

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14 of the Social Security Act 1998. It is:

The decision of the Sutton appeal tribunal under reference U/45/176/2005/00961, held on 4 October 2005, is not erroneous in point of law.

2. In this case, I have to decide an issue that was common ground before the House of Lords in *R(Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604.

3. The case concerns the claimant's entitlement to income support from 29 January 2000. The Secretary of State's decision-maker decided that she was not so entitled on 8 October 2004. The claimant exercised her right of appeal to an appeal tribunal, but the tribunal dismissed the appeal. The claimant then appealed to a Commissioner with the leave of a district chairman of tribunals. The appeal was referred to Mr Commissioner Bano who directed written submissions and, when they were received, an oral hearing of the appeal. As Mr Bano was not available, I took the oral hearing in the Commissioners' court in London on 9 June 2006. The claimant attended and was represented by Mr Rodrigo Lodwick of Lambeth CAB. The Secretary of State was represented by Mr Leo Scoon of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to both representatives for their interesting arguments.

History and background

4. The claimant is a national of the former Republic of Yugoslavia and lived in Mitrovica in Kosovo. She came to the United Kingdom as a refugee in February 1999 and claimed asylum. She was awarded income support under the urgent cases provisions in March 1999.

5. Her asylum claim was refused by the Secretary of State (for the Home Department) and notified to her on 29 January 2000. Her appeal against that decision was delayed. I am told (and accept) that the delay was wholly attributable to the Secretary of State. It was eventually heard on 4 October 2004 and dismissed on 21 October 2004. She was refused leave to appeal on 8 December 2004. She applied for a judicial review of the whole decision process, but this was refused on 24 June 2005. She renewed her application, but this was refused in May 2006. At the time of the hearing before me, she was seeking leave to appeal from the Court of Appeal.

6. The Secretary of State (for Work and Pensions) did not realise that the claimant had been refused asylum until October 2004. It was then that the decision-maker superseded the decision awarding income support and terminated the claimant's entitlement from 29 January 2000, the date when that refusal was notified.

The law and the issue

7. The claimant's appeal is governed by regulation 12 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000. These Regulations made extensive amendments to the law governing benefit entitlement for some of those who are

subject to immigration control. Regulation 12 is a transitional and savings provision that applies to claimants who claimed asylum before 2 April 2000, as the claimant did. Paragraph (3) provides for the law to apply as it stood before the amendments until a claimant 'ceased to be an asylum seeker by virtue of paragraph (5).' Paragraph (5) provides:

'(5) A person ceases to be an asylum seeker for the purposes of this paragraph when his claim for asylum is recorded by the Secretary of State as having been decided (other than on appeal) or abandoned.'

8. The issue in this case is whether the claimant has ceased to be an asylum seeker within the meaning of paragraph (5). She has not abandoned her claim for asylum. Quite the reverse – she is pursuing it by every legal means available. So the issue is whether her claim for asylum has been recorded by the Secretary of State as having been decided (other than on appeal).

Social security law and immigration and asylum law

9. I want to begin by emphasising for the claimant the limits of my jurisdiction. Some judicial bodies have general jurisdiction over any issue. Others have only limited jurisdiction. Immigration and asylum appeals are initially allocated to a specialist body, now the Asylum and Immigration Tribunal. Social security issues are initially allocated to specialist bodies, the appeal tribunal and the Commissioners. All those bodies only have the jurisdiction that is allocated to them by legislation. They have no power to deal with other issues.

10. This does not mean that the law on asylum and on social security is entirely distinct. A claimant's immigration status can affect entitlement to social security benefits. But it does not follow that the concepts used in the different areas of law are necessarily the same. I emphasise that, because Mr Lodwick relied in part on the concept of a failed asylum seeker that have not been adopted in social security law.

11. The limitations on my jurisdiction mean that I can take no account of any of the following: (i) the merits of the claimant's claim for asylum; (ii) the problems encountered in the handling of her claim for asylum and the related appeal and judicial review proceedings; (iii) the legal consequences (if any) of those problems; (iv) the extent to which she has obtained qualifications in computer programming; (v) whether she should be given leave to remain here; and (vi) the value that she would contribute to the economy if she were given leave to remain in this country. The only jurisdiction that I have is to interpret and apply regulation 12(5).

Mr Lodwick's arguments for the claimant

12. Mr Lodwick had put forward a number of different arguments in writing before the hearing. I will set out only the arguments that he relied on before me.

13. The claimant had been given temporary admission on her arrival, not exceptional leave to remain. She became and remained an asylum seeker. She was not a 'failed asylum seeker', because she had not been detained and no steps had been taken to deport her. She was pursuing a judicial review, which is not an appeal.

14. It would be absurd if regulation 12(5) applied to claimants who were not 'failed asylum seekers'.

15. The word 'finally' should be read into regulation 12(5) so that a person remains an asylum seeker until every legal avenue of challenge had been exhausted. I had no power to redraft that provision, but I had power to interpret it. No human rights challenge could be mounted, but the legislation was in breach of the Refugee Convention and Council of Europe instruments, specifically the Social Charter and the European Convention on Social and Medical Assistance.

