(55)

Asylum seekers – "on arrival" means before passing through immigration control for 1st time at port of entry (contrary view in CIS/4431/1998)

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's File No: *CIS 259/99* * 50/99

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: P L Howell QC

30 September 1999

Claimant:	Ilir Shaba
Claim for:	Income Support
Tribunal:	Oxford SSAT
Tribunal Case No:	S/04/048/98/00786
Tribunal date:	14 August 1998

PLH *Commissioner's File: CIS 259/99*

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[ORAL HEARING - with case CIS 3867/98]

1. Each of these cases raises a similar question about the meaning of the apparently simple words "on his arrival" in reg 70(3A)(a) Income Support (General) Regulations 1987 SI No. 1967. That regulation provides for income support at a special "urgent case" rate for persons, described as "asylum seekers", who submit on their arrival (other than on re-entry) in the United Kingdom from outside the British Isles a claim for asylum in this country under the 1951 Geneva Convention on the Status of Refugees as amended by the 1967 New York protocol. Unless the claimants fall within that category, it is common ground that despite having made a claim for income support in the proper form and being physically present in Great Britain at the material time their entitlement to benefit would have been nil, by virtue of reg 21 ibid which provides that for a "person from abroad" the applicable amount for benefit purposes is nil.

2. The point of construction I have to decide in these cases has already been touched on in a number of other Commissioners' decisions and unhappily the views expressed have not been wholly consistent with one another. The present appeals, along with others, were deferred in the hope that definitive guidance could be obtained in appeals to the Court of Appeal which were instituted in at least three of the decided cases. For various reasons all of those appeals were later withdrawn or disposed of without being heard by the Court of Appeal. It is therefore necessary for me to proceed to determine the two present appeals and the relevant issues of law myself as best I can.

3. I held a combined oral hearing of the two appeals. In case CIS 3867/98 the claimant is the appellant. He appeared by Duran Seddon of counsel, instructed by Fisher Meredith, solicitors. In case CIS 259/99 the appeal was by the adjudication officer and the claimant was the respondent. He appeared by Peter Turville of Oxfordshire Welfare Rights. The adjudication officers concerned in both appeals were represented by Leo Scoon of the solicitor's office, Department of Social Security. I am grateful to all the representatives for their assistance at the hearing but I should like to pay a particular tribute to Mr Seddon's ably presented arguments.

4. The salient facts can be shortly stated. On behalf of each claimant it is asserted that he qualified for urgent cases payments under regulation 70 by virtue of having indicated a wish to seek asylum in this country before having left the physical confines of the port through which he entered. However it is common ground that in neither case did the claimant make an application for asylum by proceeding immediately on disembarkation to present himself before an immigration officer as a refugee and applying to be admitted to the United Kingdom on that basis. In each case the "applications" relied on were made at the place of arrival and within no more than a few hours of actual disembarkation, but not immediately on disembarkation at the normal point of first entry through immigration control.

5. The following more detailed explanation of the two cases is derived from the tribunal findings and the documentary and other evidence in the two appeal files. The supplementary findings of fact it incorporates are those I consider it appropriate to make under s. 23(7)(a)(ii) Social Security Administration Act 1992.

6. (1) In case **CIS 3867/98** the claimant is an Eritrean national now aged 31 seeking asylum in this country because of persecution in Ethiopia. He employed a paid agent to get him out of Ethiopia and into this country and arrived on an international flight at Heathrow airport terminal 3 on 12 March 1997, accompanied by the agent. He presented himself to an immigration officer through the channel for non-EU nationals and sought entry to the United Kingdom on a forged passport in the name of Solomon (not the claimant's real name) supplied by the agent. The agent acted as interpreter and spoke to the immigration officer on the claimant's behalf, the claimant himself saying nothing. Neither the claimant nor the agent gave any indication at that stage that the claimant was a refugee or wished to be admitted to the United Kingdom on that basis. The immigration officer was taken in, and allowed the claimant entry to the United Kingdom on the false passport. The claimant and the agent then passed through immigration control. Soon afterwards the agent retrieved the forged passport from the claimant, abandoned him and disappeared.

(2) The claimant was left with his bags in an area where there were other people sitting about and there was a bar. Some time after that, late at night on 12 March or in the early hours of the morning of 13 March, the claimant encountered a security guard in this area and the police were called. Although the claimant speaks very little English he managed to make the security guard understand that he wished to claim asylum and the guard indicated that he should speak into a telephone that was attached to the wall. The claimant attempted to do this but was unable to obtain an answer.

