

CO/7578/2006

Neutral Citation Number: [2006] EWHC 3147 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Wednesday, 29 November 2006

B E F O R E:

SIR MICHAEL HARRISON
(Sitting as a Deputy High Court Judge)

THE QUEEN ON THE APPLICATION OF AW (KENYA)
(CLAIMANT)

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(DEFENDANT)

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MR ALASTAIR MACKENZIE (instructed by Pierce Glynn) appeared on behalf of the
CLAIMANT

MS ELIZABETH LAING (instructed by Treasury Solicitor) appeared on behalf of the
DEFENDANT

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

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SIR MICHAEL HARRISON:

Introduction

1. The short point in this case is whether the defendant has power under section 4(2) of the Immigration and Asylum Act 1999 (the 1999 Act) to provide the claimant with clothing for herself and her child.

Facts

2. The relevant facts can be shortly stated. The claimant is a Kenyan national, aged 20, who is a failed asylum seeker. She claimed asylum in July 2002 and her appeal rights were exhausted in June 2003. Subsequently, in March 2004 she made further representations, which she asked the defendant to treat as a fresh asylum claim based on fresh evidence. The defendant has not yet decided whether to treat them as a fresh asylum claim.
3. Since December 2004, the claimant has been provided with accommodation and assistance by the defendant, through the National Asylum Support Service (NASS), under section 4 of the 1999 Act. In December 2005, she gave birth to a son. She receives £35 per week for herself and £35 per week for her son in the form of Tesco vouchers. Those vouchers are restricted to the purchase of food and toiletries. The claimant states that her clothes are worn out and that she does not have warm clothing for the winter for herself or her child.
4. In June 2006, her solicitors wrote to the defendant with a list of the clothing that she urgently required. The defendant's initial response was that she could buy clothing out of her vouchers, but the defendant's present position is that, if he had power to provide clothing, it would be in addition to the vouchers. However, although it is accepted that clothing is an essential living need, the defendant maintains that it does not have the power to provide clothing under section 4 of the 1999 Act. The claimant seeks a declaration that he does have such a power.

Statutory Framework

5. I turn then to consider the statutory framework relevant to the question whether the defendant does have power to provide clothing under section 4 of the 1999 Act.
6. The 1999 Act contains two different systems for what I will call asylum support. The first is under section 4 for failed asylum seekers, and the second is under sections 95 and 96 in Part VI of the Act for asylum seekers whose claims have not yet been determined. Part VI of the Act is headed: "Support for Asylum Seekers". Section 95 is headed: "Persons for whom support may be provided". It states as follows:

"95(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.

...

(3) For the purposes of this section, a person is destitute if-

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

7. Section 94(1) defines an asylum seeker as a person who is not under 18 and who has made an asylum claim which has not been determined. Section 96(1), which is headed: "Ways in which support may be provided", states:

"96(1) Support may be provided under section 95-

(a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);

(b) by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any)."

8. I should mention that section 45(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) substitutes a new paragraph (b) in section 96(1) of the 1999 Act which reads:

"(b) by providing the supported person and his dependants (if any) with food and other essential items."

but that substitution has not yet been brought into force.

9. The position therefore under Part VI of the Act is, put broadly, that the Secretary of State can provide adequate accommodation and/or essential living needs for an asylum seeker whose asylum claim has not yet been determined, and for his dependants (if any), if he is destitute, that is to say, if he does not have adequate accommodation and/or if he cannot meet his other essential living needs.

10. The position under section 4 of the 1999 Act is rather different. The section is headed: "Accommodation". As I have said, it deals, inter alia, with failed asylum seekers. Sub-sections (2) to (5) provide as follows:

"(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person, if

(a) he was (but is no longer) an asylum seeker, and

(b) his claim for asylum was rejected.

(3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under sub-section (2).

(4) The following expressions have the same meaning in this section as in Part VI of the Act (as defined in section 94)-

(a) asylum seeker,

(b) claim for asylum, and

(c) dependant.

(5) The Secretary of State may make regulations specifying criteria to be used in determining-

(a) whether or not to provide accommodation or arrange for the provision of accommodation for a person under this section,

(b) whether or not to continue to provide accommodation or arrange for the provision of accommodation for a person under this section."

11. Sub-sections (2) to (4) were inserted by the 2002 Act and sub-section (5) was inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 2004 Act).

12. The Regulations made under section 4(5) are the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (the 2005 Regulations). Regulation 3 is headed: "Eligibility for and provision of accommodation to a failed asylum-seeker". Paragraphs (1) and (2) of Regulation 3 provide as follows:

"(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-

(a) that he appears to the Secretary of State to be destitute, and

(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.

