home Office correctly identifies those claims which were likely to be straightforward. He referred to the way in which the adjudicator could divert a case from the fast-track if he considered it appropriate.

10. Collins J set out in his evidence the concerns which had been expressed by those with great experience in representing asylum seekers. The evidence tends to relate only to the early days of the scheme. In paragraph 9 of the judgment the judge sets out the history of the early discussions:

> "In August [2003], responses to a questionnaire which included the question: 'Overall are you happy with the operation of fast

> track? If no, please give reasons' showed that 17 said no and 5 said yes (or "not applicable"). The reasons for dissatisfaction varied. 12 said the timescale was too short and led to a real difficulty in putting forward a proper case on behalf of the client."

All that the Refugee Legal Centre is seeking is a slightly elongated period so that the all important interview with the Home Office representative does not take place on the same day as a time-limited interview is taking place in the morning.

11. Paragraph 10 of the judgment sets out the concerns of the Refugee Legal Centre as to timings. Five participant firms have expressed the concern that the timescales currently operating are insufficient to properly to prepare a client's case. In practice it is currently not possible for solicitors to see their clients except immediately before the asylum interview, so that the asylum seeker is subjected to a very long and stressful day.

12. The judge, who has vast experience in this area of law, considered all the evidence and decided that he could not reach a conclusion that the system was unfair as a system. He said at the end of his judgment:

> "I recognise there are real concerns by those who work under it that the scheme has the potential for unfairness. I am satisfied that anything quicker would be impossible to justify but I am equally satisfied on the material I have had put before me that the present system is not unlawful."

13. The trustees of the Refugee Legal Centre, who have comparably vast experience of the operation of the asylum system, considered that it was not only appropriate but necessary to challenge the fairness of this entirely novel arrangement in the courts. When I say "entirely novel arrangement" I am aware of the arrangements which did stand up to judicial scrutiny at Oakington. Those arrangements were somewhat different and, for entirely understandable reasons, the timescale there is a little longer. On the face of it this is a very fast judicial process. Recent case law shows how much importance has to be attached to the quality of the initial decision and the comparative difficulty of shifting an initial decision on appeal. It is important that those who represent asylum seekers should feel that they have had a proper opportunity to take instructions and are not operating against the clock.

14. It is against that background, and against the concerns which have been expressed not only by the Refugee Legal Centre but by a number of other organisations which have great experience in representing asylum seekers, that this challenge was initially mounted. The Home Office undertook not to ask for costs if the application failed, as in due course it did. The Refugee Legal Centre seems to have been under the impression that an undertaking of that kind would be continued into the Court of Appeal if the Court of Appeal considered the case fit for appeal. It is clear from the correspondence I have seen that that may have been an over optimistic approach.

15. I can see nothing wrong in the stance that the Secretary of State has taken, namely that he should be able to argue that the Refugee Legal Centre has had one bite of the cherry before an experienced judge in this field which should be enough, and that the normal rules as to costs should follow on the appeal. Mr Tam, who appears for the Secretary of State, uses such flowery language as "throwing the ordinary cost rules to one side" although there are a number of examples very recently where the courts have used the more flexible jurisdiction which is given them under the Civil Procedure Rules to make costs orders of one kind or another which would not have been thought of in former days.

16. All I am concerned with is whether the hearing, which is scheduled for next week, should take place with a protective costs order so that the trustees will be protected against any order that the Home Office may seek supposing they failed to get the protective costs order at the substantive hearing for which they are looking. I have read with care the witness statement of Mr Stoyle, the Chief Executive of the Refugee Legal Centre. He has set out with great clarity the way that the Centre is funded. It was first funded by the Home Office and since 1 April 2004 it has been funded by the Legal Services Commission who has provided it with four "not for profit" contracts. It also funds their litigation work. I am satisfied on the evidence I have seen that the trustees reasonably consider that it is simply not safe for them to expose their limited funds to the risk of an adverse costs order.