(3) When the police arrived they took the claimant to the bureau de change to change some money and to the bar to get some food. After that he was kept in police custody at the airport for the remainder of the night. He was released in the morning when he was able to speak to an immigration officer on the telephone and was put in touch with advisers at the Refugee Arrivals Project. The duty immigration officer to whom he spoke on that morning recorded that the claimant asked him for asylum then: see the statement in his letter dated 20 March 1997 at page 2A. Subsequently the

claimant was issued by the Home Office with a document (in form "SLA2": page 2) confirming that he had applied for asylum in the United Kingdom and giving the date of his application as 14 March 1997 which was no doubt when a fuller application with the assistance of the refugee advisers was made.

(4) Insofar as it is relevant exactly where and when the claimant had earlier indicated his wish to apply for asylum, there can I think be no doubt from the details outlined above that his encounter with the security guard took place in the *public* area of the arrivals terminal at Heathrow, where people wait to meet recently-arrived passengers after they collect their bags, and there are seats and a wall telephone for the public to speak to immigration officials about people they are hoping to meet: and I so find. If the claimant had still been within the secure area where immigration and customs are dealt with, there would have been nothing to prevent him walking back to speak directly to an immigration official instead of having to try and use the wall telephone. I further find that his application for asylum was made and recorded in the course of his telephone call to the immigration officer the following morning (that is on 13 rather than 14 March) when he was at Heathrow police station, after having left the arrivals terminal but still within the airport itself: cf. the immigration officer's statement at page 2A.

(5) Some months later the claimant made an application for income support, which was rejected by the adjudication officer on the ground that the claimant was a person from abroad and did not qualify for an urgent cases payment because he had not submitted his claim for asylum "on his arrival" within the meaning of regulation 70. This decision was confirmed by the tribunal on 27 January 1998 for the reason that the claimant had not submitted a claim for asylum to the Secretary of State on his arrival as such a claim had not been made and recorded until 14 March 1997, that is two days after he had entered the United Kingdom on 12 March: see the statement of the tribunal's reasons at pages 28-29 of this file.

(6) On his behalf Mr Seddon argues that the tribunal were wrong first in adopting a meaning of "on arrival" restricted to the clearing of immigration control at the port of entry, and second in imposing a condition that the claim for asylum should be made and recorded in some formal way, ignoring in particular the evidence of a request for asylum having been made and noted by the immigration officer the following morning when the claimant was still within the confines of the airport.

7. (1) In case **CIS 259/99** the claimant is a Kosovan Albanian now aged 20 who according to the facts found by the tribunal on 14 August 1998 at pages 83-84 travelled to the United Kingdom at the start of 1998 by way of Montenegro and Italy in the back of a lorry. The lorry disembarked in the United Kingdom on 10 January at Hull docks and the claimant remained in the back of it while it drove off the ferry and afterwards until it went and parked in a lorry parking area at the freight terminal. Shortly after this the claimant got out of the lorry and almost immediately afterwards encountered some men in uniform who (it was common ground in the argument before me) were probably port employees. The tribunal accepted the claimant's evidence that he had said the words "Yugoslavia - Kosovo - Asile" to these men. After that the police were called.

(2) When the police arrived the claimant was taken outside the port to a police station in the city where (some hours later, after an interpreter had been found and brought there) he was interviewed by an immigration officer. In the course of that interview the claimant said he had come to the United Kingdom for asylum and the officer recorded this as an asylum application: see the record of interview dated 10 January 1998 at pages 51-54. The claimant also said that he, along with a number of other people, had paid a substantial sum in deutschmarks to be brought to the United Kingdom in lorries from Italy. The lorry in which he travelled was partly open so he had been able to get out for himself.

(3) The tribunal accepted by a majority that in these circumstances the claimant counted as a person who had made his application for asylum on his arrival and was entitled to urgent cases payments. Their principal reason as recorded on page 83 is that they considered the claimant's first opportunity to make an official request for asylum after his initial request at the port had been during the interview with the immigration officer some hours later after an interpreter had been found. They made no findings about what had happened in relation to immigration control on the claimant's disembarkation at the port, and it is implicit in this and the terms of their decision that they did not consider the meaning of "on arrival" to depend so closely on this as the tribunal in the other case had done.

