

C1/2003/0234

Neutral Citation Number: [2003] EWCA Civ 1673
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT
(Mr Justice Silber)

Royal Courts of Justice
Strand
London, WC2

Tuesday, 28 October 2003

B E F O R E:

THE VICE CHANCELLOR
(Sir Andrew Morritt)

LORD JUSTICE BUXTON

LORD JUSTICE LAWS

AHMET DOGAN

Appellant/Interested Party

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

First Respondent/Claimant

CHIEF ASYLUM SUPPORT ADJUDICATOR

Second Respondent/Defendant

(Computer-Aided Transcript of the Stenograph Notes of
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Official Shorthand Writers to the Court)

MR SIMON COX (instructed by Hackney Community Law Centre of London) appeared on behalf of the Appellant

MR PUSHPINDER SAINI (instructed by Treasury Solicitor) appeared on behalf of the First Respondent

The Second Respondent was not represented and did not attend

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE LAWS: This is an appeal against the decision of Mr Justice Silber given in the Administrative Court on 25 October 2002 when he acceded to the Secretary of State's claim for judicial review and made an order to quash a determination of the Chief Asylum Support Adjudicator which, in its turn, had been made on 17 January 2002. Permission to appeal to this court together with its necessary extension of time was granted by Lord Justice Sedley on 20 May 2003.
2. The case raises a question of some importance as to the true construction of Section 103 (2) of the Immigration and Asylum Act 1999. It is convenient to introduce the legislation before describing the short facts and the course of the proceedings. Section 103 falls within Part VI of the 1999 Act which is cross-headed Support for Asylum Seekers. Its background was succinctly explained by the judge below as follows:

"4 Asylum seekers almost invariably arrive in this country without any assets and they cannot legitimately earn any money until their asylum claims have been determined. This case is concerned with the basis on which asylum seekers are to be treated in the interim. The Secretary of State, acting by the National Asylum Support Service ('NASS'), administers the system of support for asylum seekers under Part VI of the 1999 Act. This is a new system, which provides centralised support for asylum seekers who previously had to rely upon piecemeal provision by local authorities under general welfare legislation. One of the central aims of this new system of asylum support is to ensure that there is fair dispersal of asylum seekers around the country and, in particular, to end the concentration of asylum seekers in the London region and the port cities in South-East England. The new system gives the Secretary of State power to give support to asylum seekers, subject to conditions that they move to certain specified dispersal areas so as to enable him to ensure that asylum seekers are dispersed."

3. The principal provision empowering the Secretary of State to provide such support is Section 95. I need only read subsection (1), parts of subsections (5) and (6) and subsection (9). Section 95 (1):

"(1) The Secretary of State may provide, or arrange for the provision of, support for -

- (a) asylum seekers, or
- (b) dependants of asylum seekers,

who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.

.....

(5) In determining, for the purposes of this section, whether a person's accommodation is adequate, the Secretary of State -

.....

- (b) may not have regard to such matters as may be prescribed for the purposes of this paragraph or to any of the matters mentioned in subsection (6).

(6) Those matters are -

.....

(d) the location of the accommodation.

.....

(9) Support may be provided subject to conditions."

The policy of dispersal is reflected in Section 97 (1) (b) and (2) (a). Section 97 (1):

"(1) When exercising his power under section 95 to provide accommodation, the Secretary of State must have regard to -

.....

(b) the desirability, in general, of providing accommodation in areas in which there is a ready supply of accommodation

(2) But he may not have regard to -

(a) any preference that the supported person or his dependants (if any) may have as to as the locality in which the accommodation is to be provided

Section 98 provides, in part:

"(1) The Secretary of State may provide, or arrange for the provision of, support for -

(a) asylum seekers, or

(b) dependants of asylum seekers,

who it appears to the Secretary of State may be destitute.

(2) Support may be provided under this section only until the Secretary of State is able to determine whether support may be provided under section 95."

Section 102 (1) provides:

"(1) There are to be adjudicators to hear appeals under [Part VI]."

I go to the pivotal section, Section 103 (1):

"(1) If, on an application for support under section 95, the Secretary of State decides that the applicant does not qualify for support under that section, the applicant may appeal to an adjudicator.

(2) If the Secretary of State decides to stop providing support for a person under section 95 before that support would otherwise have come to an end, that person may appeal to an adjudicator."

4. Section 103 (3), which I need not read, sets out the adjudicator's powers on appeal. I should say that an appeal under Section 103 (1) has been called - at any rate, in the argot of this litigation - a "non-qualification appeal" and an appeal under Section 103 (2) a "stoppage appeal". A third category of appeal called a "location appeal" is contemplated by Section 103 (7) which provides:

"The Secretary of State may by regulations provide for decisions as to where support provided under section 95 is to be provided to be appealable to an adjudicator under this Part."