17. Mr Tam wishes to kill this process at birth. He asks me to start with the pre-CPR judgment of Dyson J as if this had the force of a statute. He says that Dyson J set out stringent tests as to the circumstances in which the court can make a pre-emptive costs order, and he submits that it would be quite wrong for the court to contemplate the Secretary of State having to defend these novel procedures before this court in any litigation forum in which he might not be able to recover his costs from the other side -- even from a Centre which is an independent, not for profit, charity, which has overall responsibility to ensure the delivery of quality legal services to those seeking human rights protection; not a political campaigning organisation like CND. Mr Tam was wise, or unwise, enough to show me a judgment relating to CND as though the conclusion in that case could be carried straight across to this situation. The Refugee Legal Centre is prima facie looking after the interests of vulnerable people against all the resources of the state and doing its best to ensure that there is a fair process before a decision is taken which means they have to be deported.

18. Mr Tam, unabashed and on instructions, has submitted that the Secretary of State is bound to win this appeal, that the procedure at Harmondsworth is extremely fair, and that it is so flexible that any unfairness in any unusual case can be ferreted out. At this stage his submissions became less convincing. He submitted that there was no reason why the ordinary judicial review scenario should not apply whereby individual asylum seekers who feel that they are being treated unfairly should obtain a legal aid certificate and bring proceedings in which there will be no prospect of the Home Secretary recovering his costs even if the matter has not been settled by compromise before it came to a hearing.

19. If the challenge is to systemic unfairness, as this challenge is, it would be necessary to have 10 or 12 individual cases for the court to look at in order to test whether the system is generically unfair. That would mean 10 different legal aid certificates, perhaps 10 different solicitors' firms, and counsel and solicitors acting on terms on which they now act in legal aid cases, so that if they win the Home Office would be liable to pay the costs of lawyers acting in a legal aid case who are successful at reasonable and not restricted rates of pay. But Mr Tam submits that this is the appropriate way to go forward and not by the route that the Refugee Legal Centre has selected.

20. I told Mr Tam during the course of argument that I was less than convinced that this would be a satisfactory way of resolving issues relating to systemic unfairness if they can be substantiated by the evidence. Mr Tam says that the proof of the pudding is in the eating and, although he accepts there is a lot of disquiet among those who represent the applicants at Harmondsworth, he says that in practice there have been virtually no complaints, and that any complaint of unfairness can be taken out of the system because the scheme is flexible and staff have their instructions to be on the look out for potential unfairness.

21. I cannot decide anything this afternoon except whether, in my judgment, it is appropriate to make a protective costs order for next week's hearing, when the full court will have the opportunity of considering the appropriate criteria for making a protective costs order under the CPR costs regime. It can look at the ways in which more flexible costs orders have been made in recent months than ever took place in pre-CPR days, with the court concerned to pursue above everything else the overriding objective in CPR 1.1 (see for example **King v Telegraph Group Ltd** [2004] EWCA Civ 613 and **R (Davies) v Birmingham Deputy Coroner** [2004] EWCA Civ 543 at [44]-[48]; [2004] 3 All ER 543). This case gives the court a really good opportunity to consider this important point. Up to now there have been two decisions at first instance, and the principles underlying Dyson J's instance at first instance in pre-CPR days have been applied by this court, but without any careful scrutiny as to whether they are the appropriate principles on which the court should exercise its jurisdiction. In the course of argument there have been recent decisions of this court which portray a more flexible approach to the making of costs orders of one kind or another as fairness demands then was necessarily the vogue in 1998.

22. All I have to decide is whether it is appropriate for next week's hearing to be protected by a protective costs order. I am told that counsel and those who instruct them are acting pro bono in a matter of public interest which the trustees in the Centre regard as important to bring before the Court of Appeal. There would be no question of their asking for an order for costs against the Secretary of State if they are successful in this application. It is against that background that I am satisfied that it would be appropriate to make a protective costs order protecting the claimant in relation to the costs of next week's application should they lose, on the clear understanding that they would not be looking for their costs against the Secretary of State should they be successful on that application.