(4) In this case the adjudication officer appeals, arguing through Mr Scoon that the more relaxed test implicitly applied by the tribunal of the individual claimant's "first opportunity to make an official request" through an interpreter for asylum was wrong, and that in any case the tribunal failed to make and record sufficient findings of fact about what did happen at the port before the claimant got out of the lorry to make a proper conclusion on whether this (or any stricter) test was satisfied. I would add that as recorded on pages 74-84 the decision is also defective for failure to include the reasons for the dissent: reg 23(2)(c) Social Security Adjudication Regulations 1995 SI No 1801.

(5) Mr Turville, whose organisation has most helpfully continued to represent this claimant's interests even though the claimant himself has since been removed back to the channel port in Belgium from which he embarked and has not been heard of since, submitted that the lack of more detailed findings was not an error, and the majority of the tribunal were justified in applying a reasonably flexible meaning of "on arrival". In particular this should include a case where a claimant was still within the port area when first detained and sought from that point on to make clear his wish to be given asylum in this country, having no choice about where the police took him after he was detained, and no control over how long it was before an immigration officer and interpreter were then found to interview him formally.

(6) Again so far as the exact sequence of events at the port is relevant, there can in my judgment be no doubt from the undisputed evidence that by remaining in the back of the lorry while it was driven off the ferry and through the port area the claimant failed to present himself to an immigration officer and apply for entry or admission to the United Kingdom at the point he should have done, and thereby entered the United Kingdom

illegally: and I so find. (It was specifically accepted on his behalf at the tribunal that he "did not go through immigration control" which I am satisfied can only mean in the context that he evaded it, by remaining concealed in the bottom of the lorry: pp. 79, 81. His representative's submission at page 122 expressly states it not to be disputed that he entered the United Kingdom illegally, and that he entered by "illicit means such that he was unable to make his asylum request before clearing immigration control". The claimant's own oral evidence to the tribunal as recorded on page 76 was that "He went out of lorry. A big field. He kept going. He saw some people and he was caught." This was in a big field in the dock area with lots of cars around, and he had been caught after walking for about five minutes from where he first got out of the lorry. All this is in my judgment consistent, and consistent only, with the claimant not having emerged from hiding until after the lorry had already passed beyond the point at which an application for entry or admission could have been made to an immigration officer in the course of clearing immigration control in the normal manner. As the tribunal themselves recorded in their short decision notice on page 74, the claim for asylum was made at the police station, the claimant not having passed through immigration control. In my judgment it is thus clear that the first indication of any wish to apply for asylum was only made *after* he had already entered the United Kingdom illegally by other means.)

8. I was puzzled why a genuine asylum seeker should need to try and get into the country illegally instead of pouring out the truth to a British official at once. Mr Seddon explained from his knowledge of other cases that a post-entry application was still widely perceived among asylum seekers as involving less risk of immediate deportation than one made at immigration control, even though in fact that is now incorrect and the appeal rights for both are similar: and in addition, the paid agents who specialise in getting people into the country tend to insist on it in the hope of lessening their own chances of detection. I accept therefore that an individual may come here in genuine fear of persecution but still fail for a variety of reasons to make an immediate application for asylum at immigration control. Regulation 70 is not of course concerned with whether the application is genuine, but only with the point at which it is made.

9. The question I have to decide in each of these cases is whether a claimant who enters the United Kingdom through a recognised port of entry but manages to get through immigration control, or past it, without making any application for asylum at that point can nevertheless be accepted as having made such an application "on his arrival" by indicating his wish to claim it fairly shortly after actual entry to the United Kingdom and without having removed himself physically from the port of arrival.

10. Several Commissioners' decisions as noted above have already attempted to give guidance on the meaning of the apparently innocent phrase "on his arrival" in this context.

(1) In case CIS 143/97 the claimant had got through immigration at Heathrow airport on a Friday on an unknown basis without having applied for asylum, and presented herself at the immigration office in Croydon the following Monday to make her claim. The Commissioner held that on these facts the claim had not been made "on

arrival" for the purposes of reg 70 and rejected a submission that some test of reasonableness and practicality for the particular individual taking into account the level of his or her ignorance or lack of understanding should be adopted. Instead he accepted the submission of the adjudication officer that in the context of arrival through a recognised port of entry "on his arrival" meant while clearing immigration control at that port, where there was in all cases an opportunity to claim political asylum even though through fear or ignorance an individual might not have taken that opportunity. The Commissioner held a broader construction of "on his arrival" would be inconsistent with the context and history of the legislation by which reg 70 in its present form was introduced, to which he referred briefly at para 7 to his decision, commenting that insofar as it was permissible to look at the parliamentary record it was perfectly clear that the House of Commons understood, and intended, that the primary legislation authorising it would have the effect there contended for by the adjudication officer.