(2) Those conditions are that-

...

(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of

the Human Rights Act 1998."

13. Regulation 2 provides that the word "destitute" is to be construed in accordance with section 95(3) of the 1999 Act.
14. Thus far, the position under section 4, so far as relevant to this case, is that the Secretary of State can provide facilities for the accommodation of a failed asylum seeker and his dependants (if any) if he is destitute, that is to say, he does not have adequate accommodation and/or he cannot meet his other essential living needs, and the provision of accommodation is necessary to avoid a breach of his Convention rights.
15. Finally, so far as the legislative framework is concerned, sub-sections (10) and (11) of section 4 were inserted by the Immigration, Asylum and Nationality Act 2006 (the 2006 Act). They provide:

"(10) The Secretary of State may make regulations permitting a person who is provided with accommodation under this section to be supplied also with services or facilities of a specified kind.

(11) Regulations under subsection (10)—

(a) may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services,

(b) may not permit a person to be supplied with money,

(c) may restrict the extent or value of services or facilities to be provided, and

(d) may confer a discretion."
16. The position at the moment is that no regulations have yet been made under section 4(10), but draft regulations have been circulated for consultation. Draft regulations 3, 4 and 5, as presently drafted, would enable the Secretary of State to supply travel facilities for qualifying journeys, facilities to make essential telephone calls, and additional support for pregnant women and new mothers, including vouchers redeemable for goods. Draft regulation 6 is headed "Clothing" and would enable the Secretary of State to supply a child of a person who is provided with accommodation under section 4 with such clothing as is necessary to ensure that he is sufficiently and suitably clad whilst he remains a supported person. Draft regulation 7, which is headed "Exceptional specific needs" would enable the Secretary of State to supply a person supported under section 4 with goods or services to meet specific needs in exceptional circumstances.
17. The position therefore is that the draft regulations to be made under section 4(10), as presently envisaged, would enable the Secretary of State to provide clothing for the claimant's child, and possibly clothing for the claimant if she could show a specific need for it in exceptional circumstances.

18. The Secretary of State's view on the provision of clothing, so far as the existing situation under section 4 is concerned, is contained in a section of his website headed: "Frequently asked questions on section 4 support" where, under the question "Is clothing provided under section 4?" the following answer is given:

"Due to the temporary nature of the support, we do not supply clothing to any person supported under section 4. Any requirement for new clothing is currently met through the service user approaching local charities. The provision of the Immigration, Asylum and Nationality Act 2006 to make regulations to provide services and facilities to failed asylum-seekers supported under section 4 not connected with accommodation may enable us to meet clothing needs for babies and children."

Submissions

19. Mr Mackenzie's argument on behalf of the claimant ran as follows. Firstly, the purpose of both section 95 and section 4 of the 1999 Act is the avoidance of destitution. Secondly, section 95 contains an express power to prevent a person being left without accommodation or essential living needs. Thirdly, the definition of "destitute" is the same for section 4 as it is for section 95. Fourthly, it therefore followed that the power under section 4 must be a power to meet a person's accommodation needs and his essential living needs. Fifthly, what is required to meet a person's "essential living needs" must be the same under section 4 and section 95, there being no rational basis for making a distinction depending on which section the person is supported under.
20. Thus it was that Mr Mackenzie submitted that "facilities for the accommodation of a person" in section 4(2) means something more than accommodation and includes all essential living needs, which includes clothing and is not confined, as the defendant contends, to food and essential toiletries.
21. It was submitted on behalf of the claimant that the statutory context was that of a scheme designed to relieve the plight of those lacking essential living needs (ie destitute). It was argued that clothing is an essential living need for health and social reasons. It had been accepted by the defendant that clothing is an essential living need. It was therefore contended that there was no principled basis on which the phrase "facilities for the accommodation of a person" could include food but exclude clothing. To do so would, it was submitted, be an arbitrary and inappropriate drawing of a line with no justification in the statutory scheme.
22. It was accepted that the power under section 4 was more limited than that under sections 95 and 96, but it was contended that that did not mean that there was no power to provide clothing under section 4.
23. Mr Mackenzie drew attention to the phrase "services or facilities" in section 4(10), inserted by the 2006 Act, and to draft regulation 6 relating to a dependant child's clothing which was proposed to be made under that sub-section. He submitted that clothing could not be "services", so that it must come under "facilities", which should mean the same as "facilities" in section 4(2). He suggested that the use of vouchers,

referred to in sub-section (11)(a), and the prohibition against cash in sub-section (11)(b) reflected the existing situation for section 4 support, and he submitted that the purpose of sub-sections (10) and (11) of section 4, and the regulations to be made under them, was to clarify and restate the law.