However, and this is of some little importance given the arguments in the case, no regulations have to date been made under Section 103 (7).

5. In deference to Mr Cox's submissions on behalf of the appellant, I go to Section 122 (3) which provides:

"If it appears to the Secretary of State that adequate accommodation is not been provided for the child,"

I interpolate, in summary, that is a child of an asylum seeker,

"he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, adequate accommodation for the child as part of the eligible person's household."

Schedule 8 to the statute, paragraph 7, provides:

"(7) The regulations may make provision for the Secretary of State to take into account, when deciding -

(a) whether to provide, or to continue to provide, support under section 95, or

(b) the level or kind of support to be provided,

the extent to which any condition on which support is being, or has previously been, provided has been complied with."

Paragraph 8 (1) provides:

"(1) The regulations may make provisions for the suspension or discontinuance of support under section 95 in prescribed circumstances (including circumstances in which the Secretary of State would otherwise be under a duty to provide support)."

6. Before leaving the statute I should offer a word of explanation concerning non-qualification appeals under Section 103 (1). Section 95 (3) to (8) explain what is meant by "destitute" for the purposes of the section. I need not read them out beyond the citations I have already given from subsections (5) and (6). The Secretary of State might, no doubt, decide in a particular case that the asylum seeker is not destitute and so decline support. In that case a

non-qualification appeal would lie under Section 103 (1). But it would also lie if the Secretary of State concluded that the claimant was not an asylum seeker within the meaning of that expression given in the interpretation section, that is Section 94 (1). It defines "asylum seeker" as -

" a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined."

There is provision which I need not read as to when a claim will be taken to have been determined. The Secretary of State might have concluded for one reason or another that the claimant before him does not fall within this definition and then, too, there would be a non-qualification appeal under Section 103 (1).

7. To understand the controversy as to the construction of Section 103 (2) I should turn to the short facts of the case. Ahmet Dogan and his wife are Turkish Kurds who arrived in the United Kingdom on 11 October 1999 and claimed asylum. They have a young son born here. Mr Dogan was represented as an interested party in the proceedings which ultimately came before Mr Justice Silber, and is the appellant before us. From May 2001 NASS provided temporary support for the appellant and his family under Section 98 (1) of the 1999 Act by way of accommodation and vouchers. That support was provided in Luton. The appellant's asylum claim had been refused by the Secretary of State on the merits, but he was at this time, as I understand it, awaiting the result of an outstanding appeal against that decision so there is no controversy but that he fell within the definition of "asylum seeker".
8. On 21 December 2001 NASS wrote to the appellant at his Luton address. They wrote three letters of that date, only two of which were before the Chief Asylum Support Adjudicator and Mr Justice Silber. All three dealt with the appellant's claim for support under Section 95. The first letter recorded the appellant's request to return to London and be supported there. The last three paragraphs of that letter read:

"Having fully considered your and your family's circumstances the Secretary of State is satisfied that it is reasonable to allocate you accommodation in a dispersal area where there is a ready supply of accommodation.

The enclosed letter explains the support that has been made available for you in a dispersal area, and the arrangements for you to travel to the new accommodation. Your local authority has also been informed of the arrangements.

You should note that support will only be available to you in a dispersal area and that, should you fail to travel, you will not receive any further support at your current address."

9. The reference there to the enclosed letter must be a reference to the letter not before the judge below. It stated that the appellant's application for accommodation and subsistence had been approved and identified the accommodation at an address in Liverpool. The letter contained these passages:

"Please note that accommodation is provided on a no-choice basis. If you fail to accept it, there should be no expectation that an alternative will be offered."

Later, on the same page it reads:

"Warning: The accommodation that you are currently being provided with is

only available to you until the date that you are required to travel.

Failure to travel when required is a breach of the terms of your agreement with NASS."

The reference to "your agreement with NASS" is to a document which includes under the heading "When we offer you accommodation":

"When you receive notice about the accommodation we have offered you, you must move to the accommodation in line with the travel instructions we give you. You must not delay your journey or break your journey without a good reason.

If you do not follow these conditions, we may suspend or end the support we give you."

10. The remaining letter of the three gave details of the travel arrangements which had been made which were by coach from Luton to Liverpool on 3 January 2002. I should read the conclusion:

"You and your dependants are expected to travel as arranged. If you do not, or are ill and unable to do so, you must inform us immediately and let us know the reason. A decision will then be made on the appropriate action to be taken and whether new travel arrangements will be made for you."