(2) In case CIS 3231/97 the claimant had had himself smuggled into United Kingdom in the back of a lorry in circumstances where he did not even know where or how the lorry got into this country. He had been bundled out of the lorry in the Edgware Road in London in a confused state on a Sunday afternoon, and had subsequently been collected by a relative and taken by him to South Wales where the claim for asylum had been made to an immigration officer the following Thursday morning. The Commissioner rejected the contention than a person who had gained illegal entry by being smuggled in or landing unofficially should be in a better position that a person who went through the normal procedures and was required to make his application in the course of clearing immigration control. He cited CIS 143/97 with approval and stated that he accepted that in the case of the person arriving in the normal way the test was whether the status was claimed at immigration control, and while also accepting that there might be some exceptional cases such as the immigration officers being on strike he also specifically rejected any general test equating "on his arrival" with "as soon as reasonably practicable after entry to the United Kingdom", referring in para 11 to the history of the legislation as showing this clearly to be wrong.

(3) In case CIS 2719/97 the claimant, like the claimant in the present appeal CIS 3867/98, entered the country through immigration control at Heathrow airport under the guidance of an agent without applying for asylum. They then left the airport and, following instructions, the claimant went to the immigration office in Croydon and made her application for asylum some hours later though during the course of the same day. The Commissioner heard detailed oral argument on the history and meaning of the legislation. His actual decision was that on the facts of that case the claim to have applied for asylum "on arrival" could not be made out, since the claimant was not even still within the port of entry when she applied. Thus even if a less stringent test than that applied by the two previous Commissioners was applicable, the claimant did not fall within it.

(4) However in the course of reaching that conclusion and in his analysis of the parliamentary history the Commissioner based himself on a distinction between "in-port" and "in-country" applications for asylum, which differed from that adopted in the

earlier cases in holding that an application for asylum could be made "on arrival" for this purpose at a time while the claimant still remained physically within the port of arrival even though after clearing immigration control and thus at some time after entry into the United Kingdom. He referred to the general meaning of "arrival" and in para 24 of his decision pointed out that this was a process that can take some time and would normally involve four identifiable stages, namely disembarkation, passing through immigration control, passing through customs and leaving the port or airport. Although rejecting the idea that there was a fifth stage for asylum seekers involving the first practicable opportunity to make an application, it is clear that the Commissioner's decision founds on the proposition that as a matter of ordinary language something may be said to be done "on arrival" at any rate up to the point where his fourth stage, of leaving the port or airport, is reached. Like the Commissioner in CIS 143/97 he referred to the parliamentary history but unlike him did not reach the conclusion that this clearly supported the adjudication officer's submission limiting "on arrival" in this context to the stage of clearing immigration control: instead after much more extensive reference to the Secretary of State's statements to the Social Security Advisory Committee and to the House of Commons he concluded that at no point had the Secretary of State said that the application for asylum had to be made before clearing immigration control and that his repeated references to "in-port" applications were consistent with the broader meaning of "arrival" the Commissioner himself favoured.

(5) That decision was followed by the same Commissioner in case CIS 1137/97, in which the broader meaning of "on arrival" to include things done while still physically within the port of entry though after passing through immigration control was embodied in the directions he gave in para 9 to the tribunal for rehearing (and thus was an essential part of the decision even if strictly it had not been so in his earlier case). His concluding direction to the new tribunal on the test to be applied in redetermine the case was that it would be for the claimant to establish to their satisfaction on the balance of probabilities that *before leaving Heathrow airport on the day of his arrival* he had informed somebody acting in the name of the Secretary of State that he required asylum. This necessarily involved a departure from the test previously adopted and expressly accepted in cases CIS 143/97 and CIS 3231/97, so to that extent the Commissioner here was directing the tribunal and himself holding that what had been said by the two Commissioners in the earlier decisions had been wrong.