24. Finally, Mr Mackenzie criticised the reason given by the defendant on his website for not supplying clothing under section 4, namely due to the temporary nature of the support. He pointed out that the claimant has been receiving section 4 support for two years, and that there were others, for instance those with no viable route for return home, or those with serious medical conditions, who would be on section 4 support for long or indefinite periods, but, if the defendant were correct, there would be no power to provide them with clothing. Similarly, if a failed asylum seeker gave birth to a new baby, the defendant would not be able to provide it with clothing, nor could he do so if a person's possessions, including clothing, were lost in a fire or burglary.
25. It was submitted that it could not have been the intention of Parliament that the defendant had no power to provide clothing in those circumstances, bearing in mind that the failed asylum seeker is prohibited from working and has no other avenue of support. If Parliament had thought that section 4 did not cover clothing in those circumstances, it would have amended section 4 long ago to ensure that it did. But all that it has done via the 2006 Act is to take the opportunity to clarify and restate the law.

Discussion

26. Although all of those submissions were very attractively made by Mr Mackenzie, I am afraid that I am not persuaded by them, basically for the reasons given by Ms Laing on behalf of the defendant. As much as I would like to find that the defendant has power under section 4 to provide the claimant and her baby son with warm clothing for the winter, I am afraid that I am unable to do so.
27. The claimant's argument involves importing into section 4 the power to provide for essential living needs, other than accommodation, when no such power is given by section 4. Section 4, disregarding sub-sections (10) and (11), is confined to a power to provide "facilities for the accommodation" of a failed asylum seeker, whereas the power under section 96 to provide Part VI support to an asylum seeker is expressly a power to provide adequate accommodation and/or other essential living needs. There is no such express provision in section 4 relating to the provision of essential living needs.
28. Section 4 is dealing with accommodation. Not only is that the heading of the section, but the provision of accommodation permeates through the various sub-sections of section 4. The words "facilities for the accommodation of a person" obviously go wider than the accommodation itself, but the facilities must be linked to the accommodation. Clothing cannot possibly be linked to the accommodation.
29. My attention was drawn to the case of R(on the application of Khan) v Oxfordshire County Council [2004] EWCA Civ 309. That was a case involving section 21 of the National Assistance Act 1948 and its relationship with section 2 of the Local

Government Act 2000. Section 21(5) of the 1948 Act defined "accommodation" in this way:

"References in this Act to accommodation provided under this part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections, and as including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary."

30. Dyson LJ considered that definition of accommodation at paragraphs 57 and 58 of his judgment. He said:

"57 ... Section 21(5) gives 'accommodation' a very wide meaning. It includes 'board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary'. So it includes food, and other things which are necessary *in connection with* the accommodation. There must be a link between what is provided and the physical accommodation or premises. In my view, it is clear that the definition of accommodation, wide though it is, does not extend to all of a person's essential living needs. An obvious example is clothes. It is not possible to say that, if provided, clothes would be services, amenities or requisites provided in connection with the accommodation. They have nothing to do with the accommodation.

58. It is possible to conceive of a case where a person is provided with accommodation and food by his family, but they have no money to pay for his clothes, toiletries etc. In my view, it is clear that such a person could not claim that his need for clothes, toiletries etc was a need for accommodation. Mr Lewis and Mr Swift submit otherwise. They say that the key to the understanding of the scope of section 21(1)(a) is the fact that the trigger for the exercise of the section 21(1)(a) function is that a person is in need of care and attention which is not otherwise available. This is true, but it does not tell us what the authority can provide for a person who is in need of care and attention. The statute plainly states that a person who is need of care and attention may be provided with accommodation (as defined). It does not, for example, say that a local authority may provide whatever is necessary to meet the person's essential living needs, including accommodation."

31. The definition of accommodation in section 21(5) of the 1948 Act is a wide definition and has a wider embrace than the term "facilities for the accommodation of a person" in the 1999 Act, but the point in common between them is that what is being provided must be linked to the accommodation. As I have said, clothing cannot possibly be linked to the accommodation. As Dyson LJ remarked, clothing has nothing to do with the accommodation.