11. It seems that the appellant received two weeks' worth of vouchers along with the letter of 21 December 2001. This constituted further support in Luton for the period before 3 January 2002 which was the date fixed for travel. This support was necessarily provided under Section 95, not Section 98, having regard to the terms of Section 98 (2), which I have read and need not repeat. In the event, the appellant and his family did not travel to Liverpool on 3 January 2002 or at all. Support at Luton was withdrawn, as I understand it, on instructions from NASS.

12. The appellant launched an appeal to an Asylum Support Adjudicator. The nature of the appeal was later described by the Chief Asylum Support Adjudicator in her determination of 17 January 2002 as follows:

"(2) The appellant, a 29 year old citizen of Turkey appeals against the decision of the Secretary of State who on 21 December 2001 decided to discontinue support to the appellant on the grounds that he has breached a condition of his support by failing to travel to Liverpool. The Secretary of State disputes that a decision to discontinue support has been made and submits that in the circumstances I have no jurisdiction to hear this appeal."

That description is not perhaps an accurate reflection of the events which had happened but it shows, as was the case, that there was a substantial issue before the Chief Asylum Support Adjudicator as to a breach of her jurisdiction.

13. The appeal was purportedly mounted under Section 103 (2). The Chief Asylum Support Adjudicator held that on the facts and on a proper construction of Section 103 (2) she possessed jurisdiction to hear the appeal which thus was classified as a stoppage appeal. On the merits she allowed the appeal in part, holding that the appellant had not been given adequate notice of the proposed dispersal to Liverpool, and remitted the case to the Secretary of State for further arrangements to be made for the dispersal of the appellant and his family.

14. The Secretary of State sought judicial review of this decision, not to assert a case on the individual merits or demerits, but in order to obtain an authoritative ruling as to the extent of the jurisdiction under Section 103 (2). We are told this morning by Mr Cox that the appellant has now been accepted as a refugee. Accordingly he has no continuing personal interest in these proceedings. He had none before Mr Justice Silber because, as I understand it, at that time he had been given exceptional further support under Section 95 notwithstanding that he remained in the London area. In the result the proceedings have been conducted before us essentially on a public interest basis, that is to say it is accepted - and, for my part, I would accept - that the proceedings are an appropriate vehicle in which to determine, as a matter of principle, the scope of the appeal jurisdiction conferred by Section 103 (2). The Chief Asylum Support Adjudicator was respondent to the application at first instance and was represented by counsel who advanced substantive argument before Mr Justice Silber. As I have said, the appellant was represented before him as an interested party. For reasons which I respect but need not describe, the Chief Asylum Support Adjudicator has felt inhibited in pursuing a substantive case in this court and has taken no part in the appeal. The issue on the appeal has thus been joined between the appellant, effectively acting as a public interest claimant supported by the Legal Services Commission, and the Secretary of State.
15. Now I will address the issue of the true construction of Section 103 (2). The position of the Secretary of State has not always been consistent as between the proceedings before the Chief Asylum Support Adjudicator and the court proceedings. And the construction in the Secretary of State's favour, which ultimately prevailed before the judge, seems to have been put forward by the judge himself. But it is not profitable to go into whatever vacillations there may previously have been. We are faced with a pure question of statutory interpretation, and all that matters is what construction is right.
16. I will re-read Section 103 (2) for convenience:

"(2) If the Secretary of State decides to stop providing support for a person under section 95 before that support would otherwise have come to an end, that person may appeal to an adjudicator."

This is what the Chief Asylum Support Adjudicator briefly said about it:

"13 The words 'stop providing support' must be given their ordinary everyday meaning. This must therefore include suspension or discontinuation of support. The fact that in this and other similar cases the Secretary of State argues that he has not decided to discontinue support but merely to suspend it until the open offer of accommodation if taken up in a dispersal area, does not entitle the Secretary of State to deprive the appellant of his right of appeal and to have his reasons for failing to travel tested by an independent and impartial tribunal."

The essence of the judge's conclusion, disagreeing with the Chief Asylum Support Adjudicator, is to be found at paragraphs 32 and 33 of the judgment:

"32 a decision to stop support to an asylum seeker only gives rise to an appeal under section 103 (2) if before the decision under challenge to stop payment is made, the claimant already possessed an existing right to section 95 support which then had been prematurely terminated by the decision under challenge in the appeal proceedings. The claimant could only have possessed that right to pre-existing section 95 support if he or she had already and previously been granted to him or her."

I interpolate, there seems to be a corruption in the text there. The judge continued:

"32 In other words, the right of appeal under section 103 (2) of the 1999 Act for a stoppage appeal only arises if the asylum seeker can show that two separate decisions had been made, namely a first one to grant it and then a second later one, being the one being challenged, to terminate it prematurely.