(6) In case CIS 4117/97 the Commissioner who decided CIS 143/97 was faced with a further case of a claimant who arrived at Heathrow airport on a Friday afternoon and passed through immigration control without applying for asylum, which she only claimed after leaving the airport and presenting herself at the immigration office in Croydon on the following Monday. On this occasion the Commissioner heard full oral argument and was urged to adopt a more flexible meaning of "on arrival" so as to extend to the four stages of the process identified by the Commissioner in CIS 2719/97, and also beyond to include questions of reasonableness and practicability making allowances for the genuine difficulties experienced by refugees. The decision, following what was said in CIS 2719/97, was that this extension to a "fifth stage" in the case of asylum seekers was not permissible or consistent with the intention of the legislation; and that

was enough to dispose of the case against the claimant on the admitted facts. In the course of reaching that conclusion after his own more extensive consideration of some ministerial statements, the Commissioner said that he accepted that there was some flexibility in the words "on his arrival" and that "clearing immigration control" was not a universal test applicable in all cases. However he declined to define the extent of that flexibility which he said must be considered on a case by case basis though it was limited: adding that it was not necessary for the purposes of the case before him to decide whether asylum must be claimed before clearing immigration control or before leaving the port of entry or whether neither of those events was necessary determinative. He added that he imagined there would be few cases in which it would make any difference, though as it transpires the two appeals now before me do fall exactly within that category and both sides agreed that this was a choice I now have to make.

[Two further decisions in this area were not available at the time of the hearing, but I mention them for completeness.]

(7) Case CIS 3803/98 was decided by the same Commissioner as CIS 3231/97. The claimant had been allowed entry to the United Kingdom on a visa for medical treatment and claimed asylum two days later, alleging that he had been too ill to do so at the time of his actual arrival. It appears to have been conceded by the department that a person too ill to make an application on his actual arrival could nevertheless be treated as having done so "provided he claimed as soon as he was able" (para 5). On the basis of that concession but without further legal analysis beyond saying that "there are exceptional cases" the Commissioner remitted the case for further findings of fact to be made about how ill the claimant had really been "*on his arrival at Heathrow*" (my emphasis): see para 8.

(8) Finally in case CIS 4341/98 another Commissioner determined that an application for asylum had been made "on arrival" in the context of reg 70 when the claimant, having passed through immigration control at Gatwick airport on a false passport in the company of an agent without claiming asylum, was taken back by an adviser some two hours later to see an immigration officer while still at the airport and then indicated that she wished to claim asylum. The Commissioner considered all the previous cases, cited with approval the reference in CIS 4117/97 to the test allowing a measure of flexibility and in effect followed CIS 2719/97 in holding "on arrival" to include what was done by the claimant after a period of an hour or so sitting around in the arrivals area of the airport after passing through immigration control and having obtained entry to the United Kingdom on a false basis.

11. In view of the authorities before me at the hearing Mr Seddon submitted, in my view correctly, that I am faced in these cases with having to make a choice between two objectively defined but inconsistent tests of "on arrival" each supported by an equal weight of judicial authority. I agree that is right though I am sorry it should be so. The normal practice of the Commissioners is to follow one another's considered decisions, for judicial comity and clarity in the law, and it is unfortunate and unhelpful if tribunals are faced with differing interpretations of where the line should be drawn in such

sensitive and unhappy cases as these. That a line does have to be drawn on a factual basis is inherent in this legislation, and so is the inevitable consequence that there will be hard cases found the wrong side of the line wherever it is drawn. No one before me sought to argue otherwise, and despite the references to "flexibility" it seems to me that Mr Seddon must be right in saying that the test is an objective and factual one: either a person has submitted his application for asylum on his arrival (whatever that means) or he has not. His subjective intentions or reasons for doing or not doing what he did or failed to do at the time are beside the point. The legislation itself is not open to question in these proceedings and it was not argued that either interpretation was invalidated by the Convention: in particular by the "penalty" provisions of Art 31 which had been considered in a different context a few days earlier by the Divisional Court in *R v Uxbridge Magistrates ex p Adimi:* (unrep. 29 July 1999). My only task is thus to determine on normal principles and as dispassionately as I can what the legislation approved by Parliament has actually done.

12. A further submission of Mr Seddon which I also accept, and appears to me to provide the most reliable starting point for understanding what "on his arrival" is intended to mean in this context, is that both reg 21 containing the definition of "person from abroad" and reg 70 containing the provisions about urgent cases and asylum seekers are as he put it "infused with references" to the Immigration Act 1971 and borrow its language extensively. Thus the categories of "persons from abroad" in reg 21(3) make use of concepts such as limited leave to enter or remain in the United Kingdom, temporary admission, illegal entry and so forth; reg 70 and the definitions in reg 21(3) refer to limited leave and reg 70(3A) itself speaks of arrival "other than on his re-entry", re-entry being a further term from the 1971 Act.

13. In that context the correct approach to the reference in reg 70(3A)(a) to a person submitting a claim for asylum "on his arrival (other than on his re-entry) in the United Kingdom" must in my judgment be to read it in accordance with normal principles of legislative construction as meaning "arrival" as that term is used in the Immigration Act 1971 and not in some different more general sense from ordinary usage. The focus of interest and immediacy implied in a phrase such as "on arrival" may of course vary considerably according to the context: "On arrival at Dover I stopped for a real pint of bitter" or "On arrival back in the country I rushed to my aunt's bedside" are both perfectly valid uses of the English language, but they do not of course imply that the events described took place within the port area at the time of entry. The details of the arrival or formalities of entry into the country are simply irrelevant to the narrative whose focus is placed elsewhere by the context (the special taste of English beer, the anxiety over the sick relative). However when the question is what a person does "on his arrival (other than on his re-entry) in the United Kingdom" in a context closely focused on immigration procedures and the terms used in the immigration legislation itself, it seems to me one must look to that legislation, and not to more general usage, for guidance as to what is meant.

14. When one does so, the conclusion becomes in my judgment inevitable that the term "arrival" in this context is a good deal more limited than in the two general

examples given above, and also than the four-stage process referred to in CIS 2719/97 para 24. As noted by the House of Lords in *R v Naillie* [1993] AC 674 (which does not appear to have been cited to the Commissioner in CIS 2719/97) the Immigration Act makes use of the two separate concepts of arrival and entry, and draws a clear distinction between them. So while by s. 1(3) arrival in and departure from the United Kingdom on a journey within the British Isles is not generally subject to control under the Act, in all other cases immigration control (by granting or refusing entry) is applied to non-British citizens by reference to their arrival, using this in the physical sense of disembarkation from a ship or aircraft (or crossing into United Kingdom territory by the Channel Tunnel, for which special provision is now made by s. 8 Immigration Act 1988), rather than in any more extended general sense.

15. Thus in the words of Lord Slynn (with whom all their Lordships agreed) in *R v Naillie* at pages 679G-680B:

> "...section 3 of the Act draws a distinction between *arrival* and *entry*. Thus a person shall not *enter* without leave and the power to give leave to *enter* is vested in immigration officers who may examine persons *arriving* in the United Kingdom. By section 11 a person who has not *entered* whilst he is in a place approved for the purposes (semble) of awaiting examination and being examined. Nor has he *entered* when he is temporarily admitted under powers conferred by Schedule 2 to the Act.
>
> By paragraph 2 of the Schedule a person who has *arrived*, including transit passengers and persons not seeking to *enter*, may be examined so that the immigration officer may determine whether such person may or may not *enter* the United Kingdom without leave.
>
> The pattern of the Act is thus that a person arriving in the United Kingdom by air must present himself to an immigration officer, and if so required, be examined, furnish information and produce a valid passport or other document. He can only enter lawfully if he is given leave. He is an illegal entrant if he comes in without such leave or in breach of the immigration laws, e.g. by deceiving the immigration officer knowingly or otherwise.
>
> A person arriving by air at Heathrow does not *enter* the United Kingdom when he disembarks..."

16. In my judgment that passage, and the legislative provisions to which it refers, show clearly that "arrival" as used in the context of the Immigration Act 1971 is the physical arrival of a person on disembarkation at the port or airport through which he seeks to enter the United Kingdom, and in this sense is something that *precedes* such entry, which is something for which prior leave is required, special provision being made in s. 11 to deem it artificially not to take place while a person who has arrived is still within a designated area or has been detained or allowed temporary admission. See in particular ss. 3 and 4, and para 2 sch. 2 which is the main provision for immigration officers to examine "any persons who have arrived in the United Kingdom by ship or aircraft" for the purpose of determining whether they require leave to enter the United Kingdom and if so whether they should be allowed entry. By equating "the examination of persons arriving" with "may examine any persons who *have arrived*", s. 4(2)(b) and para 2 sch. 2 appear to me to refute any idea of "arrival" in the context of the Act being a

longer or more general process including any stages after the recently-arrived passenger has got beyond (or past) the immigration control area and thereby made an *entry* into the United Kingdom, even if still within the perimeter fence of the port of arrival.

17. It follows in my judgment that the reference in reg 70(3A)(a) to a person submitting a claim for asylum on his arrival (other than on his re-entry) in the United Kingdom is concerned with the nature of the application made to be allowed into the United Kingdom at the point where a recently-arrived passenger submits, or should submit, himself to examination by an immigration officer at his or her port of first entry into this country. By s. 3(1) no non-British citizen may lawfully enter the United Kingdom otherwise than by applying for and obtaining leave in accordance with the Act or under its express provisions: and such a person entering or seeking to enter the United Kingdom, at any rate through a recognised port of entry as the claimants in both present cases did, may for the present purpose be doing so in only one of three ways:

> (a) by applying to be allowed into the United Kingdom as a refugee claiming asylum;
>
> (b) by applying or claiming to be allowed into the United Kingdom on some other basis, e.g. as a visitor or as a person entitled to enter without leave;
>
> (c) by making a *de facto* entry, getting past immigration control without making any application at all.

18. It is in my judgment only in the first of these cases that a person claiming to be a refugee may in this context be said to have submitted his claim for asylum on his arrival in the United Kingdom so as to get within the provision for urgent cases in reg 70 of the Income Support regulations. A person who has made some different application on his arrival, or has managed to get past immigration control and effect an entry without making any application at all, has not submitted a claim for asylum on his arrival for this purpose but done something else on his arrival instead.

19. It follows that I find myself unable to accept the next step in Mr Seddon's argument, that because reg 70 makes use of the term arrival instead of the more specialised concept of entry it must have been intended to give it a broader meaning of the kind favoured by the Commissioner in case CIS 2719/97; and I have to conclude that in that case and in CIS 1137/97 and CIS 4341/98 the Commissioners applying a "port perimeter" test were mistaken in departing from the "immigration control" test adopted by those who decided the first two cases CIS 143/97 and CIS 3231/97. Moreover if "arrival" is a purely factual test as I think it must be, I find it very difficult to see how the meaning can be subject to a list of possible exceptions for illness, etc. to be prescribed on a case by case basis as suggested in the later decisions since that idea is, so far as I can see, simply not there in the legislation at all.

20. The above conclusion is in my judgment dictated by the ordinary principles of legislative interpretation and the statutory context of the terms used in the Immigration Act 1971. For my part I would doubt whether this is a case where it is right to have recourse to other material such as ministerial statements as an aid to construction but for

the sake of completeness I would add that this too appears to me to point conclusively in favour of the "immigration control" test accepted by the Commissioner in the first case as he himself noted in that decision (CIS 143/97 para 7). The written statement referred to in para 8 of CIS 2719/97 that the intention was for social security benefits no longer to be available to those who "entered the country on a basis other than seeking asylum", and the repeated statements of intention to the House of Commons referred to in para 11 about confining benefits to people making their claims for asylum "at the point when such people are asked why they have come to this country", are to my mind inconsistent with any other meaning.

21. The result in my judgment is that neither of the claimants in the two cases before me was entitled to urgent cases payments under reg 70 since (in the first case) the claimant had applied for and obtained entry to the United Kingdom on a false basis on his arrival instead of making an application for asylum at that point and his asylum application was not made until the next morning; and (in the second) the claimant had managed to enter the United Kingdom by-passing immigration control altogether and thus without making any application on his arrival at all. In case CIS 3867/98 I set aside the decision of the tribunal as I accept that it was wrong for them not to have found as a fact on the immigration officer's evidence on page 2A that the claimant's application for asylum was made and recorded on 13 March 1997 rather than the following day, but I substitute my own decision to the same effect that even on that footing the claim for asylum had not been made on the claimant's arrival within the meaning of reg 70(3A), but afterwards. In the second case CIS 259/99 I set aside the decision of the tribunal for having applied the wrong test, and substitute my own decision that the claimant was not entitled to any urgent cases payment under reg 70 as for the reasons given above he entered the United Kingdom on his arrival without submitting any claim or application for entry or admission at all and only applied for asylum after that.

22. Each appeal is thus formally allowed and my own decision substituted.

(Signed)

P L Howell
Commissioner
30 September 1999