32. The definition of "accommodation" in the Khan case plainly embraced food. The defendant in this case has taken the view that food and essential toiletries are included within the term "facilities for the accommodation of a person" in section 4(2) on the basis that what is envisaged is what would be provided in a hotel offering full board, because a power to house failed asylum seekers would be inadequate unless the defendant could also feed them. The claimant seeks to take advantage of that approach by saying that, if accommodation is inadequate without food, it is also inadequate without clothing. That submission is based upon a generous interpretation of section 4(2) by the defendant. If that interpretation is correct, it can only be on the basis of the claimed link with the accommodation, but I certainly would not accept that any such concession by the defendant could provide any valid basis for a link between clothing and the accommodation, such as to bring it within section 4(2).
33. The claimant's argument that section 4 embraces the provision of all essential living needs is derived from the fact that Regulation 2 of the 2005 Regulations, made pursuant to section 4(5), adopts the definition of "destitute" contained in section 95(3), which includes a person who cannot meet his essential living needs. However, in much the same way as Dyson LJ concluded in paragraph 58 of his judgment in the Khan case that the trigger for the exercise of the section 21 function under the 1948 Act, namely that a person is in need of care and attention, does not tell you what the authority can provide for that person, so in this case the fact that a failed asylum seeker is destitute is the trigger or, as Ms Laing put it, the gateway to section 4, does not tell you what can be provided under section 4 to that person. Unlike section 96, section 4 is not a power to alleviate destitution; it is a power to provide facilities for the accommodation of a failed asylum seeker. The claimant, as a destitute asylum seeker, is eligible under section 4 to be provided with facilities for her accommodation, but that expression does not include all her essential living needs, and in particular does not include clothing for her or her son. As I have mentioned, when regulations are made under section 4(10), the position may be different, but that is the position at present.
34. I accept that the lack of power to provide clothing under section 4 may cause hardship to failed asylum seekers, especially to those whose period of section 4 support is far from temporary, but I am afraid that that is the position in law, at least until the regulations have been made under section 4(10). The mere fact that the 2006 Act inserted the regulation making power may itself be recognition that such a power is needed.
35. I do not accept the claimant's argument that the word "facilities" in section 4(10) must have the same meaning as that word in section 4(2). As Ms Laing pointed out, the facilities referred to in section 4(2) are facilities for the accommodation of a person, whereas the facilities referred to in section 4(10) are facilities of a specified kind: in other words, they can be facilities of any kind specified in the regulations and are not restricted to facilities for the accommodation of a person.
36. Finally, I can understand the claimant's concern about the lack of a principled dividing line between food and clothing for inclusion in the phrase "facilities for the accommodation of a person", but that arises from the defendant's generous interpretation of that phrase as including food on the basis of its link with the

accommodation, whereas there can be no such link between clothing and the accommodation.

37. For the reasons I have given, I have regretfully come to the conclusion that the defendant does not have power under section 4 of the 1999 Act to provide clothing for the claimant or her child. It does, however, look as if the position may be different so far as her child is concerned, and possibly so far as she is concerned, if and when regulations are made under section 4(10) of the 1999 Act. It follows that this application for judicial review must be dismissed.
38. MS LAING: My Lord, I am instructed today to ask for the usual order for costs which is made against a person with LSE funding. I am afraid I do not have the wording at my fingertips, but I can certainly provide it.
39. SIR MICHAEL HARRISON: Yes, can you resist that?
40. MR MACKENZIE: In light of the result, my Lord, perhaps not. Obviously she is on LSE funding. She has no means of support.
41. SIR MICHAEL HARRISON: But the usual order copes with that.
42. MR MACKENZIE: I am afraid I also do not have the wording at my fingertips.
43. SIR MICHAEL HARRISON: I think the associate would know that and she confirms that to me. I will make an order that the claimant pays the defendant's costs, such order being in the form usually made for a claimant who has LSE funding, and the associate knowing the precise terms of that order.
44. MR MACKENZIE: My Lord, I do seek an order for a detailed assessment of her publicly funded costs.
45. SIR MICHAEL HARRISON: Yes, you may have that too.
46. MR MACKENZIE: I am grateful, my Lord. In spite of the clear terms in which my Lord has expressed his judgment, in light of the general importance of this matter, may I seek leave to appeal?
47. SIR MICHAEL HARRISON: What do you say about that, Ms Laing?
48. MS LAING: My Lord, I cannot argue against the proposition that the case has wider ramifications than merely for this claimant. I would simply say that your Lordship has reached a very clear view on the construction of the statutory provisions, and in the light of that I would respectfully suggest that it should be for the Court of Appeal to decide whether or not to grant permission.
49. SIR MICHAEL HARRISON: Yes. Mr Mackenzie, I think the appropriate course at this stage is to refuse leave and to leave it for the Court of Appeal to decide whether to grant permission.

50. MR MACKENZIE: Indeed, my Lord.

51. SIR MICHAEL HARRISON: I am very grateful to you both for your assistance during the case.