16. *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64 was relevant. The claimant was still lawfully present in the United Kingdom and the reasoning of the House of Lords could be used to interpret regulation 12(5).

17. The Secretary of State had relied on *CIS/3418/1998*. However, this was decided under the former regulation 70(3A)(b)(ii) of the Income Support (General) Regulations 1987, whereas this case concerned the successor to regulation 70(3A)(b)(i). Reasoning could not be read across from (b)(ii) to (b)(i).

Mr Scoon's arguments for the Secretary of State

18. Mr Scoon argued that all the reasons given by Mr Lodwick were insufficient to support his interpretation of regulation 12(5).

19. Regulation 12(5) repeated regulation 70(3A)(b)(i). Before the 1996 amendments, that provision had referred to the asylum claim being 'finally determined'. The word 'finally' had been removed in 1996 and it would be wrong to read it back in, which the effect of Mr Lodwick's argument. Passages in *CIS/3418/1998* supported the tribunal's reasoning in this case.

20. *Szoma* was irrelevant. It dealt with lawful presence, which was not a relevant concept in this case.

21. The Social Charter was subsequent to the period in issue in this case and did not apply.

22. The final sentence in *Anufrijeva* showed that the point of interpretation in this case was common ground and that point had been correctly conceded.

23. There were options open to the claimant which would provide some financial support without resort to income support: (i) section 21 of the National Assistance Act 1948; (ii) possibly a crisis loan from the social fund, although her difficulties in repaying a loan might prevent this; (iii) support from charities; and (iv) permission to work. (The claimant told me that she had been given permission to work intermittently.)

Analysis

24. I accept Mr Scoon's arguments and reject Mr Lodwick's arguments for the following reasons.

25. The meaning of the wording of regulation 12(5) seems to me to be absolutely clear. A claimant ceases to be an asylum seeker when the claim for asylum is decided other than decided on appeal. That means that any appeal is disregarded. In other words, the person ceases to be an asylum seeker as soon as the Secretary of State has recorded that the claim for asylum has been refused.

26. I have come to this conclusion for these reasons. First, this meaning of the words is the natural one in the context. Second, Mr Lodwick's arguments renders the words in brackets '(other than on appeal)' redundant. Third, it reintroduces words that have been removed on amendment. As regards judicial review, an application for a judicial review does not alter the fact that the claim has been recorded as decided. And if the judicial review is successful, the record is overwritten and becomes irrelevant.

27. I accept Mr Lodwick's argument that this meaning was merely common ground in *Anufrijeva* and that it is open to me to decide it. However, for the reasons I have given I consider that the basis on which the House of Lords proceeded was correct.

28. The language of regulation 12(5) has to be read subject to the decision of the House of Lords in *Anufrijeva*. That case decided that a decision was not effective until it was communicated to the claimant. I must, therefore, read regulation 12(5) as applying if the claim for asylum has been recorded by the Secretary of State as having been determined (other than on appeal) and the decision has been communicated to the claimant. In this case, the decision was communicated on 29 January 2000 and the decision-maker has terminated the award of income support only from that date.

29. The concept of failed asylum seeker has no place in social security law. (I do not know if it is used in asylum law.) As I have said, the concepts of social security and asylum may differ and I only have jurisdiction to apply the social security concepts.

30. I can see nothing absurd in either that meaning itself or in the consequences that follow from it.

31. Having decided on the meaning of the wording of regulation 12(5), is there any basis on which I can give them a different interpretation? Mr Lodwick accepted that he could not construct an argument under the Human Rights Act 1998. As far as the other international instruments mentioned by Mr Lodwick are concerned, I listened with particular care to his submissions because I could not follow his argument. I asked him several times to say more precisely what his argument was. He was very clear that I should reconsider the interpretation of regulation 12(5) in the light of those instruments. He was equally clear on the interpretation that he sought. But he was less clear on the legal basis for such an interpretation. I am unable to identify any basis in statutory interpretation that would allow me to override the clear and natural meaning of the language of regulation 12(5) by reference to the Council of Europe instruments to which he referred.

32. As regards *Szoma*, this is irrelevant to the issues that arise in this case. It turns on the meaning of 'lawfully present', which is not a relevant concept in this case. As I have said, this case turns on the wording of regulation 12(5). There is no scope for applying *Szoma* in that provision.

33. Finally as regards the decision in *CIS/3418/1998*, I have my decision without reference to the reasoning in that case. There are some passages that support my conclusion, but I have not relied on them.

Disposal

34. There was no dispute about the relevant facts. The tribunal directed itself correctly on the law and applied it correctly to those facts. The chairman has given a clear explanation of her decision and the reasons for it. She did not go wrong in law. I dismiss the appeal.

**Signed on original
on 20 June 2006**

**Edward Jacobs
Commissioner**