Neutral Citation No [2004] EWCA Civ 540 Case No: C/2004/0383, C2/2004/0384 & C/2004/0277

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
The Honourable Mr Justice Collins
The Honourable Mr Justice Gibbs
The Honourable Mr Justice Charles

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2004

Before :

LORD JUSTICE LAWS
LORD JUSTICE CARNWATH
and
LORD JUSTICE JACOB

- -

Between :

The Secretary of State for the Home Department	**Appellant**
- and -	
(1) Wayoka Limbuela	**Respondents**
(2) Binyam Tefera Tesema	
(3) Yusif Adam	

- -
- -

Mr Nigel Giffin QC (instructed by Treasury Solicitors) for the Secretary of State
Mr John Paul Waite (instructed by Treasury Solicitors) for the Secretary of State
Ms Kate Grange (instructed by Treasury Solicitors) for the Secretary of State
Mr Christopher Jacobs (instructed by White Ryland) for the 1st and 2nd Respondents Limbuela and Tesema
Ms Susan Monaghan (instructed by Hanne & Co) for the 3rd Respondent Adam
Mr Stephen Knafler (acting pro bono) for Shelter as Intervener

Hearing dates : 23 & 24 March 2004

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Laws:

INTRODUCTORY

1. These conjoined appeals raise important issues about the application of s.55(5) of the Nationality, Immigration and Asylum Act 2002 ("the Act of 2002") and Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). Permission to appeal was in all three cases granted to the Secretary of State by the judge below. Pursuant to those grants of permission the appeals are brought against the judgment of Collins J in *Limbuela* given on 4 February 2004, that of Gibbs J in *Tesema* given on 16 February 2004, and Charles J in *Adam* given on 17 February 2004.

2. In each case the judge in the Administrative Court granted relief by way of judicial review of the Secretary of State's decision not to provide support for the claimant asylum-seeker. The three claimants are of course the respondents before us. We have been asked to give general guidance as to the operation of s.55(5) and Article 3: there has been some divergence of view among the judges of the Administrative Court as to the correct approach to be applied, notwithstanding earlier learning in this court in *R(Q) & ors v Secretary of State* [2003] 3 WLR 365 ("*Q*") and *R(T) v Secretary of State* [2004] 7 CCLR 53. In addition to these authorities, and the three judgments under appeal, it will be necessary to pay attention to the decision of Newman J in *Zardasht* [2004] EWHC Admin 91, given on 23 January 2004. At the time of the hearing of these appeals in this court on 23 and 24 March 2004, we were told that no fewer than 666 further cases awaited disposal which are likely to be affected by our judgment.

THE STATUTORY MATERIALS

3. It is convenient to set out the material statutory provisions before coming to the facts of the three cases. S.95 of the Immigration and Asylum Act 1999 ("the 1999 Act") provides in part:

> "(1) The Secretary of State may provide, or arrange for the provision of, support for –
>
> a) asylum-seekers, or
>
> b) dependants of asylum-seekers,
>
> who 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."

There is a statutory definition of "asylum-seeker", but I need not set it out. There is no contest but that the three respondents to these appeals are asylum-seekers within the meaning of the statute. The same will almost certainly be true of all or the overwhelming majority of the other claimants whose cases are in the pipeline. I should add that by force of other legislation, subject to certain qualifications and exceptions an asylum-seeker has no access to State support or provision other than through s.95 of the 1999 Act. The provision of accommodation pursuant to s.95 is administered by the National Asylum Support Service ("NASS"), which is effectively an agency of the Secretary of State.

4. S.55 of the Act of 2002 provides in part:

> "(1) The Secretary of State may not provide or arrange for the provision of support to a person under a provision mentioned in subsection (2) if –
>
> a) the person makes a claim for asylum which is recorded by the Secretary of State, and
>
> b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.
>
> (2) The provisions are –
>
> a) [section]… 95… of [the 1999 Act]
>
> …
>
> (5) This section shall not prevent –
>
> a) the exercise of a power by the Secretary of State for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998)
>
> …"

5. It will at once be evident that an asylum-seeker who is barred from support by the application in his case of s.55(1), for whom the bar is not lifted by the application of s.55(5), will be on the streets with nothing unless he has resources of his own or can

get access to some form of support from other individuals or non-State groups or agencies. Article 3 ECHR, as is well known, provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

It is unnecessary to set out any of the measures in the Human Rights Act 1998, save to recall that s.6 renders it unlawful for any public authority (which includes the Secretary of State and the courts) to act incompatibly with a Convention right. Consistently with that provision, s.55(5) of the Act of 2002 lifts the prohibition imposed by s.55(1) if in any given case it is necessary to exercise the power given by s.95(1) of the 1999 Act to avoid a breach of the asylum-seeker's right guaranteed by Article 3. There are other statutory powers mentioned in s.55(2) (and so implicitly the subject of the reference to "a power" in s.55(5)), and there are other Convention rights which might be engaged by s.55(5). S.95(1) and Article 3 are the material provisions for the purpose of these appeals.

6. In light of these statutory measures one formulation of the critical issue in these appeals might be expressed thus: how grave must the facts of any individual case be to require the Secretary of State to apply s.55(5)?

7. I think it useful in the context of this recital of the relevant statutory materials to set out this description of the purpose of s.55 given at paragraph 26 of the judgment of this court, delivered by the Master of the Rolls, in *Q* (to which I shall have to return):

> "… [W]e consider that the primary object of section 55 can properly be treated as preventing (1) those who are not genuine asylum seekers and (2) those who are not in fact in need of state support from obtaining assistance. The section assumes that genuine asylum seekers can be expected to seek asylum on arriving in this country, not to go off and do something else before seeking support. Furthermore, those who do not claim asylum and support on arrival, but do so later, will ordinarily have demonstrated an ability to subsist without support in the interim. Section 55 is designed to ensure that the circumstances in which support is sought will be circumstances in which support is likely to be needed."

THE FACTS

8. I will first describe the facts in the individual appeals. For this purpose I have largely taken the narratives which follow from the summaries given in the skeleton arguments provided in each case on behalf of the Secretary of State. The summaries' accuracy is not I think disputed, but it is said for the respondents that they are too sparse, and if a fair view is to be taken of the facts they need to be filled out with rather more detail. I go a little way, but not very far, with that. The narrative I have given draws here and there on material in the respondents' skeleton arguments, on the account of the facts given in the court below, and on the primary documents. My aim has been to describe

the facts to the extent necessary to determine the issues in the appeals and no further. I should notice that in each of the three cases the Secretary of State did not believe the respondent's account of how and when he arrived in the United Kingdom.

9. However there are other more general factual issues of which I must give some account. The charity Shelter put in a skeleton argument with permission earlier granted by myself. They also submitted substantial written evidence. For that they had no permission; and it is very important that interveners, who take part in proceedings at the court's discretion and not by right, should strictly abide by the terms on which they are allowed to participate. That said, I acknowledge at once that much of the factual material submitted by Shelter has proved useful to the court, and I accept without hesitation the explanation and apology offered by Mr Knafler, counsel for Shelter, in his careful and courteous letter of 25 March 2004. At the hearing Mr Knafler addressed the court on behalf of Shelter to the extent that he was allowed to do so. I have to say that his skeleton is highly rhetorical, and that is by no means conducive to this court's better performance of its task. But I must certainly consider the essence of the factual material which Shelter has provided.

10. The evidence also includes statements put in on behalf of the Secretary of State by Michael Sullivan, a caseworker with NASS. He produces a list of day centres for homeless people in London, and in his second statement confronts criticisms which had been levelled by Sophia Linehan, Adam's solicitor, at what he had first asserted. I need also to consider this material. Lastly there is a document titled "Destitution by Design" issued in February 2004 by the office of the Mayor of London, which contains passages relied on by the Secretary of State as showing the extent to which asylum-seekers without State support have been able to look to resources to be found in community-based organisations.

11. I turn first to the facts of the individual cases.

LIMBUELA

12. Wayoka Limbuela is a national of Angola born on 20 April 1980. He maintains that he arrived in the United Kingdom on 6 May 2003. He claimed asylum on 7 May 2003, and was provided with NASS accommodation in Margate. On 16 May 2003 the Secretary of State decided that Limbuela had not made his claim for asylum as soon as reasonably practicable so that by force of s.55(1) of the Act of 2002 he was barred from support or further support under s.95 of the 1999 Act, subject to s.55(5). That decision, and decisions made to the same effect in the cases of *Tesema* and *Adam*, is not or is no longer the subject of any challenge.

13. However the Secretary of State concluded also that in the circumstances of the case s.55(5) did not avail Limbuela. At length, on 22 July 2003, he was evicted from the NASS accommodation where he had been placed. After that he spent two nights sleeping rough outside Croydon Police Station. In that time he claims (and there is nothing, I think, to contradict it) to have had no money and no access to food or washing facilities. He asked the police for a blanket, but that was not provided; he begged

passers-by for food, but was not given anything. Then from 24 July 2003 he was able to stay for four nights at the Lord Clyde night shelter, where he was also provided with food. On 28 July he was asked to leave the night shelter and advised to contact a solicitor. So he did, and on the same day solicitors instructed by him wrote to NASS stating that he faced violations of Articles 3 and 8 because support was not being provided to him. There was no prompt reply to this letter, but the Secretary of State's effective continuing refusal to accept that this is a s.55(5) case and accordingly provide support is the subject of the judicial review challenge.

14. Also on 28 July 2003 application was made on Limbuela's behalf to Eady J who granted an interim injunction against the Secretary of State pursuant to which Limbuela has since been housed and fed. No material was put before the Secretary of State or the judge on 28 July to indicate any medical problems. At length on 29 October 2003 (after judicial review permission had been granted by Jackson J) the Treasury Solicitor sought specific information from Limbuela's advisers in relation to what may be called his s.55(5) claim. Eventually, on 5 January 2004, Limbuela made a witness statement in which among other things he said he had suffered from stomach pains. Later a general practitioner's letter was produced (two days before the hearing of the judicial review). The doctor said that Limbuela had been to his surgery three times since August 2003. His complaints had been, variously, constipation, a cough, pain in the lower abdomen and testicles, dizziness and heartburn. He had been prescribed appropriate medication.

15. The Secretary of State rejected Limbuela's asylum claim on 10 June 2003. The Adjudicator dismissed his appeal on 1 September 2003. We were told at the hearing that on 24 February 2004 (thus after Collins J's judgment) the Immigration Appeal ("the IAT") gave leave to appeal and remitted the case for a re-hearing before a different Adjudicator. The re-hearing is still awaited.

TESEMA

16. Binyam Tefera Tesema was born on 22 July 1977 and is a national of Ethiopia. He claims to have arrived in the United Kingdom on 13 August 2003 and to have stayed that night in a hotel arranged by the agent with whom he had apparently travelled. By the next morning, however, the agent had disappeared. On the same day, that is to say 14 August 2003, he made a claim for asylum and was thereafter housed in NASS emergency accommodation.

17. He was interviewed on 14 August 2003. That was what is called the "Level 1" interview. The *pro forma* for Level 1 is essentially restricted to questions concerning the claimant's identity, status and travel route, though it provides for some questions relating to health. In response to those Tesema complained of earache, backache, and pain in the left knee, but said he had not seen a doctor for three years. He was interviewed again on 17 August 2003. This was the "Level 2" interview, which deals with the claimant's identity, status and travel route. On that occasion he said he was in good general health. Difficulties he suffered with his ears, back and feet were, he said, due to his having been beaten.

18. On 20 August 2003 the Secretary of State concluded that Tesema had not claimed asylum as soon as reasonably practicable within the meaning of s.55(1), and that there was nothing to justify his taking action under s.55(5). Tesema's solicitors wrote to the Secretary of State on 1 September 2003 to call into question both decisions. As I have indicated only the s.55(5) challenge is live. On 2 September Tesema was evicted from his NASS accommodation but on the same day upon application to Henriques J obtained an order for interim support. So he has not in fact had to sleep rough at any time.

19. Jackson J granted judicial review permission on 27 October 2003. Thereafter the Treasury Solicitor, seeing that Tesema had complained of various medical problems in his first witness statement, asked his solicitors to provide evidence from a doctor as to the nature of his medical condition and any treatment he was receiving. At length on 21 January 2004 the solicitors sent a report dated 1 January 2004 from a psychiatrist, Dr Steadman. The report summarised Tesema's allegations of what had been done to him in his home country. It contained also an account of certain physical ailments – some loss of hearing, intermittent pain in the back and above the left knee – which Tesema described to the doctor. Then as Gibbs J was to put it (paragraph 30):

> "[Tesema] further reported to Dr Steadman ongoing, frequent, recurrent, intrusive and distressing thoughts of his experiences in his country… Dr Steadman … did not feel that [he] presented with the full syndrome of clinical depression. He did, however, present with some anxiety."

Dr Steadman concluded that Tesema "would benefit from being under the care of a local Community Health Team" and should be registered with a general practitioner.

20. Some further medical material was submitted a little later in the shape of a letter dated 13 January 2004 from the Lambeth Primary Care Trust. However Gibbs J concluded (paragraph 34) that it added little to Dr Steadman's assessment.

21. In light of all the medical evidence he had received since the grant of judicial review permission the Secretary of State issued a further decision, dated 5 February 2004, by which he concluded that Tesema had not provided evidence of a medical condition such as would engage s.55(5). After that further evidence was put in to show that Tesema had made two approaches for support and accommodation, one to the Ethiopian Community Centre and the other to the Eritrean Community Centre in Haringey, but neither was able to provide for him.

22. The Secretary of State rejected Tesema's asylum claim on 20 August 2003, by the same letter that conveyed his decisions under s.55(1) and s.55(5). His appeal to the Adjudicator was allowed on 14 January 2004. On 11 March 2004 the IAT granted leave to the Secretary of State to appeal. The appeal has not yet been heard.

ADAM

23. Yusif Adam was born on 25 December 1975. He claims to be a national of Sudan. He was to say that he left Port Sudan on 22 September 2003 by cargo ship arriving in the United Kingdom on 15 October. He claimed asylum on 16 October 2003. On the same day the Secretary of State reached decisions adverse to him under ss.55(1) and 55(5) of the Act of 2002. His substantive asylum claim has still not yet been determined.

24. At his Level 1 interview on 16 October 2003 Adam stated that his health was "generally fine", he was not suffering from any medical condition, and he had last seen a doctor about two years previously. He is or claims to be illiterate. From 16 October until 10 November 2003, when Ouseley J granted judicial review permission and interim relief, he was on the streets. On his own account (in two witness statements of 28 October and 4 November 2003) he slept outside the Refugee Council in Brixton. During the day he had access to the Refugee Council premises where he could wash himself and his clothes, get tea and coffee in the morning, sometimes an evening meal, and a hot meal at 1 pm.

25. Adam's judicial review claim form was issued on 7 November 2003. Attached to it was a doctor's note dated 27 October 2003 stating that he was suffering from haemorrhoids, back pain and gastritis, and giving details of the medicines which had been prescribed. After he was provided with accommodation following Ouseley J's order for interim relief a report dated 10 December 2003 from Dr Michael Peel of the Medical Foundation was served on the Treasury Solicitor. Given a particular criticism levelled at Charles J's reasoning by Mr Giffin QC for the Secretary of State (to which I will come in due course) it is convenient to cite this passage from Dr Peel's report:

> "Mr Adam feels physically well but psychologically depressed. He has poor concentration and he does not sleep well. He cannot get to sleep easily then wakes with nightmares. He has been prescribed anti-depressants by his GP but did not collect the prescription because he did not know he was exempt from charges and could not afford the tablets."

SHELTER'S EVIDENCE

26. The background to what Shelter have to say rests in the undisputed fact that asylum-seekers whose claims are not yet determined are prohibited from obtaining employment and at the same time barred (by force of s.115 of the 1999 Act) from State benefits; though this latter circumstance is mitigated by s.95 of the 1999 Act in cases where that provision applies.

27. Shelter refer to what they describe as "generic" evidence which they have deployed in the courts before. It was served on the Secretary of State in *T* (material contained in certain statements has since been updated) and in another case, *Kumetah*. It has been available to many other claimants. In summary, Shelter roundly assert that there is no realistic prospect of a destitute asylum-seeker obtaining accommodation through a charity. Unless he has family or friends able to provide him with accommodation or substantial funds, he will have to sleep rough. So far as charitable provision might be available, it does not stretch to things like umbrellas, plastic sheets or mats (let alone

sleeping bags, warm and waterproof cagouls, tents and the like). In London (and these appeals are all, so to speak, London cases) charity food, drink and washing facilities are in limited supply. The asylum-seeker's access to them depends on where he is sleeping rough, and whether he is (a) able to ascertain that such facilities exist, where they are and when they are open, (b) able to walk what will generally be substantial distances to find them, (c) able to find them when he gets to the relevant area, and (d) lucky enough to arrive when there is still some available provision. On all these points there is a good deal of detail before us, which I have of course considered. I will not set out all of it. I hope it goes without saying that I do not thereby intend to diminish its obvious force. I will highlight some specific points.

28. Mr Adam Sampson, the Director of Shelter, has made a very full statement, dated 17 March 2004. He says there are only two free hostels in London. One, in W9, is for women only and has a capacity of 15. It is said to be full every night. The other, for men who must be at least 30 years of age, is in SE1 and has a capacity of 36. No vacancies were recorded over a period of two months monitored by Shelter between November 2003 and January 2004. There are five winter night shelters operating free of charge, in Croydon (10 spaces), Hackney (15 spaces), Harrow (8 spaces), Islington (12 spaces) and West London (35 spaces). They offer a camp bed or a mattress in a church hall. Mr Sampson describes various formidable difficulties of access to these facilities.

29. There are also three "Rolling Shelters" which provide free accommodation, operated by St Mungo's. But Mr Sampson says that s.55 asylum-seekers (a shorthand for those against whom s.55(1) and 55(5) decisions have been made) are not regarded as "an appropriate client group" for these shelters.

30. Mr Hugo Tristram of the Refugee Council has also made a statement in support of Shelter's intervention. He describes, in particular, the Refugee Council's day centre. As its name implies it does not provide overnight accommodation. It is closed at weekends. Coffee, tea, breakfast and a hot lunch are available four days a week, and sandwiches on Wednesdays. There are limited laundry and shower facilities. Some clothing and blankets are given out.

31. Mr Tristram also recounts incidents of bottles and stones being thrown at asylum-seekers sleeping rough, and of the degrading condition to which they may be reduced.

MR SULLIVAN'S EVIDENCE

32. In his first statement Mr Sullivan produces, as I have said, a list of some 54 day centres for homeless people in different parts of London, and a schedule giving details of each of them. He says they all offer help with such things as meals, showers, clothing and medical services, and advice on alcohol and drugs, benefits, and accommodation.

33. There followed, as the written evidence took its course, what amounted to something of a debate between Sophia Linehan, Adam's solicitor, and Mr Sullivan about two

matters. The first was the utility or otherwise of a facility called Hostels Online which Mr Sullivan had stated was a resource of which s.55 asylum-seekers such as Miss Linehan's client might take advantage. The second went to the practical availability for asylum-seekers of the day centre facilities in Mr Sullivan's list. As for the first, Miss Linehan crisply asserts (statement, 2 February 2004, paragraph 5) that none of the organisations listed on the Hostels Online website will take an asylum-seeker with no access to public funds. That is not answered by Mr Sullivan in his statement of 5 February 2004 save in the vaguest terms. As regards the second, Mr Sullivan says that thirteen of the day centres in his list state in terms that they are available to asylum-seekers. Enquiries were made of fifteen others by a representative of the Treasury Solicitor. These also offer some support by way of basic amenities which is available to asylum-seekers.

34. Mr Sampson of Shelter and Mr Tristram also comment on Mr Sullivan's list of day centres. Mr Tristram had been involved in drawing up the list. Mr Sampson emphasises their considerable distance, one from another. He states (cross-referring to Mr Tristram's evidence) that the list has proved of little value and is no longer distributed by the Refugee Council.

"DESTITUTION BY DESIGN"

35. This document, issued as I have said by the Mayor of London's office in February 2004, is of particular interest because it asserts facts which might be said to weaken the case that it seeks to make; at least they do not go to support it. The facts so asserted may on that account be taken to be more likely than not to be true. The document's subtitle is: "Withdrawal of support from in-country asylum applicants: An impact assessment for London". It is heavily critical of the effects of s.55 of the Act of 2002, as exemplified in particular by the summary at the end of the document, in paragraph 8.18. At the same time it contains these following assertions, which are necessarily selective:

> "7.1… With an estimated total of more than 500 community-based organisations, London's asylum seekers and refugees have developed self-organisation and self-help to an exceptional degree…
>
> 7.4… Since 2000 many tens of thousands of asylum seekers – up to 29,000 at a time – have chosen to stay in London on subsistence-only support rather than undergo NASS dispersal…
>
> 7.8 The level of need created by Section 55 has however proved too much for households to absorb entirely. They have not been able to save a substantial minority of these destitute newcomers from sleeping rough…"

OBSERVATIONS ON THE BACKGROUND FACTS

36. It must be obvious that it is not possible for this court to make full, accurate and detailed findings of fact as to the exact realities faced by s.55 asylum-seekers in London, let alone elsewhere. Such an exercise could only be satisfactorily conducted by a process of factual enquiry involving a wide-ranging examination of the evidence, with oral testimony and cross-examination. A process of that kind is inapt for determination in the course of adversarial litigation in the judicial review jurisdiction, and particularly inapt in this court. I draw attention to this circumstance in order to point up the wisdom of my Lord Carnwath LJ's observations in the course of argument to the effect that it cannot be the court's task to judge the daily circumstances of the plight of individual s.55 asylum-seekers so as to ascertain whether there is an actual or potential violation of Article 3 ECHR. To that I will return; but despite its force we must surely reach and describe some impression of the general or background evidence. We are at least required to articulate a kind of touchstone for the application of Article 3 in these cases.

37. Looking at the factual material as a whole, my impression is that a significant proportion – I cannot give a tighter description – of s.55 asylum-seekers will not get access to overnight accommodation and will therefore be on the streets. Many, however, will obtain accommodation and are doing so. So much is plain from the Mayor of London's document. Both those who do and those who do not find accommodation will mostly, though sometimes with real difficulty, get access at least to rudimentary facilities including food during the daytime. This very broad, and (as I acknowledge) necessarily superficial view is I think consistent with the picture that emerges from the facts relating to the three individual cases. It must go without saying – I do not by that phrase mean to undervalue the point's importance – that the plight of living on the streets will bear more or less hardly according to the impact of a whole range of factors: not least, the state of the person's health, mental and physical, and the state of the weather.

THE LEARNING: Q AND T

38. In paragraph 6 I proposed what I described as "one formulation" of the critical issue in these appeals in these terms: how grave must the facts of any individual case be to require the Secretary of State to apply s.55(5)? The formulation is useful and important in reflecting on the facts of the individual cases and the general background facts which I have described. But the issues of law with which we are in the end confronted in these appeals cannot in my judgment be reduced to so simple a question. They engage the nature of the obligation undertaken in Article 3 by the States signatory to the ECHR, and also the proper construction of s.55 of the Act of 2002. In finding the way into these matters it is convenient to start with the two earlier decisions of this court in *Q* and *T*.

39. *Q* (Lord Phillips MR, Clarke and Sedley LJJ) concerned six test cases in which adverse decisions had been made under s.55(1) of the Act of 2002. The case's first focus was upon the approach to be taken to the decision-making process carried out under that subsection. At first instance Collins J held that the process adopted had been unfair. This court agreed. I would refer in particular to paragraphs 37 (which contains the court's definition of the test propounded in s.55(1) by the phrase "as soon as

reasonably practicable"), 43, 81 – 92 and 97 – 100 of the judgment of the court. With respect I need not set them out.

40. The court also, however, gave close attention to the effect of s.55(5). They considered (paragraph 46) two issues: "(1) can failure to provide support ever constitute *subjecting* an asylum seeker to inhuman or degrading *treatment*? If yes, (2) in what circumstances will the failure constitute such treatment?" In relation to (1), as the court recorded (paragraph 52), the Attorney General submitted that failure to provide support could never of itself constitute treatment and so amount to a breach of a negative obligation imposed by ECHR Article 3. He conceded, however, that in extreme circumstances Article 3 might impose a positive obligation on the State to provide support for an asylum seeker: the plight of a heavily pregnant woman was given by way of example. There follows in the court's judgment some discussion of the distance between positive and negative obligations in the context of Article 3. I shall have more to say about the distinction between these forms of obligation when I come later to confront the scope of Article 3 and it will be more convenient to cite the relevant passages from *Q* at that stage.

41. The court's conclusion on question (1) in *Q* is given at paragraphs 56 and 57:

> "56 In our judgment the regime that is imposed on asylum seekers who are denied support by reason of section 55(1) constitutes 'treatment' within the meaning of article 3. Our reasoning is as follows**.** Treatment, as the Attorney General has pointed out, implies something more than passivity on the part of the state; but here, it seems to us, there is more than passivity. Asylum seekers who are here without a right or leave to enter cannot lawfully be removed until their claims have been determined because, in accordance with the UK's obligations under article 33 of the Refugee Convention, Parliament has expressly forbidden their removal by what is now section 15 of the 1999 Act. But while they remain here, as they must do if they are to press their claims, asylum seekers cannot work (section 8 of the Asylum and Immigration Act 1996) unless the Secretary of State gives them special permission to do so: see the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225).
>
> 57 The imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere inaction."

42. In confronting question (2), after observing (paragraph 60) that "it is quite impossible by a simple definition to embrace all human conditions that will engage article 3", the Master of the Rolls proceeded to cite the decision of the Strasbourg court in *Pretty v UK* 35 EHRR 1, paragraph 52. *Pretty* is with respect an important case and I shall have to return to it. It is convenient however at this stage to set out paragraph 52, given its part in this court's reasoning in *Q*:

> "As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."

43. In *Q* this court continued:

> "61 The passages from the judgment of Collins J to which we have referred above suggest that he considered that there will be a breach of article 3 if the Secretary of State refuses permission to an asylum seeker where there is a *real risk* that, because he will receive no support from any alternative source, he will decline into the kind of state described in *Pretty v United Kingdom*. The 'real risk' test is one that the Strasbourg court has applied in the case of removal to a country in circumstances where the removing state will no longer be in a position to influence events. We do not believe that it is an appropriate test in the present context.
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> 62 Some who claim asylum may already be in a condition which verges on the degree of severity capable of engaging article 3 described in *Pretty v United Kingdom*. For those section 55(5) of the 2002 Act will permit and section 6 of the Human Rights Act 1998 will oblige the Secretary of State to provide or arrange for the provision of support. What of the others? Their fate will be uncertain. Those who have been in-country long enough to demonstrate that they have found other means of subsistence may be able to fend for themselves. But it is manifest that some recent arrivals who have no recourse to work, to funds or to help may also be caught by section 55(1). The Attorney General submitted that one cannot discount the possibility that charitable bodies or individuals will come to their assistance. This must be a possibility. But equally there must be a possibility that some will be brought so low that they will be driven to resort to crime or to prostitution in order to survive.
>
> 63 Unlike Collins J we do not consider that the fact that there is a real risk that an individual asylum seeker will be reduced to this state of degradation of itself engages article 3. It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself. That is what section 55(1) requires him

> to do. He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves. The Attorney General indicated that is always open to asylum seekers who have been refused support to reapply for this."

I should finally set out this sub-paragraph from the court's conclusions in *Q* at paragraph 119 (though in truth it replicates what had been said in paragraph 62), in particular because of the echo it finds in the later case of *T*:

> "(vii) Where the condition of a claimant verges on that described in *Pretty*…, section 55(5)… permits and section 6 of the Human Rights Act 1998 obliges the Secretary of State to arrange for the provision of support."

44. *T* (Kennedy, Peter Gibson and Sedley LJJ) was decided on 23 September 2003, six months after *Q*. The appeal was brought by the Secretary of State from a judgment given by Maurice Kay J, as he then was, in the Administrative Court ([2003] EWHC Admin 1941). There had been three claimants before Maurice Kay J: S, D and T. However this court was only concerned with the judge's findings as to the effect of s.55(5) in T's case. Kennedy LJ gave the judgment of the court.

45. Kennedy LJ referred (paragraph 9) to the finding in *Q* that the s.55(1) regime constitutes 'treatment' within the meaning of Article 3. As regards the issue of severity of treatment the court proceeded (paragraph 13) on the footing, effectively agreed between counsel, that it was for the claimant to establish that his right to relief pursuant to Article 3 was "clear". But that, of course, did not speak as to the level of suffering or potential suffering required to be established. Counsel for the appellant Secretary of State urged among other things that a claimant had to show "that he had taken all available steps to help himself" (paragraph 14). It seems to have been accepted (again, paragraph 14) that the moment at which the circumstances of the case had to be judged was immediately before the claimant obtained emergency interim relief, as T had done on 24 April 2003.

46. Counsel for the respondent T – in fact Mr Knafler – submitted (paragraph 15) "that any asylum-seeker who is homeless and without means is verging on the condition described in *Pretty*". The court said (paragraph 10):

> "It seemed to us at times that what we were being asked to do by both sides in this case was precisely that which was said in *Q* to be impossible, namely to provide a simple way of deciding when Article 3 will be engaged. As to that we agree with the court in *Q*. There is no simple solution, beyond what was said in *Pretty*. But, as was made clear in *Q*, even where there is a real risk that Article 3 will become engaged the Secretary of State is not obliged to act. At paragraph 63 the court said –
>
> > 'It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable

> support has not been provided and the individual is incapable of fending for himself.'
>
> At the end of the judgment in *Q*,… the court said in paragraph 119 that the burden of satisfying the Secretary of State that support is necessary to avoid a breach of Article 3 lies upon the claimant. He has to show that the support is necessary to avoid his being subjected to inhuman or degrading treatment, and the threshold is a high one. Where the condition of an applicant verges on the degree of severity described in *Pretty* then the Secretary of State must act."

Then at paragraph 16:

> "As we have already said, we are not prepared to attempt to lay down any simple test which can be applied in every case."

At paragraph 19 the court said:

> "The question whether the effect of the State's treatment of an asylum-seeker is inhuman or degrading is a mixed question of fact and law. The element of law is complex because it depends on the meaning and effect of Article 3. Once the facts are known, the question of whether they bring the applicant actually or imminently within the protection of Article 3 is one which [counsel for the Secretary of State] accepts can be answered by the court – assuming that viable grounds of challenge have been shown – without deference to the initial decision-maker. Equally, he submits and we would accept, this court is as well placed as the judge at first instance to answer the question."

47. In the event the court allowed the Secretary of State's appeal, holding (paragraph 19) that it was

> "impossible to find that T's condition on 24th April had reached or was verging on the inhuman or the degrading. He had shelter, sanitary facilities and some money for food. He was not entirely well physically, but not so unwell as to need immediate treatment."

The concept of "verging on" Article 3 mistreatment is clearly important for the reasoning in both *Q* and *T*.

AFTER Q AND T: THE LATER DECISIONS AT FIRST INSTANCE

48. Following two substantial judgments (if I may use the term) in this court dealing with s.55(5) of the Act of 2002, one might have expected to find a consistency of approach

among later decisions of the Administrative Court in the same area. But that is not what has happened. I make it clear I do not criticise the judges below on that account. I think the relevant principles in this area are more than usually elusive. I will deal with the cases before attempting any analysis. It is convenient to do so in chronological order.

ZARDASHT – NEWMAN J

49. As I have indicated the judgment in this case is not the subject of appeal to this court. It was decided by Newman J on 23 January 2004 (four months after this court's judgment in *T*). The claimant was a 20-year old Iraqi. Initially he received support but that was withdrawn following, as I understand it, an adverse decision under s.55(1) of the Act of 2002. He had no specific health problems. He was not given support under s.55(5) and spent fourteen days sleeping rough. Newman J dismissed his application for judicial review, holding (paragraph 39) that it was not clear that "the high threshold laid down by *Pretty*… ha[d] been achieved in this case".

50. Newman J was of course referred to *Q* and *T*. In paragraph 5 of his judgment he listed the main practical detriments facing asylum-seekers arriving here. They must be especially applicable to persons denied support: having no home or income, being a stranger to the language and the people, loneliness, anxiety, vulnerability. Newman J recognised (paragraph 6) that special circumstances such as ill health might exacerbate the burdens imposed by these conditions. Then he said this:

> "7 But such special circumstances aside, it is, in my judgment, essential for practitioners to realise that simply to state what could be regarded as the obvious, namely that the applicant is homeless, sleeping rough, has no money, and is lonely and vulnerable, will not be likely to be regarded, in the normal run of things, as sufficient..."

And this:

> "9 In my judgment, the principled working out of this legislation leads to the conclusion that Parliament must be taken to have intended that, even if all the circumstances which I have listed above in paragraph 5 are present, a case will not necessarily have been made out for support…
>
> 12… [B]eing destitute for weeks will not necessarily verge on a breach of Article 3. This is because of the obligation on an applicant to establish, so that it is clear, that charitable support has not been provided and that the individual is incapable of fending for himself. By way of example, the claimant in this case is apparently a fit and healthy man of 20. If, despite being homeless… he can obtain food from charities during the day, or other sources, and has some access to washing and sanitary facilities in the course of the day, it is possible that he could live for an extended period under such conditions without severe

> adverse consequences reducing his condition to the *Pretty* level…
>
> 13 Within the concept of fending for himself falls the assistance or support which he might be able to obtain from friends, whether new or old, and family, as well as simply 'fending for himself'. For the legislation contemplates that from such efforts a palliative measure may ensue which will prevent the seriousness of his condition sinking to the *Pretty* level. It follows that these factors must be eliminated by evidence, or covered in as much detail as makes the position clear."

51. Newman J went on to place further emphasis (paragraphs 16 – 17) upon the need as he saw it for claimants to provide evidence of particular circumstances which might qualify them for s.55(5) support.

LIMBUELA – COLLINS J

52. At paragraph 31 Collins J cited the judgment of Maurice Kay J at first instance in *T*, including this passage:

> "… [W]hen a person without such access [sc. to private or charitable funds or support] is refused asylum support and must wait for a protracted but indefinite period of time for the determination of his asylum application it will often happen that, denied access to employment and other benefits, he will soon be reduced to a state of destitution (not in the section 95 sense). Without accommodation, food or the means to obtain them, he will have little alternative but to beg or resort to crime. Many… will have little choice but to beg and sleep rough. In those circumstances and with uncertainty as to the duration of their predicament, the humiliation and diminution of their human dignity with the consequences referred to in *Pretty* will often follow within a short period of time."

Then in paragraph 32 Collins J struck a theme which has echoed loud in the to and fro of argument on these appeals. He said:

> "I find it distasteful to require that a wait and see policy is adopted, that is to say, it is not possible to be sure that he will suffer as he says he will, so remove his support, let us see whether he does descend into the state which is indicated in that paragraph from Maurice Kay's judgment, let us see whether his health does deteriorate, and then if it does, he can make an application."

53. Collins J proceeded to refer to the judgment of Newman J in *Zardasht*. He accepted (paragraph 37) that a claimant should put before the court evidence about "what steps

he has taken to try and get support, how he has fared and what effect it has had on him if he has had to sleep rough or beg or whatever". But he by no means accepted the general position adopted by Newman J. He said (paragraph 42) that he had "not approached the matter in quite the same way as Newman J". But that considerably understates the difference between them. Collins J took the view that in the case of any asylum-seeker who "shows that he has taken reasonable steps and that no assistance is available except by begging and hoping, then the fact that he will have to sleep rough, he has no money, he has no proper access to food or other facilities, will be likely to suffice to establish his case" (paragraph 37). And I should set out paragraphs 38 and 41:

> "38 Treatment, as I say, which causes someone to sleep rough, in particular in winter, to have to beg or hope for the possibility that he might find someone prepared to provide him with food, to be required to live in the same clothes for days on end, which clothes may or may not be adequate to protect him from the English climate, will, as it seems to me, in most cases be sufficient to cross the relevant threshold. In winter, the imminence of serious injury to health, which is likely to result from sleeping rough, is all too obvious and, in my judgment, it needs no medical or other specific evidence to establish what, after all, is a matter of common sense.
>
> 41… [I]t seems to me that, on the facts of this case, this claimant has established that, were he to be deprived of support, he would have no access to overnight accommodation and his chances of obtaining food and other necessary facilities during the day would be remote. He would be, as it seems to me, reduced to begging or to traipsing around London in the hope of finding somewhere which might provide him, perhaps irregularly, with some degree of assistance. That, in my judgment, as I repeat, particularly in winter time, is quite sufficient to reach the *Pretty* threshold…"

54. I think it a fair reading of the essential reasoning in this judgment that once an asylum-seeker who is denied NASS support under s.55(1) has shown that he has tried but failed to find accommodation and other support, so that he will have to sleep on the streets, he will have established an imminent breach of ECHR Article 3 and a corresponding entitlement to be supported under s.55(5).

TESEMA – GIBBS J; ADAM – CHARLES J

55. I can with respect deal with these two judgments rather more shortly. The position is that broadly speaking Gibbs J adopted the approach taken by Collins J, and Charles J that taken by Newman J. (I assume that Charles J did not see Gibbs J's judgment, which was given the day before his own.) I need only cite these passages from Gibbs J in *Tesema*:

> "59 On the question of whether Article 3 can be infringed where the treatment in question is imminent, I adopt the approach of

> Collins J. It seems to me that to hold otherwise would be contrary to any reasonable concept of justice. In a situation where the evidence before [the] decision-maker is that without intervention the person concerned will imminently experience inhuman and degrading treatment, it would not be reasonable or sensible to say, 'I require you to put it to the test just in case things do not turn out as I expect, but when they do, you can reapply'.
>
> …
>
> 68 The question whether or not Article 3 is infringed has to be determined on the basis of what a reasonable person, objectively applying the standards of a civilised society, would find to be acceptable or otherwise upon application of the test described in *Pretty* to the facts of the particular case. Applying that standard, I agree with the reasoning of Collins J in *Limbuela*. I consider that a decision which compels a person to sleep on the streets, or elsewhere in the open, without basic shelter and without any funds, is normally inhuman and degrading…"

56. In *Adam* Charles J stated at paragraph 55 (see also paragraph 68) that subject to certain points about the availability of charitable support (as to which the evidence had moved on) he agreed with the judgment of Newman J in *Zardasht*. He considered (paragraph 58) that Collins J's reasoning in *Limbuela* bore no more than "fine distinctions" from the "real risk approach" which this court had expressly rejected in *Q*, and that (paragraph 59) Collins J's description of the *Pretty* threshold did not accord with earlier authority.

WHERE ARE WE NOW?

57. I fear that the state of the law in this area has got into serious difficulty. So much is spoken to by the fact that judges of the Administrative Court have felt driven to take starkly contrasting positions as to the right test for the engagement of s.55(5) of the Act of 2002 notwithstanding the attention given to the subsection in two previous decisions of this court. I think the difficulty has principally arisen from two circumstances. First, it has not been found possible to articulate the ingredients of a violation of ECHR Article 3 in the case of a person put on the streets without support any more precisely than by reference to what was said by the Strasbourg court at paragraph 52 in *Pretty*: see by way of example paragraph 10 in *T*. Secondly, the prospect that the bare fact of being on the streets will not of itself engage Article 3 seemingly faces the executive, and (upon a challenge being advanced) the courts, with the "wait and see" approach excoriated by Collins J and Gibbs J.

58. The first of these circumstances breeds an inevitable uncertainty as to who is and who is not a proper candidate for s.55(5), and leaves that question to the factual arbitrament of the courts case by case; although this is in contrast to their proper role in judicial review, which is to hold public decision-makers to account for errors of law. The second circumstance has fuelled the division between first instance judges, and

persuaded some to adopt an approach, namely to accord the benefit of s.55(5) once it is demonstrated that the claimant will otherwise go on the streets, which in my judgment (I deal with this below) eviscerates the subsection and misunderstands Article 3. We are left with a state of affairs in which our public law courts are driven to make decisions whose dependence on legal principle is at best fragile, leaving uncomfortable scope for the social and moral preconceptions of the individual judge (I mean no offence to the distinguished judges who have heard these cases); and law and fact are undistinguished. We need to see whether there is room for a sharper, more closely defined approach.

ARTICLE 3

THE DISTINCTION BETWEEN CATEGORY (A) AND CATEGORY (B): STATE VIOLENCE AND OTHER CASES

59. The starting-point for such an exercise must, I think, be to re-visit the nature and extent of our obligations under Article 3. Here, the first thing to emphasise is a distinction which is well recognised in the jurisprudence, but whose importance has perhaps not always been fully unravelled. It is between (a) breaches of Article 3 which consist in violence by State servants, and (b) breaches which consist in acts or omissions by the State which expose the claimant to suffering inflicted by third parties or by circumstance. Given the historic crucible of the European Convention's beginnings it must be plain that category (a) is the paradigm case. It expresses a fundamental value, the abhorrence of State violence. It is qualified only by strictly confined exceptions allowed under the general law, namely the use of reasonable force for the purpose of arrest, lawful restraint, self-defence and the prevention of crime. The common law requires that reliance on any of these by a State servant – indeed by anyone – as authorising the use of force in any particular case must always be strictly justified, and no other justifications whatever are available.

60. But it is plain that as the jurisprudence has developed, the scope of Article 3 is not limited to category (a). Various sets of facts which can only fall within category (b) have been accepted, in Strasbourg and here, as giving rise to violations. So much is recognised in general terms in paragraph 50 of the judgment in *Pretty*:

> "An examination of the court's case law indicates that article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of state agents or public authorities. It may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of article 3, the court has reserved to itself sufficient flexibility to address the application of that article in other situations that might arise."

THE DISTINCTION BETWEEN NEGATIVE AND POSITIVE OBLIGATIONS

61. I must in due course explain what seems to me to be the true importance of the distinction between (a) and (b) and its part in the resolution of these appeals. I should say first that it has links with another distinction familiar in the Article 3 jurisprudence, that between a negative obligation not to inflict inhuman or degrading treatment and a positive obligation to take steps to protect persons from forms of suffering sufficiently grave to engage Article 3. A like difference is especially clear in the jurisprudence relating to Article 2 (the right to life): see for example *Osman* (1998) 29 EHRR 245. The distinction between categories (a) and (b) and that between positive and negative obligations are not the same. The latter distinction is discussed by Lord Bingham in *Pretty* in the House of Lords ([2002] 1 AC 800). The Strasbourg court incorporated into its judgment the whole of Lord Bingham's opinion, to which in reply Mr Giffin commended our attention. At paragraph 15 Lord Bingham had referred to *Rees v UK* (1986) 9 EHRR 56, in which the Strasbourg court had said (paragraph 37):

> "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance the aims mentioned in the second paragraph of article 8 may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph—in other words it is concerned with the negative obligations flowing therefrom."

Lord Bingham in *Pretty* continued:

> "That was an article 8 case, dealing with a very different subject matter from the present, but the court's observations were of more general import. It stands to reason that while states may be absolutely forbidden to inflict the proscribed treatment on individuals within their jurisdictions, the steps appropriate or necessary to discharge a positive obligation will be more judgmental, more prone to variation from state to state, more dependent on the opinions and beliefs of the people and less susceptible to any universal injunction."

62. The extent to which, in securing the rights of individuals under Article 3, the court may allow an area of discretion or judgment to the Secretary of State is a matter of great importance, and I must return to it. But first there is more to say about the distinction between positive and negative obligations. I have already referred (paragraph 40) to the Attorney General's submission in *Q* (paragraph 52 of the court's judgment) that failure to provide support could never of itself amount to a breach of the negative obligation imposed by ECHR Article 3, and his contrasting concession that in extreme circumstances Article 3 might impose a positive obligation on the State to provide support for an asylum seeker. The court in *Q* proceeded to cite paragraphs 49 – 51 of the judgment in *Pretty*. I have already set out paragraph 50. I need only cite this extract from paragraph 51:

> "… A positive obligation on the state to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example,… *A v United Kingdom* (1998) 27 EHRR 611, 629, para 22 where the child applicant had been caned by his stepfather, and *Z v United Kingdom* (2001) 34 EHRR 97, where four child applicants were severely abused and neglected by their parents. It also imposes requirements on state authorities to protect the health of persons deprived of liberty."

The judgment in *Q* continues:

> "54 As the Attorney General pointed out, decisions of the Strasbourg court, typically *O'Rourke v United Kingdom* (Application No 39022/97)…, make it clear that the state's failure to provide shelter does not by itself amount to inhuman or degrading treatment. But, as he himself accepted, it does not follow that in a case of sufficiently acute individual need… no positive obligation can arise; and such cases as *D v United Kingdom* (1997) 24 EHRR 423 clearly establish that a breach of the constant negative obligation can occur where an affirmative act of the state is such as to result, indirectly, in inhuman or degrading consequences for the individual.
>
> 55 The distance between positive and negative obligation is thus not necessarily great. But the distinction is still real, not least because of its potential consequences for state policy."

THE DISTINCTIONS COMPARED

63. I shall come later to *O'Rourke*, which was much prayed in aid by Mr Giffin. *D*, as the court in *Q* stated, was a negative obligation case. But it fell within category (b), not category (a). As I have said the two distinctions are not the same: negative obligations are not to be equated with (a), nor positive obligations with (b). It is useful to describe *D* at this stage. D was a drugs dealer from St Kitts with a bad criminal record and an immigration history to match. He suffered from AIDS. The British authorities proposed to remove him to St Kitts. At length he complained to the Strasbourg court for breach of Article 3. By the time the court considered the case D was close to death, and there was nothing to show that in St Kitts (where the population was beset with health and sanitation problems) he would receive any moral or social support nor even that he would be guaranteed a bed in either of the hospitals on the island which the UK government had stated cared for AIDS patients. The court regarded these facts as amounting to very exceptional circumstances (paragraphs 53, 54) and held that the implementation of the decision to remove the applicant would be a violation of Article 3.

64. Some instances of category (b) are much closer to category (a) than others. These are the cases where the State owes a duty – a positive obligation – to protect individuals from violence by persons other than its own officials. Thus prisoners, who are in the

care of the State, are entitled not only to be kept safe from assault by State servants such as the prison officers, but also to be protected from being attacked by fellow prisoners. (The decision in *Keenan* (2001) 33 EHRR repays attention: the complaint there was of a violation of Article 2 by failure to protect a prison inmate from suicide or self-harm.) There will of course be other examples of category (b) cases which arise out of the need for an armoury against unlawful violence. Patients in hospitals (especially hospitals or hospital wards for the care of the mentally ill) and children (and nowadays, I fear, teachers also) in difficult or failing schools come readily to mind as vulnerable instances. And while it is a negative obligation case, not strictly an example of protection against assault, the decision in *Soering v United Kingdom* (1989) 11 EHRR 439 may perhaps be assimilated with these examples – the sub-class of category (b) that is concerned with the prevention of violence. As is well known the Strasbourg court held in *Soering* that Article 3 would be violated were the United Kingdom to comply with a request to extradite the applicant, a German national, to the United States to face charges of murder in Virginia because he would be held on "death row" facing the death penalty. There would be a "a real risk" that the applicant would be exposed to inhuman or degrading treatment or punishment in the receiving State. Further, it is now uncontroversial that the United Kingdom may be in breach of its Article 3 obligations if it returns a would-be immigrant to a State where he would suffer violence sufficiently grave to engage the Article. The immigrant enjoys statutory appeal rights which enable him to raise both ECHR and asylum grounds of appeal against a decision to remove him.

65. I have said that State violence – category (a) – is the paradigm case of violation of Article 3. But the category is not unitary. It contains three different kinds of case. The first is where the violence in question is actually *authorised* by the State. That is by far the biggest beast which Article 3 is there to slay. The second is where a State servant, acting on the face of it in the course of his official duty, assaults another but has no colour of sanction or permission from his superiors to do so. The third is where the State servant has authority to use force (e.g. to arrest a criminal) but exceeds what is reasonable. Both negative and positive obligations are in play in these cases. The State and its servants must absolutely refrain from violence which is not justified on the narrow basis to which I have referred. So there is an overall negative obligation. The State also is responsible, in the second and third of these three instances, to take positive steps to prevent its servants from so acting and to punish them as appropriate if they do. These considerations, coupled with the fact that the category (b) cases concerned with protection against violence by non-State agents are as I have said much closer to category (a) than others, tend to demonstrate that the distinction between negative and positive obligations is in principle of lesser importance than that between categories (a) and (b), and, it might be thought, less important than the further distinction between cases concerned with protection against violence (whether (a) or (b)) and other cases in category (b). I shall have more to say about this last distinction below.

THE SCOPE OF EXECUTIVE JUDGMENT

66. It is plain that the State has no lawful discretion or power whatsoever to authorise violence – the first category (a) instance – beyond cases of the use of reasonable force for the purpose of arrest, lawful restraint, self-defence and the prevention of crime.

And those cases, indeed, involve no State discretion properly so called, but are given by the law which is the sole arbiter of such justifications. Here Article 3 is in truth absolute. But the other two category (a) instances, before one ever gets to category (b), begin to allow some space for judgment and discretion on the part of government. In both, such issues as the nature and intensity of any training which State servants ought to receive, and the rigour or severity with which defaulters should be pursued and punished, will admit of a range of lawful options. The range allowed by the court is likely to be very narrow, given the gravity of failure, and it will certainly be unlawful for the State to do nothing. The position is broadly the same in relation to those category (b) cases which I have described as lying closer to category (a) than others: those concerned with the duty of protection from violence by non-State actors. The State cannot fail to take steps to protect prisoners from their fellow inmates; but there must be an area of judgment, however narrow, as to the steps which are to be taken. The judgment belongs to executive government. Where the government's responsibility is less immediate, such as, for example, its responsibility to the public at large, its lawful range of choice is likely to be wider: compare *Keenan*, paragraph 91.

67. Article 3 is said to be absolute; we are accustomed to hearing it so described. But the term is misleading. If it means only that the Article is not qualified by an express entitlement of proportionate interference with the right in the public interest, of the kind conferred by paragraph 2 in the case of each of the political rights guaranteed by Articles 8 – 11, well and good. So also if it means that Article 15 confers no right to derogate from Article 3, as it does not. But if it is taken to mean that the executive government *in no case* has any legitimate power of judgment whatever as regards the protection of individuals from suffering which is inhuman or degrading to the extent which Article 3 contemplates, then it is false. Article 3 indeed imposes a truly absolute requirement in this strict sense in the worst instance of category (a): State sponsored violence. In other cases within category (a) the negative obligation, prohibiting the State servant from unlawful violence, is absolute. The State's positive obligation of training, investigation and sanction is not.

68. It is not enough to claim category (a), especially its worst instance, as a special case simply because any tolerance of State violence is barbarous, though that is plainly so. The true importance of the distinction between (a) and (b) has to be more closely articulated. I would express it thus. Whereas State violence (other than in the limited and specific cases allowed by the law, which I have described) is always unjustified, acts or omissions of the State which expose persons to suffering other than violence (at anyone's hands), even suffering which may in some instances be as grave from the victim's point of view as acts of violence which would breach Article 3, are not categorically unjustifiable. They may be capable of justification if they arise in the administration or execution of lawful government policy; and if they do not so arise, they are liable to be struck down by the courts on conventional judicial review grounds irrespective of the impact of ECHR. But even if the act or omission happens in the pursuance of lawful policy, Article 3 still offers protection against suffering, albeit not occasioned by violence, where the suffering is sufficiently extreme.

69. It will be seen that this approach tends to assimilate those category (b) cases where the duty is to protect the individual against non-State violence (as opposed to other forms of suffering) with category (a), and to proceed on the basis that tolerance or

contemplation of violence from any quarter is always unlawful and can never be justified on policy grounds. In that case the distinction of real importance would not be between (a) and (b) (far less between negative and positive obligations) but between cases concerning protection against violence, State or non-State, and the rest. This is the distinction to which I referred at the end of paragraph 65. The State's response to the risk of violence to those who come within its jurisdiction, citizen or not, will always be a significant mark of its claim to civilised government. But in practice the degree of risk will vary very widely, and arise in an infinity of circumstances. Such risks include those which happen on deportation or removal to another country. I would not adopt an approach which might suggest the existence of a rule that Article 3 imposes on the State a general over-arching duty of protection against violence in any and all circumstances.

70. In my judgment the legal reality may be seen as a spectrum. At one end there lies violence authorised by the State but unauthorised by law. This is the worst case of category (a) and is absolutely forbidden. In the British State, I am sure, it is not reality, only a nightmare. At the other end of the spectrum lies a decision made in the exercise of lawful policy, which however may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision. In that case the decision is lawful unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the State's right to implement the policy on Article 3 grounds.

71. This figure of a spectrum seems to imply the existence of a point upon the spectrum which marks the dividing line, in terms of State acts or omissions, between what violates Article 3 and what does not. There *is* such a point, but it does not, I fear, provide a brightline rule by which the court may readily determine whether any particular set of facts falls on this or that side of the line. The point is at the place between cases where government action is justified notwithstanding the individual's suffering, and cases where it is not. Various factors will determine where this place is to be found. They will include the severity of the threatened suffering, its origin in violence or otherwise, and the nature of the government's reasons or purpose in acting as it does. This last consideration illustrates an important point, material to what is or is not to be regarded as "inhuman or degrading" treatment. Anyone suffering unlawful *violence* is degraded by it, and if it is meted out at the hands of the State, it is all the more degrading: the State, which should look after the citizen, treats him instead with contempt. It is what vile tyrannies do. But a person is not degraded in that particular, telling sense, if his misfortune is no more – and of course, no less – than to be exposed to suffering (not violence) by the application of legitimate government policy. I do not mean to sideline such a person's hardships, which may be very great. I say only that there is a qualitative difference, important for the reach of Article 3, between such a case and one where the State, by the application of unlawful violence, treats an individual as a thing and not a person.

THE SCOPE OF EXECUTIVE JUDGMENT LIMITED BY ARTICLE 3

72. I have said (paragraph 68) that even where act or omission by the State is done in pursuance of lawful policy, Article 3 still offers protection against suffering, albeit not

occasioned by violence, where the suffering is sufficiently extreme, and so it certainly does. What is "sufficiently extreme"? *Pretty* (paragraph 52) is clearly very much in point. So is the consideration I have just addressed, that in such a case the sufferer is not degraded in the particular, disgusting sense in which a person brutalised by violence (especially State violence) is degraded. But there are two other points, closely connected. First, we ought to recognise a further reason to acknowledge a distance between the case where a person is exposed to hardship through circumstance, because the State declines (in pursuit of a proper policy) to give him food and shelter, and the case of State violence, and kindred cases of violence: it is surely this second category which, primarily at least, the drafters of the Convention must by Article 3 have intended to outlaw. Secondly, we should also recognise and respect the claim of the democratic arm of government to exercise and fulfil its powers and duties in matters which lie within its particular responsibility. Plainly these include the management of immigration control and so of asylum claims.

73. On these two points I would refer, if I may, to a judgment given by myself in *N v Secretary of State* [2004] UKHRR 49, [2003] EWCA Civ 1369. The case concerned a Ugandan woman who after her arrival in the United Kingdom was diagnosed HIV-positive. The Secretary of State, having rejected her asylum claim (to which decision there was no challenge), proposed to remove her to Uganda. She claimed that her removal would constitute a violation of Article 3 because the facilities for her care and treatment in Uganda fell far short of those available to her here. I said:

> "38 I am bound to declare, with great respect, that as a matter of principle I have much difficulty with the case of *D* [to which I have already referred: (1997) 24 EHRR 423] … The elaboration of immigration policy, with all that implies for the constituency of persons for whom within its territory a civilised State will undertake many social obligations, is a paradigm of the responsibility of elected government. One readily understands that such a responsibility may be qualified by a supervening legal obligation arising under ECHR where the person in question claims to be protected from torture or other mistreatment in his home country in violation of the Article 3 standards, especially if it would be meted out to him at the hands of the State. But a claim to be protected from the harsh effects of a want of resources, albeit made harsher by its contrast with facilities available in the host country, is to my mind something else altogether. The idea of the "living instrument", which is a well accepted characterisation of ECHR (and some other international texts dealing with rights), no doubt gives the Convention a necessary elastic quality, so that its application is never too distant from the spirit of the time. I have difficulty in seeing that it should stretch so far as to impose on the signatory States forms of obligation wholly different in kind from anything contemplated in the scope of their agreement.
>
> …
>
> 40 But I am no less clear that *D* should be very strictly confined. I do not say that its confinement is to deathbed cases; that would

> be a coarse rule and an unwise one: there may be other instances which press with equal force. That said, in light of the considerations I have described I would hold that the application of Article 3 where the complaint in essence is of want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State. This does not, I acknowledge, amount to a sharp legal test; there are no sharp legal tests in this area. I intend only to emphasise that an Article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is, judged in the context of cases all or many of which (like this one) demand one's sympathy on pressing grounds. On its facts, *D* was such a case. I consider that any broader view distorts the balance between the demands of the general interest of the community, whose service is conspicuously the duty of elected government, and the requirements of the protection of the individual's fundamental rights. It is a balance inherent in the whole of the Convention: see, for example, *Soering* paragraph 89."

In that case Dyson LJ concurred with myself in dismissing the appeal, and Carnwath LJ dissented. I mean no disrespect if I do not set out their reasoning.

74. In looking at the question what degree of suffering is in the present context "sufficiently extreme" to engage Article 3 I should at this stage recall this court's finding in *Q* (paragraph 56) to the effect that the regime imposed on an asylum seeker denied support by reason of s.55(1) of the Act of 2002 constitutes "treatment" within the meaning of Article 3. With great respect I agree with this reasoning by which we are in any case bound. But there remains the question, in what kind of case should such "treatment" be held to be inhuman or degrading. In seeking to offer an answer, I would not use quite the same language as I thought appropriate in *N*. Because of the operation of s.55(1) the State is in part the author of the asylum seeker's misfortunes; their other author is the very fact of his status as an asylum seeker who cannot be removed before his case is decided. At the same time there is nothing in the Convention jurisprudence to show or even suggest that the State is a compulsory guarantor of any minimum level of living standards.

75. It is to my mind clear from this court's approach in *Q* and *T* that the Secretary of State will not violate Article 3 by declining to act under s.55(5) so that a claimant in whose case there are no special considerations, such as age, infirmity, or any other special vulnerability in the applicant's circumstances, is put on the streets. And this is consistent with the Strasbourg court's decision in *O'Rourke*, to which I have already referred in passing. In that case the applicant was evicted from temporary accommodation which the local authority had provided for him while they considered his claim for housing as a homeless person. Thereafter he spent fourteen months on the streets. At length he sought to complain in Strasbourg of violations of Articles 3 and 8. The court declared the application inadmissible. It stated (paragraph 2):

> "The Court recalls that, in order to fall within the scope of Article 3, mistreatment must attain a minimum level of severity… The Court does not consider that the applicant's suffering following his eviction attained the requisite level of severity to engage Article 3. Even if it had done, the Court notes that the applicant failed to attend a night shelter… contrary to the advice he was given… He also indicated an unwillingness to accept temporary accommodation… The applicant was therefore largely responsible for his own deterioration following his eviction."

I would accept Mr Giffin's submission that this passage shows that the Strasbourg court would not regard an act or omission by the State whose consequence is that an individual is then and there put on the streets without support as necessarily constituting a violation of Article 3. However unlike asylum seekers affected by s.55(1) Mr O'Rourke was not (as I understand it) barred access to ordinary State welfare payments.

76. I would however also accept (as this court accepted in *Q*: see paragraph 63) that a person initially deprived of support without breach of Article 3 may in course of time become entitled to it on Article 3 grounds, and thus to the benefit of s.55(5). He would have to show that some particular vulnerability had come upon him: that he was, in effect, an exceptional case. That might plainly be demonstrated by illness or accident materially affecting his ability to fend for himself. It may include the impact of conditions or circumstances external to the person himself, if these were distinctly shown to have grave effects. It would certainly also include a demonstrated inability, over time, to find food and other basic amenities. There will be other cases; this is the tightest test I can find. Its application should be capable of reasonable and objective ascertainment. In any concrete instance it will be for the Secretary of State to find the present facts and evaluate the future course of events: see *Turgut* [2001] 1 AER 719. In case of challenge the court cannot escape the final responsibility of decision, as to the application of Article 3 to the facts found and events predicted in light of the test I have sought to describe.

CONCLUSIONS OF PRINCIPLE ON ARTICLE 3

77. (1) Unlawful violence which is authorised by the State is absolutely forbidden. In this instance the legal rule, given by Article 3 and the common law, governs the whole field. There are no exceptions to the prohibition, no qualifications or legal space for manoeuvre. The prohibition is the law's first and only word. (2) Unlawful violence by State servants which is unauthorised is also forbidden; so, of course, is all unlawful violence. Here, the State's duty in fulfilment of ECHR Article 3 (where it runs) lies, so far as it can be done, in prevention before and where prevention fails, investigation, sanction and punishment after. In these cases the prohibition of assault is not the law's only word. At the hands of the law the State enjoys a measure of judgment in the elaboration of measures to serve the aims of prevention and sanction. The closer the State's responsibility to the affected individual, the narrower will be the measure of judgment which the law allows. (3) Where Article 3 is deployed to challenge the

consequences of lawful government policy whose application consigns an individual to circumstances of serious hardship, the Article is no more nor less than the law's last word: that is, it operates as a safety net, confining the State's freedom of action only in exceptional or extreme cases. This spectrum, as I have called it, is required by two dictates: first, the need of some respect for the nature of the obligations which the States parties to the Convention advisedly undertook, and secondly the need for a measured balance in a democracy between the judicial domain of the protection of individual rights and the political domain of State policy evolved in the general interest.

CONSEQUENCES FOR THESE CASES

THE TRUE CONSTRUCTION OF s.55(5) OF THE ACT OF 2002

78. If it is accepted that (1) the bare fact of putting a late asylum-seeker on the streets, absent any special features of the case, will not then and there – on day 1, as it were – constitute a violation of Article 3, but (2) his condition may in time deteriorate so as to cross the Article 3 threshold, the executive and the courts are faced with the "wait and see" approach so vilified by Collins and Gibbs JJ: *unless* s.55(5) of the Act of 2002 can be construed so as to require the Secretary of State to provide NASS support not only where the individual's condition will imminently cross the threshold, but also where it may do so in the reasonably foreseeable future. Such a construction may be thought supportable by the subsection's words: "the exercise of a power by the Secretary of State *for the purpose of avoiding* a breach of a person's Convention rights" (my emphasis). However this construction cannot be correct. It would mean that s.55(5) obliges the Secretary of State to ensure that no asylum-seeker is deprived of basic support. This would plainly emasculate the effect of s.55(1). In any event we are surely bound by the reasoning of this court in *Q* (paragraph 63), rejecting the approach adopted by Collins J at first instance in that case "that the fact that there is a real risk that an individual asylum seeker will be reduced to this state of degradation of itself engages article 3", and the court's further view (*Q* paragraph 119, *T* paragraph 10) that it is when "the condition of an applicant *verges on* the degree of severity described in *Pretty* [that] the Secretary of State must act" (again, my emphasis). We are fixed with the "wait and see" approach. It is a function of the legislation. The courts cannot widen the scope of Article 3 to avoid it.

THE INDIVIDUAL APPEALS

79. Since writing this first draft of this judgment, I have had the advantage of reading draft judgments prepared by my Lords Carnwath and Jacob LJJ, in which in different ways they express very considerable anxiety as to the practical consequences if these appeals are allowed. Both point to the prospect of 600 and more asylum-seekers being suddenly without support; to the "practical certainty" (per Carnwath LJ) that the charitable agencies will be unable to cope; and the "near certainty" (per Jacob LJ) that a substantial proportion will fall below the Article 3 threshold.

80. In referring to these passages I by no means intend to indicate any great distance, as to the facts, between my Lords and myself. Though for my part I would be a little more

sceptical, the concerns they express are with respect obviously real enough. I desire only to say that such matters, however, pressing, cannot in my judgment be allowed to divert us into adopting a role which is not our own. We cannot don the mantle of the statute's practical administrators. We certainly cannot do so (and I do not suggest that my Lords have any such thing in mind) in order to save s.55 from excoriation in the moral and political arena. In particular we cannot strain and extend the obligations of the United Kingdom under the ECHR Article 3 beyond what, judicially, we conceive to be their proper limits.

81. In light of all I have said the approach taken by Collins and Gibbs JJ, in *Limbuela* and *Tesema* respectively, was mistaken. As for *Adam*, I would accept Mr Giffin's criticism of the judgment of Charles J to the effect that the learned judge was not entitled to find on the medical evidence that Adam's condition took him over the Article 3 threshold as I have tried to describe it. On the proved or admitted facts none of these cases exhibits exceptional features so as to require the Secretary of State to act under s.55(5).

82. I would allow the appeals.

Lord Justice Carnwath:

Introduction

83. This appeal concerns the extent of the Secretary of State's obligations to three asylum-seekers whose applications for asylum were not made as soon as reasonably practicable, and who therefore fell through the safety net provided for the destitute asylum-seekers by the Immigration Act 1999 and the Nationality, Immigration and Asylum Act 2002. It raises issues first considered by this Court in *R ("Q") v Home Secretary* [2003] 3 WLR 365, upholding a decision of Collins J. It is worth noting that, although that case caused some political controversy at the time of Collins J's decision, the decision of this Court was not subject to appeal, and, according to press reports, was welcomed both by the Home Secretary and by refugee groups (see A. Bradley "Judicial independence under attack" [2003] PL 397, 404-5).

84. The question raised by the present appeals, in its starkest form, is to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the "minimum level of severity" to amount to "inhuman or degrading treatment" under Article 3 of the European Convention of Human Rights. In this judgment I shall use the term "Article 3 threshold" to describe the level of suffering required to engage Article 3.

85. Although we are dealing with three appeals, we were told that at the time of the hearing there were before the Administrative Court over 650 "live" cases of the same kind, awaiting our decision, and that on average there were about two new cases per day. In all these, as I understand it, interim support has been ordered by the Court.

The Article 3 threshold

86. In *Q* this Court held that destitution resulting from denial of assistance to asylum-seekers could involve a breach of Convention rights, if the Article 3 threshold were crossed. The threshold was described by reference to the ECHR decision in *Pretty v UK* (2002) 35 EHRR 1. The Court spoke variously of "the kind of state described in *Pretty v UK*" (para 61), or "a condition which verges on the degree of severity… described in *Pretty v UK*" (para 62; see also para 121(vii)-(viii)). It gave no further specific guidance, since -

> "It is quite impossible by a simple definition to embrace all human conditions that will engage Article 3." (para 60)

Although the Judges in the present cases purported faithfully to follow this guidance, all found some difficulty in using it to arrive at a principled decision on the facts of the individual cases.

87. That is not surprising. The description in *Pretty* was not designed as a precise legal formula. The case concerned the wholly different (if no less intractable) problem of the right of a terminally ill patient to die, the "treatment" alleged being the failure of the prosecuting authorities to give an assurance that they would not prosecute a person who assisted her suicide. From that judgment (para 52) we learn that, under the case-law of the Court, the ill-treatment in question must reach a "minimum level of severity" and involve "actual bodily injury or intense physical or mental suffering"; but that in addition treatment may be characterised as "degrading" if it -

> "… humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance…"

88. Under this analysis, there are two broad categories: in short, intense *suffering* (physical or mental), or *humiliation* of a degree sufficient to "break moral or physical resistance". However, the passage (understandably in the context) was clearly intended as a general statement to cover a range of possible circumstances, rather than a precise formula for determining where or how the threshold is to be set in any particular case or category of case. On the facts of the *Pretty* case, the Court did not need to decide that issue, because the claimant's undoubted suffering was held not to be the result of any relevant "treatment" by the state (paras 54-5).

Variable circumstances

89. Even if there were a precise criterion for defining the Article 3 threshold, the factual circumstances are so varied and so variable, as to make it practically meaningless to attempt to assess them by reference to a single test at a single point in time. They include the physical and mental resistance of the particular individual; the season of the year and the state of the weather; the incidence of any epidemics or illnesses affecting

the area; the availability of medical help and drugs; the extent if any of the help available from other sources, such as charities, community support groups or passers-by; and (if one is considering humiliation) the degree of toleration or lack of it shown by other parties or the public at large.

90. A further unknown is the period for which the destitution is likely to last. The assumption seems to be that responsibility under Article 3 does not extend beyond the final determination of the asylum application. However that is a very uncertain criterion. We were told that 80% of asylum applications are decided by the Secretary of State within two months. However, appeals have to be taken into account. Mr Limbuela's case illustrates the potential circularity of the problem. His application for asylum was dealt with relatively speedily. It was made on 6th May 2003 and rejected by the Home Office on 10th June, and his appeal to the adjudicator was dismissed in his absence on 1st September 2003. However, he subsequently appealed out of time on the grounds that he had not been aware of the hearing. On 24th February 2004 the Immigration Appeal Tribunal remitted the matter for a new hearing. It found that there were special circumstances –

> "… arising from the situation in which the claimant found himself (including being evicted, having to sleep rough and being confused over who was acting for him)…"

which made it unjust to allow the decision to stand. Thus almost a year after the application it remains undetermined, much of the delay being directly attributable to the fact that the applicant was without any support.

91. The most important variables, however, are the will and ability of charities working in this field, and the resources available to them. The Court in *Q* thought that the Secretary of State could lawfully wait "until it is clear that charitable support has not been provided and the individual is incapable of fending for himself." However, this begs at least two important questions:

i) What part of their resources it is reasonable to expect charities to devote in supporting those whom they (or their funders) may fairly regard as a state responsibility.

ii) Even assuming the willingness of charities to help, much will depend on the extent of resources available to them, and how they order their priorities, but above all on the competition for those resources from others in a similar position. A small number of destitute asylum-seekers may be able to obtain adequate support from the charities dedicated to that purpose, but there is no evidence of any existing organisations able to cope with a sudden influx of several hundred new clients with no resources of their own and no state support of any kind.

92. The practical realities are well-illustrated by the evidence from the Refugee Council (in a statement by Hugh Tristram, a team leader responsible for advising asylum-

seekers). The Council have a day centre open on weekdays from 9.30 am to 5.30 pm (2 – 5.30 on Wednesdays), and they are able to offer asylum-seekers some meals during those times. They have no sleeping accommodation. They are closed in the evenings and at weekends. They have four showers in total (two for women, two for men), but no separate hand-basins. Mr Tristram comments:

> "Many (asylum-seekers) sleep outside our offices, in doorways, in the gardens of a local church and sometimes in telephone boxes (the only place where they are able to keep dry). They do not have enough blankets and clothing to keep them warm. They are often lonely, frightened and feel humiliated and distressed…. Staff have seen the condition of asylum-seekers visibly deteriorating after periods of rough sleeping…. On one occasion I had to tell a group of three homeless asylum-seekers to leave the building on a Friday evening during a torrential downpour with nothing more than a blanket each, a food parcel… and (a) a list of day centres. When I saw them the following Monday their condition had deteriorated considerably, their clothes were filthy, they had started to smell, and they had been unable to find any of the centres listed. Other clients have become depressed and have threatened suicide; one was sectioned after she was found lying across a railway track. Their story is not exceptional – we see people in this situation on a daily basis."

Wait and see?

93. Having accepted the *Pretty* formula as the test of the level of suffering, physical or mental, required to engage Article 3, the Court in *Q* was faced with a separate question whether the state's function is simply "to wait and see" until that threshold is crossed, or whether it must take preventative action. The Court identified one of the questions with which it would have to grapple:

> "… is it compatible with Article 3 of the Convention to provide no assistance to those who are destitute on the basis that Article 3 will not be engaged unless and until that destitution results in ill-health or some other similarly severe adverse consequence?" (para 7)

Taken to extremes such an approach would, as Gibbs J said lead to a legal adviser having to say to a destitute refugee, sleeping on the streets: "You are not ill enough; go away and come back when you are really suffering." (*Tesema* para 59-61). He understandably described such an approach as "abhorrent".

94. The Court's answer was that it must be a condition which "verges on" the degree of severity described in *Pretty*. That term "verging on" seems to have been designed to mitigate the worst effects of a pure "wait and see" approach. It was contrasted with the view of Collins J, which the Court rejected, that Article 3 would be engaged –

> "… where there is a *real risk* that, because he will receive no support from any alternative source, he will decline into the kind of state described in *Pretty*." (para 61-3)

The Court commented:

> "… It is not unlawful for the Secretary of State to decline to provide support *unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself*. That is what section 55(1) requires him to do. He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves. The Attorney-General indicated that is always open to asylum-seekers who have been refused support to re-apply for this." (para 63, emphasis added)

95. As I understand that passage, it is not necessary for the claimant to show the actual onset of severe illness or suffering. If the evidence establishes clearly that charitable support in practice is not available, and that he has no other means of "fending for himself", then the presumption will be that severe suffering will imminently follow. He has done enough to show that he is "verging on" the necessary degree of severity, and that Article 3 is accordingly engaged.

96. To explain why there should be such a presumption, I cannot do better than repeat the words of Maurice Kay J in July 2003, as presiding Judge of the Administrative Court, explaining the problem facing the Secretary of State and the Courts, in *S, D and T v Secretary of State* ([2003] EWHC 1941Admin). Having dealt with the individual cases, he added some more general comments:-

> "It is not inevitable that anyone refused asylum support will be able to rely on Article 3. For one thing, they may have access to private or charitable funds or support such that Article 3 will simply not arise. Some are more resilient or resourceful than others. However, when a person without such access is refused asylum support and must wait for a protracted but indefinite period of time for the determination of his asylum application it will often happen that, denied access to employment and other benefits, he will soon be reduced to a state of destitution (not in the section 95 sense). Without accommodation, food or the means to obtain them, he will have little alternative but to beg or resort to crime. Many, like the claimants in the present case, will have little choice but to beg and sleep rough. In those circumstances and with uncertainty as to the duration of their predicament, the humiliation and diminution of their human dignity with the consequences referred to in *Pretty* will often follow within a short period of time." (para 33)

In my view, that is not undermined by anything in the decision of the Court of Appeal in that case (confined to *T*'s case – see below).

97. That interpretation of *Q*, as I understand it, accords with those of Collins and Gibbs JJ in the present cases. A stricter view was taken by Newman J in *Zardasht* ([2004] EWHC 91Admin). He said:

> "The extent to which these circumstances are shown to affect an individual claimant, will be central to the question *whether the threshold of severity has been reached*. It may have been reached in respect of that individual, but whether it has or not will be a matter of evidence in connection with that individual's particular position. Of course, in individual cases, special circumstances outside those I have listed may exist, such as: bad physical health, disability, age, or mental disease or disorder. Their existence undoubtedly can significantly affect the position of an individual claimant. Where they do, they must be clearly stated in evidence and where possible supported by independent evidence." (para 6, emphasis added)

If by "threshold of severity", Newman J intended to indicate that there must be evidence of the actual onset of severe illness or suffering, I would respectfully disagree. I agree of course that section 55 is "not intended to be a piece of benevolent legislation" (para 10). If we are to give effect to the intention of Parliament we may have to accept (harsh as it may seem) that, in Newman J's words:

> "… simply to state… that the applicant is homeless, sleeping rough, has no money, and is lonely and vulnerable, will not be likely to be regarded in the normal run of things as sufficient." (para 6)

However, we must also give effect to Parliament's intention to abide by the Convention, as explained in *Q*. Where there is clear evidence that charitable or other support are simply not available, one does not need much imagination or evidence to conclude that the effect of such conditions, prolonged over a significant period will produce severe illness or suffering, under one or other of the *Pretty* tests.

_T_'s case

98. Further guidance as to the application of the *Pretty* test was provided by this court in *T*, decided in September 2003. The background to the case, and the main conclusions of the Court have been described by Laws LJ. The case is of particular interest because of the comparison made between by the Court between *T*'s case, and that of *S*, which was not subject to appeal. While allowing the appeal in *T*, the Court of Appeal specifically endorsed the Judge's decision in *S*, observing that –

> "… a comparison of the facts of *S* and *T* may be of assistance to those who have to decide where the line is to be drawn if the obligations imposed by the Convention are to be met." (para 16)

It is instructive therefore to contrast the two sets of facts.

99. In *S* the facts (summarised by Kennedy LJ at paras 17) were as follows:

> "He arrived in the United Kingdom by air on 7th January 2003…Until the National Asylum Support Service (NASS) gave him interim support through the charity Migrant Help Line, he slept rough on the streets. The charity arranged for him to see a doctor, who reported symptoms of psychological disturbance and considerable malnutrition… Migrant Help Line eventually gave S his bus fare from Dover, where he was being accommodated, to London, where he slept rough again. He had to beg for money in order to eat, but received very little. He begged for shelter, but without success. His physical condition deteriorated, and a further medical report from the hospital where he had gone because of abdominal pains confirmed his loss of weight. He became unable to eat more than a few mouthfuls of food when it was available."

100. The Judge had concluded:

> "… it was clear beyond all doubt that S had no access to charitable support and could not fend for himself from mid June. Indeed, he had been forced to beg for food for a considerable time before that and the medical report of 20th May provided evidence of psychological disturbance and significant weight loss at that time. His condition was verging on the degree of severity described in *Pretty* at the time when he commenced these proceedings. His is a state of destitution which, to use the words of *Q*, 'results in ill health or some other similarly severe adverse consequence'." (para 29)

The Court of Appeal agreed, describing that conclusion as "inexorable".

In *T* the relevant facts as found by the Judge (quoted by Kennedy LJ at para 19) were as follows:

> "He was… accommodated by NASS until 15th April. Apart from some unsuccessful attempts to plead for shelter in churches, T then 'lived' at Heathrow until the Secretary of State provided him with accommodation on a without prejudice basis on 24th April…. T's Article 3 claim is based on his circumstances when 'living' at Heathrow. He found it difficult to rest or sleep because of the noise and the light and because he would be

> moved on by the police. Any ablutions were confined to public lavatories and he was unable to wash his hair or his clothes or to bathe or shower. He developed a problem with his left eye and also a cough. He carried his belongings around with him in holdalls and became increasingly worried. … (T's solicitors) referred to difficulties there and to T's health being affected. They referred to his becoming increasingly demoralised and humiliated. They also referred to his fear of sleeping on the streets lest he might be attacked and have his papers stolen…."

Maurice Kay J (para 5) recorded that the accommodation made available on 24th April was offered for 7 days and then continued "on a pragmatic basis ' to avert the costs incurred by the application to court for an injunction'". Interim relief was ordered by the Court on 15th May and continued until the hearing on 31st July.

101. The Judge accepted *T's* account of the facts. He concluded:

> "In his case, too, I find that he has no access to charitable support and is incapable of fending for himself. I am satisfied that his condition verges on the degree of severity described in *Pretty*. The refusal or withdrawal of support is debasing him and showing a lack of respect for his human dignity with the consequences referred to in *Pretty*." (para 32)

102. The Court of Appeal disagreed (in a judgment given by Kennedy LJ on 23rd September 2003). It seems to have been common ground that the case should be considered as at 24th April 2003, when he was given emergency relief (para 14). Accepting the submission that "this court is as well placed as the Judge at first instance to answer the question", Kennedy LJ concluded:

> "…the Judge's conclusion in T's case does not follow from the facts he sets out. It is impossible to find that T's condition on 24th April had reached or was verging on the inhuman or the degrading. He had shelter, sanitary facilities and some money for food. He was not entirely well physically, but not so unwell as to need immediate treatment…." (para 19)

Although the appeal was allowed, Kennedy LJ noted that *T* appeared to be mentally ill (although denying it himself), and suggested that his case should be looked at again to see if he would qualify for help on that basis (whether under section 55(5) of the 2002 Act, or section 21 of the National Assistance Act 1948) (para 20). On the facts, therefore, it was an unusual case.

103. While acknowledging with respect the Court's attempt, by use of two contrasting cases, to provide more precise guidance than in *Q*, I find the decision of limited help in the present context.

104. In the first place, the main difference from *S* appears to have been that on 24th April, which was agreed to be the relevant time for the Court to consider the matter, *T* had been living rough for only nine days; he had some shelter and sanitary facilities and some money; and, though unwell, he was not in need of immediate treatment. However, the shelter was of the most precarious kind and, as Collins J pointed out in *Limbuela* (para 18), probably involved a criminal offence under the Heathrow byelaws; and his remaining money (according to his evidence which we were shown) was only "£100 or so". Thus the decision provides no indication of what his state would have been if he had not been provided with support for the five months from April until September, when the case came to the Court or Appeal. Having regard to the way in which the case was argued, the Court's conclusion represents no more than a snapshot at a particular historic moment.

105. Secondly, it seems to have been common ground, both in the High Court and in the Court of Appeal, that the Court was able to decide the issue for itself, rather than being confined to anything akin to *Wednesbury* review. This was explained by Kennedy LJ as follows (para 19):

> "The question whether the effect of the State's treatment of an asylum-seeker is inhuman or degrading is a mixed question of fact and law. The element of law is complex because it depends on the meaning and effect of Article 3. Once the facts are known, the question of whether they bring the applicant actually or imminently within the protection of Article 3 is one which Mr Eadie [for the Secretary of State] accepts can be answered by the Court - assuming that viable grounds of challenge have been shown - without deference to the initial decision-maker. Equally, he submits and we would accept, this court is as well placed as the Judge at first instance to answer the question."

106. Mr Knafler informed us that his submissions on this aspect, which were not challenged by Mr Eadie, were based on a passage in the judgment of Simon Brown LJ in *R v Home Secretary ex p Turgut* [2001] 1 All ER 719, 729 on the Court's approach to allegations of breach of Article 3. For reasons which I shall explain, I am doubtful whether, had the point been in issue, the Court would have regarded that passage as necessarily supporting the width of the interpretation which counsel put upon it. I shall return to this point.

107. Before leaving *T*, I would observe that the Court of Appeal did not attach any separate weight to the second part of the *Pretty* test, relating to "degrading" treatment. The Judge's conclusion had been based, at least partly on the view that refusal of support was "debasing him and showing a lack of respect for his human dignity". Although the Court did not comment separately on this aspect, it must be assumed that, after only nine days, the non-physical aspects of *T*'s condition were not regarded by this Court as sufficient in themselves to bring the second part of the *Pretty* test into play. Given the unusual facts of the case, I do not see that conclusion as precluding reliance on the second part of the test in other cases.

A continuing problem

108. In October 2003 (following the Court of Appeal's decision in *T*) Maurice Kay J drew attention to the mounting scale of the problem, involving some 800 outstanding cases (*R (Q) v Home Secretary* [2003] EWHC 2507 Admin). He had issued a draft statement representing his views supported by the other nominated Judges. That was intended as an attempt to encourage a practical approach to disposal of these cases which were "clogging up the processes of the Administrative Court." The Secretary of State's policies for dealing with such cases were not working effectively, because of the lack of "an adequate and efficient decision-making procedure". He said: -

> "In an area in which such a large number of claimants are being granted interim relief because they have at least an arguable case, it is incumbent on the Secretary of State to establish an adequate and efficient decision-making procedure which applies the law as set out by the Court of Appeal, which does so within a timescale appropriate to self-evidently urgent issues and which does not give rise to the need for so many applications to this Court." (para 17).

109. In the papers before us for the appeal, we had no evidence as to the Secretary of State's response to these strategic problems. However in response to a request made by me immediately before the hearing, Mr Giffin helpfully obtained some information, which has since been confirmed by witness statement. This indicated that, under arrangements established in November 2003 following the judgment of Maurice Kay J, requests for re-consideration are dealt with by a body called the "post-refusal casework team" within NASS, and that the decision time has been reduced to 24 hours in over 80% of the cases.

110. Unfortunately however as the present cases show, the problem has not gone away, although with the end of the winter period the practical effects are likely to be less. What Mr Giffin's statement does not do is to indicate what the Secretary of State expects to be the fate of the 600 or so refugees in the cases currently pending before the Court, if and when they are put back on the street. Whether or not any legal flaw is found in the particular decisions made in each of these cases some time ago, that provides little assistance on how they or the other cases should be dealt with in current circumstances, once the claimants are deprived of the interim support which they are presently enjoying. There is no doubt that the policy of the Courts of giving interim relief in most of these cases has mitigated the problem for a time, but it is clearly impossible to treat that as offering any comfort for the future.

111. The scale of the potential problem can be illustrated by the figures given in the Lord Mayor's report, to which Laws LJ has referred. He takes comfort from the fact that many thousands of asylum-seekers have apparently been able to find support in London outside the NASS scheme. However, the report also states that a "substantial minority of these destitute newcomers" are forced to sleep rough. Elsewhere (para 8.14) Government figures are given for the numbers thought to be sleeping rough in London; as a result of Government initiatives, they are said to have reduced from 650 in 1998 to 267 in June 2003. Thus the numbers currently before the Court, and at risk of being

forced onto the streets following our decision, would be equivalent to more than twice the total number currently sleeping rough in London.

112. Accordingly, in my view, we cannot look at the present cases in isolation. Nor are we invited to do so. In his skeleton argument on behalf of the Secretary of State, Mr Giffin acknowledges that in spite of some success in reducing disputes -

> "… it remains the position that a very large number of cases are outstanding, and that there continues to be a steady stream of new judicial review applications."

In these circumstances, he says, "further guidance from the Court of Appeal is urgently required".

113. I agree. We cannot ignore the fact that the likely result of allowing these appeals is that the safety net of interim relief will be removed not only from the three appellants before us, but also from a large proportion of the other 600 applicants. Further, Mr Giffin accepts that it would not be realistic for us to confine attention to the circumstances of the three appellants at the time, some months ago in each case, when interim relief was first made available. He accepts that judicial review procedure is sufficiently flexible in an appropriate case to enable the Court to consider the up-to-date position (see *E* and *R v Secretary of State* [2004] EWCA Civ 49 (para 43, 76-7)). If we are to provide any practical assistance in these and the other cases, we need to take account of the current facts.

114. Before returning to that issue, it seems to me necessary, first, to revisit the nature of the potential breach of Article 3, and then to seek to define the respective responsibilities of the executive and the Courts.

The offending "treatment"

115. In *Q*, the Court concluded that the regime imposed on asylum-seekers denied support under section 55(1) constituted "treatment" within the meaning of Article 3. The reasoning was that asylum-seekers could not be removed lawfully until their claims had been determined, but while here they were prohibited from working except with special permission. The Court summarised the position:-

> "The imposition by the legislature of a regime which prohibits asylum-seekers from working and further prohibits a grant to them, when they are destitute, of support amounts to positive action directed against asylum-seekers and not to mere inaction." (para 57).

Thus the "treatment" in question was the refusal of support combined with the denial of the right to work.

116. There was no appeal against this decision, and the reasoning was not challenged in argument before us. I would comment, however, that it appears to represent a significant extension of existing jurisprudence. We were not referred to any decision, whether of the ECHR or of any court in the other member states, which goes so far as to impose a positive obligation on the state to provide support in such circumstances.

117. The only cases referred to in *Q* in relation to the meaning of "treatment" were two cases relating to protection of children (*A v UK* [1998] 27 EHRR 611 and *Z v UK* [2001] 34 EHRR 97); and *D v UK* [1997] 24 EHRR 423, which concerned the removal under immigration legislation of a person dying from AIDS. None is directly in point. The State's function for the protection of children has always been regarded as in a special category. *D v UK* is a difficult case, and, as Laws LJ has explained, it was narrowly applied by this court in *N v Secretary of State.* Lord Bingham said, in the passage of his judgment in the *Pretty* case to which Laws LJ has referred:

> " In (*D*) the state was proposing to take direct action against the applicant, the inevitable effect of which would be a severe increase in his suffering and a shortening of his life. The proposed deportation could fairly be regarded as 'treatment'." ([2002] 1AC 800 para 14)"

The same could not be said in *Q*. Indeed the basis of the Court's decision was that Article 3 suffering was not the "inevitable result" of the state's "treatment", but would only arise if and when charities or other agencies were shown to be unable to provide support.

118. Accepting, however, that we are bound by *Q* on this issue, I acknowledge with gratitude the illumination provided by Laws LJ's powerful discussion of the scope of Article 3, and its application in the present context. As he says, the legal reality is a spectrum. At one end is state-authorised violence. At the other are to be found executive decisions in exercise of a lawful policy objectives, which have consequences for individuals so severe that "the Court is bound to limit the State's right to implement the policy on Article 3 grounds". I agree also with much of his analysis of the consequences of that distinction, and of the correct approach to the task of drawing a line in an individual case.

119. Laws LJ accepts that Article 3 may be engaged by a particular "vulnerability" in the individual, or external circumstances which make it impossible for him to find food and other basic amenities. Where, with respect, I part company from him is in his view that, on the evidence available to us, the judges were not entitled to find that such circumstances existed in the present cases. I would add that I find it difficult not to regard shelter of some form from the elements at night (even if as limited as it was in *T*'s case) as a "basic amenity", at least in winter and bad weather. I would not regard *O'Rourke* (where the facts were very different, and the applicant's plight was largely self-inflicted) as establishing the contrary.

The responsibility of the State

120. Once it is accepted that Article 3 is potentially in play, it must follow in my view that the State has some responsibility in the matter. As the Strasbourg court said in *Pretty* (para 51):-

> "….The Court has held that the obligation on the high contracting parties under Article 1 of the Convention to secure to everyone within the jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, require states *to take measures* designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment…" (emphasis added).

121. The obligation "to take measures" seems to me to imply more than simply acting as a longstop in individual cases as they arise. That may be sufficient if the alternative system of charitable support is able to cope with the generality of cases, so that Article 3 suffering is truly the exception. However, if on the available information, the scale of the problem is such that the system is unable to cope, then it is the responsibility of the State to take reasonable measures to ensure that it can cope. How that is done, for example whether by direct support or by financial assistance to charities working in the field, is a policy matter for the State. As Lord Bingham said in *Pretty*, there will be considerable room for executive judgment as to the steps necessary to achieve it, balanced against the policy objectives of the legislation (as explained in *Q* at para 26, already quoted by Laws LJ).

122. This is not inconsistent with the wording of section 55 (5)(a). That empowers the Secretary of State, as an exception to the general prohibition on providing support, to exercise his powers "to the extent necessary for the purpose of avoiding a breach of a person's Convention rights". On its face, this appears to be directed to avoiding a breach in an individual case. However, if the scale of the problem is such that individual breaches can only be avoided by more general action, such action can and must be taken "for the purpose" of avoiding the individual breaches.

123. Furthermore, fairness and consistency can only be achieved in practice if the Secretary of State has in place policies defining criteria to be applied by the decision-maker. As Lord Clyde said in *R (Alconbury Developments Ltd) v Secretary of State* [2001] 2WLR 1389 para 143:-

> "The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performances of administrative functions."

124. We have been referred to the most recent guidance note issued to decision-makers by the Secretary of State (Policy Bulletin 75). It is of interest that, in dealing with the question of whether an application for asylum has been made as soon "as reasonably

practicable", detailed guidance is given including some ten examples based on hypothetical cases. By contrast the question of breach of Article 3 is dealt with very briefly. The note states:-

> "It is lawful for the Secretary of State to refuse to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself such that his condition verges on the degree of severity described in *Pretty*."

It says that the cases show that there is no simple way of deciding when Article 3 will be engaged, but adds:-

> "In this regard it will be relevant to consider, for instance, whether the applicant is 'street homeless' or has access to shelter on a temporary or intermittent basis, access to food and sanitary facilities, and his/her state of health. The onus is on the applicant to provide sufficient evidence to show that s/he is verging on the high threshold described in *Pretty*; mere assertions are not sufficient for this purpose. Cases where the asylum seeker or a dependant is pregnant should be handled with sensitivity and care." (para 6.10-12).

125. While this is a faithful reflection of the judgment in *Q*, it provides little practical guidance as to how the decision-maker is to deal with individual cases in the light of the practical realities disclosed by the evidence before us. Case-by case decision making of this kind cannot reasonably regarded as a sufficient discharge of the Secretary of State's responsibilities, if, on the information available to him, the numbers likely to need help are far greater than the ability of the alternative agencies to cope.

The role of the Courts

126. There is no statutory right of appeal against the refusal of support under section 55. As the Court of Appeal said in *Q*, section 55(10) "is unequivocal in blocking access to the appeal mechanism for asylum support." (para 110). It was argued in that case that Parliament had thereby acted incompatibly with Article 6 of the Convention. That argument was rejected. This court, applying the decision of the House of Lords in *Runa Begum v Tower Hamlets LBC* [2003] 2WLR 388, held that a fair administrative decision-making process, combined with the possibility of judicial review would satisfy the requirements of Article 6 (para 114-7). In so holding it noted that in human rights case a more "intensive" scrutiny is appropriate, following *R v Ministry of Defence ex p Smith* [1996] QB 517, 554:

> "… the more substantial the interference with human rights, the more the Court will require by way of justification before it is satisfied that the decision is reasonable".

127. In *T* the Court proceeded on the agreed basis that, the facts having been established, it was open to the Court to form its own view as to whether the Article 3 threshold was crossed. I have already expressed my doubt as to the correctness of that approach. In practical terms, it is difficult to see how it differs from the right of appeal, which Parliament was careful to exclude.

128. As I have noted, the basis of the agreed position appears to have been the judgment of Simon Brown LJ in *Turgut.* That case concerned the refusal by the Secretary of State of exceptional leave to remain to a Turkish Kurd draft evader, who claimed that if returned to Turkey he would be subject to a real risk of suffering torture or other treatment contrary to Article 3. It is important to note that case as argued did not depend on the individual circumstances of the applicant, but was as a test case for young Turkish draft evaders generally (p 722b-c). Although the decision preceded the coming into force of the Human Rights Act 1998, the Court considered whether judicial review, in accordance with the approach in *ex p Smith*, satisfied the requirement for an effective remedy under Article 13 of the Convention. The passage in Simon Brown LJ's judgment reads as follows:-

> "I therefore conclude that the domestic court's obligation on an irrationality challenge in an Article 3 case is to subject the Secretary of State's decision to rigorous examination, and this it does by considering the underlying factual material for itself to see whether or not it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed.
>
> All that said, however, this is not an area in which the Court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here - the right not to be exposed to a real risk of Article 3 ill-treatment - is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the Court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the "discretionary area of judgment" - the area of judgment within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal (see Lord Hope of Craighead's speech in *R v DPP ex parte Kebilene* [1999] 3 WLR 972 at 993 - 994) - is a decidedly narrow one." (p 729)

129. I find no difficulty with that approach as applied to the question at issue in that case, which turned on the inferences properly to be drawn from objective information as to the treatment of draft evaders in Turkey. However, I do not think the same approach can be applied without qualification to the present cases. I accept that the Court, as a public authority, has its own separate responsibility under the Human Rights Act not to act incompatibly with the Convention. To that extent it may need to form its own view as to where the boundary is to be drawn in particular cases, or categories of case. I agree also that in a case involving a potential breach of Article 3, the Court's review must be relatively "intense". Even then, where the Administrative Court has made a reasoned assessment of the facts, applying the correct tests, I would not regard it as appropriate for this Court to interfere unless the Judge's decision is plainly wrong.

130. However, the procedure remains one of review; it must not become an appeal, which Parliament has specifically excluded. Furthermore, account must be taken of the practicalities. The Court cannot sensibly undertake a day-by-day review of individual cases in relation to Article 3. Even if it could, it would be an absurd misuse of resources for it to attempt to do so. The public money spent on legal representation would be far better spent on providing practical support. (Each of the cases before us has generated some 300-500 pages of evidence and supporting material.) The Court's primary task is to clarify the legal standard, and to ensure that there are in place adequate measures to ensure that the standard is generally met. If the Secretary of State has in place realistic arrangements for meeting his responsibilities under the Convention, and deciding individual cases, then the Court's role will normally be limited to ensuring those arrangements have been applied fairly and consistently.

The present cases

131. In *Limbuela* Collins J after a careful examination of the evidence, including that of the charities concluded:

> "In the circumstances, and applying the law as I believe it to be, it seems to me that, on the facts of this case, this claimant has established that, were he to be deprived of support, he would have no access to overnight accommodation and his chances of obtaining food and other necessary facilities during the day would be remote. He would be, as it seems to me, reduced to begging or to traipsing around London in the hope of finding somewhere which might provide him, perhaps irregularly, with some degree of assistance. That, in my judgment, as I repeat, particularly in winter time, is quite sufficient to reach the *Pretty* threshold and, therefore, on the facts of this case, I take the view that this application must succeed." (para 41).

132. In *Tesema* Gibbs J held on the evidence before him:

> "(a) The claimant and his legal advisers have made all reasonable efforts to find accommodation for him both before the making of the interim order and recently.

(b) The claimant's medical condition, whether physical, psychological or psychiatric are not such, taken singly or as a whole, as would significantly impede reasonable function and activity, provided the claimant has basic shelter and support.

(c) As far as they go, the medical complaints, as reported by the claimant, are genuine and would exacerbate the effects of any privations which destitution might cause to the claimant.

(d) If the judicial review of the claimant's case fails and the claimant's interim support is terminated, it is clear that he will have to sleep rough. By "it is clear", I mean that the facts establish this as a strong probability. It is essentially impossible to prove a future event beyond reasonable doubt, even an imminent event. It remains possible, despite the failure hitherto to find accommodation, that something might turn up within a few days to allow the claimant to be accommodated.

(e) The claimant will have no roof over his head.

(f) He will have no money and no legitimate means to obtain money.

(g) He will have to endure these conditions as an alien with a limited command of English.

(h) He is in genuine fear of what may come of him and what others may do to him or think about him if he sleeps rough. These fears are justified since some hold rough sleepers in contempt and they are vulnerable to exploitation and assault.

(i) His physical condition will be affected by exposure to the elements during the winter nights, against which his protection will be the clothing he owns and any coverings he may beg or borrow.

(j) He may he able to acquire some kind of support. On a Tuesday he could go to the West Croydon Baptist Church for a free lunch; if he can find Night Watch in Queen's Gardens, and Night Watch is in operation, he may get some food there at night; he could beg; he could walk to other parts of London to try and find more promising sources of help as listed in Mr Sullivan's chart. On the other hand, he will have no money or resources either to travel or to purchase legitimately any provisions.

(k) He will be legally entitled, as the defendant's evidence confirms, to medical care if he can overcome the undoubted practical difficulties of gaining access to it.

(l) Having regard to the limited facilities available, he is, by inference, likely within a short time to become unkempt. Despite all efforts, his hygiene will suffer and he will thus tend to

> become physically repellent to those who approach. His health is likely to deteriorate."

On these facts he concluded:

> "These features, however common or otherwise they are to destitute asylum seekers, in my judgment do cumulatively represent a situation so severe as to amount to a breach of Article 3." (para 69)

133. For the reasons I have already given I see no error of law in either decision, and I see no other reason for this Court to interfere.

134. In *Adam* Charles J applied a stricter test, following Newman J in *Zardasht*. I have already explained why I think that test does not follow from *Q*. As Laws LJ has explained, Mr Adams was on the streets between 16th October and 10th November 2003. During that time he slept outside the Refugee Council premises in Brixton, and survived by using their washing facilities and obtaining occasional meals from them. After that he had the benefit of interim relief ordered by the Court. Charles J found, even applying the strict test advocated by the Secretary of State (following *Zardasht*), that three weeks in such conditions, supported by "the inferences drawn from unsatisfactory medical evidence" was sufficient to cross the threshold. It is clear that, applying the correct test, he would have come to the same conclusion. Again I see no reason to interfere.

Conclusions

135. Before the decision of this Court in *Q*, there were three possible approaches in Article 3 to cases such as the present:

i) That it has no application because the conditions of the claimants were not the result of State "treatment";

ii) That its application is confined to the specially vulnerable (for example, pregnant woman or the old);

iii) That it is of general application provided the circumstances of an individual applicant are sufficiently serious.

By that decision (i) and (ii) were excluded. There was no appeal. As a consequence the State must be taken to have accepted responsibility for taking "measures" necessary to ensure that individuals who qualify for help under the test established by *Q* can obtain it.

136. For the reasons given I see no reason to interfere with the conclusions of the Judges in the individual cases, viewed as such. However, I think that is too narrow an approach, particularly given the way in which the appeals have properly been presented by Mr Giffin. We are asked to give current guidance. To do that, we must look at the overall position in current circumstances, and we must take account of the realities.

137. We had no direct evidence as to the current condition of the individual appellants at the time of the hearing. I would assume that, having had the benefit of interim relief for some months, and pending our decision, none of them currently is "verging on" Article 3 suffering. However, if we allow the appeal, we must anticipate that they and up to 600 others will become dependent on charitable support. We have no evidence from the Secretary of State as to how in practice he expects that sudden influx to be handled, or that he has policies in place adequate for the purpose. On the evidence presented by Shelter and others (already summarised by Laws LJ), there is not simply a "real risk", but a practical certainty that the current charitable agencies will be unable to cope with such an influx; that many of the claimants will (in the words of *Q*) "not (be) able to find any charitable support or other lawful means of fending for themselves".

138. I am conscious that the wider picture has been brought in to the discussion at a relatively late stage, partly in response to questions from me before the hearing, and partly due to the late intervention of Shelter, and its supporting evidence. Although Mr Giffin fairly did not object to this widening of the debate, the Secretary of State may not have been able to respond fully to it. I had hoped that, in response to my questions, he would have been in a position to give the Court a clearer picture as to how in practice the Secretary of State expected the overall problem to be dealt with following a successful appeal. I accept that there was little time to do this, and that my questions may not have been as specific as I intended. Having said that, however, we have to proceed on the basis of the evidence before us.

139. On that basis I would dismiss these appeals.

Lord Justice Jacob:

140. If it were appropriate to deal with the three cases simply on the materials concerning the three individuals, I would agree with the conclusion of Carnwath LJ in paragraphs 135-138 of his judgment. I also agree with his much wider analysis of the problems posed in this case. I also agree with Laws LJ's "spectrum analysis". To my mind however, that analysis does not help one resolve where, on the spectrum, these cases fall. Having said all that, I am however, clear that these appeals should be dismissed. My reasons are brief – any further elaboration would serve no useful purpose.

141. Overshadowing the facts of these individual three cases is the fact that there are 666 others where the position is similar. In all these cases the individual concerned is seeking asylum in this country and his or her case has not been decided. No-one knows whether their claims to asylum are good or bad. All that can be said at this stage is that it has been decided that they did not claim asylum within 2 days of arrival in this country.

142. What is to be done about destitute people in this position? A case by case analysis of the situation of each individual is costly – it involves solicitors (at the State's expense) ringing round all possible charities, the charities devoting scarce resources to answering inquiries, evidence of weather forecasts, examination by doctors (at the State's expense) to see how unwell the individual is, and a myriad of other inquiries, all designed to show that the applicant has "passed" the Art.3 threshold. These are followed up by applications to the court. Implicit in this approach are repeated applications for those that have failed – has the weather changed, has the capacity of charities to cope changed, and above all has the health of the individual sunk to a sufficiently low level? And in those cases where the individual has sunk below the threshold and so is provided with minimal food and shelter, the time may come when he or she is "better" and can be put out on the streets again – there is a real prospect of an endless cycle. The "verging on" test is abhorrent, illogical and very expensive. I am not surprised that some judges cannot accept that it can be correct, even though it may follow from this court's decision in *Q* in that the "real risk" test was rejected. "Verging on" seems to be the only next logical stopping place.

143. Certain figures in the evidence bring out the scale. As I have said there are 666 cases similar to the three we have. In some cases the applicant may have "passed" the Art.3 test at the time of the relevant Judge's order. Many will not – and of those who "passed" probably some are now better (having received food and shelter for some time) and might fail the test now. Any reasonable estimate of the number likely to put on the streets (and the Secretary of State has not himself made any estimate) is that it must be of the order of 500 or more. Most of these will be in London.

144. Set against that is the general position as regards homelessness, the availability of shelter and the level of demand. From 1998 to 2002, according to the Government's Rough Sleepers Unit, the Government target of reducing the number of rough sleepers by 2/3 had been met. By June 2002 there were estimated to be only 532 people sleeping rough throughout England, an impressive achievement.

145. