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Judgment: approved by the Court for handing down | *Delivered:* **28/01/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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Unamoyo's (Miliami) Application [2010] NIQB 17

IN THE MATTER OF AN APPLICATION BY
MILIAMI UNAMOYO FOR JUDICIAL REVIEW

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GIRVAN LJ (giving an ex tempore judgment)

[1] This matter comes before the court by way of an application for judicial review brought by Miliami Unamoyo who is a Congolese national who seeks asylum in the United Kingdom. In this application she seeks relief set out in paragraph 3 arising out of the Secretary of State's interpretation and application of Section 98(2) of the Immigration and Asylum Act 1999 in respect of a decision of the Secretary of State made on 22 April refusing the applicant temporary support while her appeal against a refusal of permanent asylum support had not yet been determined.

[2] In its amended form the declaration sought by the applicant is a declaration that Section 98(2) of the 1999 Act operates to provide the Secretary of State with a discretion to permit the continued provision of temporary asylum support while an appeal against refusal of asylum support under Section 95 is pending.

[3] Counsel on behalf of the applicant prepared a helpful chronology of the key events and I will just give a brief synopsis of the key dates.

[4] It appears that in late December 2008 the applicant travelled by fishing boat from the Democratic Republic of Congo into the Republic of the Congo and from there she travelled to Istanbul and thence to London arriving there on 25 February 2009. She travelled to Belfast and at Belfast City Airport she

was detained and she claimed asylum. She was then kept in police custody until 2 March 2009 when she was convicted and sentenced to 2 months imprisonment for possession of false identity documents. She served a period of incarceration and was released on 31 March 2009. She claimed that money that she had with her namely €840, $10 and about £37, she paid over which to an associate of the agent who arranged for her trip to the United Kingdom as the balance of his fee. It appears that in line with many asylum seekers she was brought to this country through middle men who charged a substantial sum of money as part of their illegal activities. She presented herself at Bryson One Stop Service for asylum seekers seeking emergency accommodation. The Home Office Border Agency was contacted but emergency accommodation was refused on the grounds that the applicant could not provide proof that she had given the money to the agent. It was decided that she should be given a place to stay in Ark Hostel funded by a local charity with very limited resources and that was on the understanding that that situation would not continue for long. She received some food and food vouchers.

[5] The Border Agency maintained the view that the applicant had not been frank and open in relation to the financial situation and they maintained the view that she was not entitled to asylum support under the relevant legislation.

[6] This led on to the commencement of judicial review proceedings ("JR1"). Weatherup J granted interim relief until 8 April 2009 when the matter was reviewed. When the matter came on for review before Morgan J the leave application was adjourned to 17 April and further interim relief given in the meantime.

[7] It subsequently transpired that the applicant had not in fact lodged a proper application for national asylum support funding and that was done. She withdrew her application for leave to issue judicial review on 20 April that being the case. This terminated JR1.

[8] On 21 April the Border Agency concluded that she was not eligible for Section 95 support on the grounds that she had failed to produce evidence to confirm her statement about the money she had given to the agent. She then brought an appeal to the asylum support adjudicators against that decision under Section 103 of the 1999 Act. On 22 April the applicant's solicitors made a telephone request to the Border Agency for the continuation of support under Section 98 pending determination of the Section 95 appeal. This was refused. This led to the bringing of a second judicial review application which I will call JR2. In JR2 the grounds included the argument that Section 98(2) of the 1999 Act was incompatible with the applicant's rights under Articles 3, 8 and 14 of the Convention and that the Border Agency had failed

to apply and give effect to the Section in a manner consistent with Articles 3, 8 and 14 of the Convention.

[9] That application came before Morgan J again. It was withdrawn when on enquiry a representative from Bryson House informed the applicant's legal team that as an act of charity the applicant would be permitted to stay in the hostel accommodation until the determination of her Section 95 appeal.

[10] In due course the Section 95 appeal came on for hearing before Judge Ghandi in the tribunal system. Having heard the appellant give oral evidence the judge had no reason to doubt what the applicant was saying and she upheld her Section 95 claim.

[11] On 12 May 2009 it is the case of the applicant's solicitors that they wrote to the Borders Agency seeking its position on whether in the light of the events to date there existed no statutory or other discretion to provide accommodation or support to an asylum seeker who had been refused Section 95 support while an appeal against that refusal was pending. The Home Office denies receiving that letter and no response to it was received. It is not necessary for the purposes of my judgment to come to a conclusion in relation to the truth of the matter about the receipt of the document. It seems clear that the solicitors file shows that they had sent the letter. There is also evidence that it was faxed apparently to the tribunal.

[12] In any event the Home Office have maintained the position that there is no power or right vested in the Secretary of State to make any Section 98 payment once a decision had been made by him under Section 95 concluding that the claim was ill-founded.

[13] As noted appeal before the Immigration Judge was successful. Following that decision the payment of assistance was resumed and it appears that it continues to be paid. The asylum position remains unclear at the moment in as much as the Secretary of State rejected the asylum claim. There was an appeal to the Immigration Judge at the Asylum and Immigration Tribunal. That appeal was unsuccessful. Leave to issue judicial review came before Weatherup J, who in an ex tempore judgment, refused leave. In relation to the asylum position she sought a reconsideration before another tribunal. The application for reconsideration was rejected and she then made an application to the High Court under Section 103A of the 1999 Act. That application before the High Court has not yet been determined.

[14] That sets out the factual chronological background to the application which is before the court. It will be apparent from a resume of the facts that the point in issue between the parties turns on the interpretation of Section 98 read with Section 95 and other provisions of the 1999 Act.

[15] Mr McGleenan on behalf of the Secretary of State raises two issues which are in the nature of preliminary issues although they are not issues that the court was asked to rule on by way of preliminary points determinative of the matter. The two matters raised by Mr McGleenan are, firstly that the present judicial review application is an abuse of process on the basis that the principles of res judicata and abuse of process; and secondly that the point raised by the applicant is an academic point as far as she is concerned because her claim will bring her no tangible benefit in that during the relevant period of the pending appeal she in fact received assistance from a third party which meant that during the relevant period she was not in fact destitute or in a situation where she would herself have a claim for a breach of any Convention rights.

[16] In relation to the res judicata issue the outline of the chronology which I have given shows that in JR2 the applicant was essentially raising the same issue that calls for determination in the application today.

[17] It must be noted however that JR2 was withdrawn before leave was granted. Thus there was no determination by the court on the merits and hence no judgment giving rise to a res judicata. There is, of course, a wider principle of res judicata, issue estoppel. One should bring forward one's case all at one time in relation to proceedings and not leave separate arguments and separate points to be pursued in later proceedings raising essentially the same cause of action. However, it does not seem to me that res judicata is of relevance in the present case either on the grounds of issue estoppel or on the grounds of ordinary principles of res judicata. The real issue is whether the third and present judicial review application should be viewed as really an abuse of process in that the applicant had raised the point before and had not proceeded with it at the proper time.

[18] I have come to the conclusion that this is a case in which the court should not strike out the present judicial review application as an abuse of process. I do not consider that the Secretary of State has suffered any real prejudice. JR2 never got past the leave application stage and the Secretary of State in those proceedings was never in a position to have had a claim for costs in relation to those proceedings. The issue raised in the present judicial review application is an issue falling within the Salem principle. Salem made clear that cases which are essentially academic on the facts as between the applicant and a respondent may nevertheless proceed to a determination by the court if what is raised in the proceedings is in the nature of a point of statutory interpretation of some general public importance. It seems to me that the issue raised in the present appeal is one that has relevance and significance in relation to the administration of asylum law throughout the United Kingdom. It appears from the argument presented and from the researches of counsel and the court that there is no binding decision in

relation to the true effect to be given to Section 98 in relation to the point that has been raised by the applicant.

[19] Thus I hold against the Secretary of State on the res judicata and Salem issues and I will proceed to consider the question of construction that has been raised in the proceedings.

[20] The relevant provisions to which the court must refer first are Section 95 of the Immigration and Asylum Act 1999. Section 98 of that Act and Section 103 which deals with appeals in relation to decisions under Section 95. Reference was also made to a provision in Section 94(3) in relation to what is meant by a "determination" in the context of a claim for asylum and reference will be had to that.

[21] Section 95 of the 1999 Act provides that the Secretary of State may provide or arrange for the provision of support for asylum seekers or dependents of asylum seekers who and I quote "appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed." There are a number of matters that are set out in the succeeding sub-sections in Section 95 but I do not think it is necessary to go through them in detail.

[22] Section 96 deals with the ways in which support may be provided, for example by way of accommodation, the provision of food and other essential items and the meeting of expenses incurred in connection with the claim for asylum. Section 97 contains some supplemental provisions which are not material.

[23] I then turn to Section 98 which is material. It provides in sub section (1) that the Secretary of State may provide or arrange for the provision of support for asylum seekers or dependants of asylum seekers who it appears to the Secretary of State may be destitute. It is necessary to note in the sub-section those words "who appear to the Secretary of State may be destitute".

[24] Then Section 98(2) provides 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.

[25] The appeal provision is to be found in Section 103(1) makes clear that an appeal may be brought in relation to a decision under Section 95 and sub-section 2 provides that the person may appeal to an adjudicator against the decision that the person is not qualified to receive the support for which he has applied. In the event of an appeal on the appeal the adjudicator may require the Secretary of State to reconsider a matter, substitute his decision for the decision against which the appeal is brought or dismiss the appeal and the adjudicator must give his reasons in writing. As I have indicated a successful

appeal was brought here successfully by the applicant and reasons were given in writing by Judge Ghandi who explained why she came to a conclusion different to the decision of the Secretary of State and having come to a different conclusion her decision was substituted for the decision of the Secretary of State.

[26] The question of construing Section 98 arises in this way. Ms Danes on behalf of the applicant argues that Section 98 should be construed having regard to the provisions of the Convention and that if it is construed in the manner for which the Secretary of State contends (namely that once he has made his decision he cannot pay any allowance until the appeal is determined) the Secretary of State, who may ultimately be shown to be wrong in the appeal, cannot make any provision for an asylum seeker in a situation where in fact it turns out he was destitute during the period pending appeal and may during that period of destitution suffer an infringement of his rights to such an extent that his Article 3 rights under the Convention are infringed.

[27] Counsel also referred and relied on breach of Article 8 and Article 6 but it seems to me that if the point has strength it arises out of potential in infringement of Article 3 rather than the other provisions. As I have indicated Mr McGleenan on behalf of the Home Secretary argues that Section 98(2) precludes the Secretary of State making a payment once he has determined the Section 95 application and once the Secretary of State has made his determination he is functus officio in relation to the payment of the statutory allowance and he has no power or discretion to make any such payment.

[28] Notwithstanding that Mr McGleenan did refer to a policy statement made by the Secretary of State which is exhibited in the bundle of authorities. It makes clear that notwithstanding the bringing of an appeal the Secretary of State may, in sceptical circumstances, make provision for an asylum seeker for a maximum period of 7 days. So the Secretary of State appears to recognise that there will be situations of hard cases where it would be appropriate notwithstanding the absence of the power under Section 98 to make provision for an asylum seeker who might otherwise suffer seriously. This policy document, as Ms Danes points out, is a recognition by the Secretary of State that the interpretation put upon Section 98 by Mr McGleenan produces such an absurd and unfair result that the Secretary of State has to arrogate to himself a power which on Mr McGleenan's argument is not without any lawful basis because it runs contrary to the powers conferred on the Secretary of State under Section 98.

[29] I do not think that Section 98 can be construed by reference to the policy document nor can it be construed by reference to the policy documents or regulations relating to timescales for appeals which are clearly designed to ensure that appeals are brought on quickly. At the end of the day Section 98 is the primary piece of legislation which falls to be construed in its overall

context and cannot be qualified by extrinsic policy statements or regulations that are not part of the statutory framework.

[30] Section 98(1) provides that the Secretary of State may make provision for supporting an asylum seeker when it appears to the Secretary of State that that person "*may* be destitute". This is a different threshold question from the question which has to be determined under Section 95 which requires the Secretary of State to determine whether the person *appears to be* destitute or likely to become destitute within the relevant period. Section 98 may come into play at two stages. It can apply prior to a Section 95 decision by the Secretary of State. Mr McGleenan argues that is really what it is dealing with. It is, he submits, dealing only with the pre-Section 95 decision time and once the decision is made Section 98 ceases to have effect. However, there is no reason why on its proper construction Section 98 cannot also apply to the situation once an appeal is brought after the Section 95 decision by the Secretary of State and pending the appeal. Neither the Secretary of State nor the asylum seeker will know their final position and in that intervening period of time as far as the applicant is concerned where she has brought a bona fide appeal the Secretary of State may ultimately be shown to be wrong by the adjudicator's analysis of the evidence which the adjudicator will hear more fully than the Secretary of State who determines these matters on the documentation. In those circumstances, against that background, the Secretary of State may properly and in many cases would properly conclude that the asylum seeker *may* be destitute even though the Secretary of State has reached a firm view under Section 95 that he is not destitute bearing in mind that the Secretary of State must recognise that ultimately the decision will be that of the adjudicator whose decision will be substituted for his. The adjudicator will have the benefit of a fuller analysis of the evidence.

[31] Accordingly, I conclude that Section 98(1) on its proper interpretation can apply both to pre and post Section 95 decisions and the result is that in a post Section 95 decision situation it is entirely open to the Secretary of State to proceed on the basis that the applicant may turn out to be destitute following the appeal process. That being so the jurisdiction under Section 98 comes into play subject to sub-section (2). Sub-section (2) provides that the support may be provided only until the Secretary of State is able to *determine* whether support may be provided under Section 95. The question then arises as to what is meant by the Secretary of State being able to determine whether support may be provided.

[32] I am fortified in that interpretation of Section 98 by an ordinary application of the mischief rule. The mischief of asylum seekers having no means of support at a time when they may well be destitute is a mischief that clearly Parliament intended to deal with by making provision for the provision of allowances to deal with the hardships that they would suffer because of the lack of means in those circumstances. Taking away the right

pending an appeal which may turn out to be successful does not seem to me to meet the mischief that Parliament is really intending to deal with, namely the extreme hardship of asylum seekers who have no means of support or who may have no means of support in a situation where they have a viable and bona fide claim by way of appeal. That supports the view why the interpretation that I have given is correct.

[33] Until the appeal is determined, the Secretary of State will not be in a position to know whether ultimately or not the person is entitled to Section 95 relief. That is a strong indicator that for the purposes of Section 98(2) the determination of the question envisages a final determination. The word "determine", which is related to the word "terminate", points to a conclusion of the matter. It is noteworthy that there is a distinction drawn in Section 103 between, on the one hand, a determination and on the other a decision. Section 103(2) talks of an appeal to an adjudicator against a decision that the person is not qualified to receive benefit. The Secretary of State clearly makes a decision under Section 95 that the person is not destitute or likely to become destitute but the question of his right to Section 95 relief, once an appeal is brought, is not determined until the appeal is concluded. It seems to me that by ordinary analysis of language in the context of a legislative framework such as this the conclusion can properly be drawn that Section 98 was not intended to preclude the payment of an allowance under Section 95 pending the ultimate determination of the question.

[34] It is quite clear that under Section 3 of the Human Rights Act primary legislation (which this is) falls to be read and given effect in a way which is compatible with the Convention rights. Section 3 accordingly would support an approach to the interpretation of Section 98 that avoids the potential infringement of Human Rights.

[35] In the course of the argument we debated the question whether Article 3 rights of individuals could in certain circumstances be infringed by the Secretary of State withholding assistance under Section 98 by reliance on the conclusion he has reached under Section 95. It is possible to see situations where, if Mr McGleenan's interpretation is correct, individuals could suffer seriously during a period of time pending their appeal in a situation where the appeal may show in fact that they have been correct in their contentions all along. One needs only to think of the weather conditions that prevailed recently of extreme low temperatures which could expose individuals to severe hardship and ill health if they are deprived of any form of assistance from the public authorities by reliance on Section 98. Since one can envisage such situations potentially arising the Secretary of State's interpretations of Section 98 could produce results that infringe Convention rights under Article 3. That is a strong indicator that the legislation should be read in a way which avoids that consequence and that consequence can be avoided by reading Section 98(2) in the manner which I consider it should be read. That would be

so if I had come to a different conclusion on the proper interpretation of Section 98(2) on the application of ordinary principles but, as I say, by the application of ordinary principles one is led to the result that it permits the Secretary of State to make payments on a temporary basis during the period pending the outcome of an appeal.

[36] For these reasons I have reached the conclusion that the applicant should be granted a declaration in the amended form sought in the notice of motion, namely that the Secretary of State has a discretion to permit the continued provision of temporary asylum support while an appeal against refusal of asylum support under Section 95 is pending. That does not determine the extent and nature of the discretion vested in the Secretary of State who under Section 98 has to exercise a discretion which will depend on the circumstances. I do not think it is necessary or appropriate to express any view as to how the discretion should or should not be exercised or what factors would or would not be permissible factors to take into account in the exercise of the discretion. That would be a matter that would require a focused consideration of the individual facts of individual cases. The determination of the principle as to the proper effect of Section 98, however, is an important one to determine. It is a matter for the Secretary of State to decide the appropriate way in which the discretion should be exercised. The policy document referred to by counsel which makes provision for the payment of allowances in exceptional circumstances, perhaps without the time limitation, might well be an appropriate way of dealing with the matter as a matter of policy. That is not a matter on which the court needs to come to a firm conclusion.