33 So an asylum seeker cannot pursue a stoppage appeal if the Secretary of State only makes *one* decision granting either support for a limited period of time or support subject to a condition, such as that it will only be provided if the claimant moves to a particular area

17. The interpretation of Section 103 (2) must necessarily focus on the words "if the Secretary of State decides to stop providing support before that support would otherwise have come to an end". It is a fundamental premise of the appellant's argument, as Mr Cox confirmed before us this morning, that the circumstances in which Section 95 support "would otherwise have come to an end" are, and are only, circumstances in which the Act itself requires that support be terminated, that is to say when the claimant for support ceases to be an asylum seeker within the meaning given by Section 94 (1). So it is contended that an appeal lies in any case where support is ended in any other circumstances whatsoever.
18. In my judgment, this is a fundamentally erroneous approach to these statutory provisions. There is nothing in Section 103 (2) to suggest that the words "would otherwise have come to an end" refer only to the statutory termination of support fixed by reference to the definition of "asylum seeker". The Secretary of State is perfectly at liberty to provide the support subject to conditions, so that where there is a breach of condition the person's support will end automatically, or may end pursuant to a further discretionary decision. I do not think these possibilities are in the least constrained by Schedule 8 (7) and (8) which I have read. In either event, it cannot be said that support has been stopped before it would "otherwise have come to an end". The imposition of the condition contemplates that support will or at least may be stopped by the original intention of the Secretary of State if the condition is not fulfilled.
19. The possibility that the stoppage for breach of condition may not be automatic but may depend on the Secretary of State's discretion cannot help the appellant's argument, as, in fairness, Mr Cox was inclined to concede this morning. The support was always liable to come to an end if the condition was violated.
20. The position taken by the appellant and, it seems, by the Chief Asylum Support Adjudicator in substance would allow appeals against the imposition of conditions, or at any rate some conditions, imposed under Section 95 (9). But it is obvious to my mind that the statute has not provided for any such appeal. In a case like the present where the condition in question requires the claimant to re-locate, the appellant's position as to construction in substance entails the availability of a location appeal although it is plainly the legislature's intention that such an appeal will only be accorded to asylum seekers when regulations are made under Section 103 (7). As I have said, none have so far been made. In fairness, Mr Cox disavowed any intention on the facts of this case to run a location appeal, but the point is one of principle and analysis. In truth, as I see it, the legislature in Part VI of the 1999 Act has advisedly provided for specific limited rights of appeal.
21. The appellant's case, with respect to Mr Cox's skilful argument, wholly undermines that approach. If one takes into account the right of appeal given by Section 103 (1) as well as Section 103 (2) right of appeal, Mr Cox's argument ultimately yields a conclusion, or something not far distant from it, that there is a general right of appeal against the Secretary of

State's decisions under Section 95. That seeks to re-write the statute, and that is elementarily an illegitimate exercise. These conclusions are unaffected in my judgment by any appeal to the operation of Section 122 relating to children or any distinction between the offer and provision of support.

22. The appellant contends - briefly this morning, but with somewhat more substance in Mr Cox's skeleton argument - that the construction adopted by the judge would allow the Secretary of State to "structure" (as it is put) his decision so as to exclude appeal rights simply by providing in any given case that the provision of support would be time limited, say, for one month or one week, and there would then be no appeal against the time limit. There is nothing in this. Apart from anything else, the Secretary of State is bound by the general law to act fairly, reasonably and in good faith.
23. In my judgment the judge below arrived at the correct conclusion. Section 103 (2) contemplates that Section 95 support has earlier been provided to the claimant and the Secretary of State then stops it - prematurely for whatever reason - before it would otherwise have been stopped.
24. For all these reasons I would dismiss this appeal.
25. LORD JUSTICE BUXTON: I agree entirely. I would add one footnote which is that, as pointed out by the judge and by my Lord, the appellant's argument involves in effect saying that the letter of 21 December 2001 - which said,

" support has been made available for you in a dispersal area, and arrangements for you to travel to the new accommodation

You should note that support will only be available to you in a dispersal area and should you fail to travel, you will not receive further support at your current address" -

at one and the same time both reported a decision to grant support under Section 95 and also reported a decision to stop providing such support: so as to bring into operation Section 103 (2). That approach cannot possibly have been right, and demonstrates the difficulty of constructing out of this statute what is in effect sought to be a general right of appeal against decisions by the Secretary of State in respect of conditions it imposes on grants of support.

26. For the reasons my Lord has given in detail, the Act does not so provide. It provides only the limited rights that my Lord has set out.
27. THE VICE-CHANCELLOR: I agree. The appeal is dismissed for the reasons given by Lord Justice Laws and also by Lord Justice Buxton.

Order: Appeal dismissed. No application for costs, those of appellant subject to a detailed assessment. Permission to appeal was refused.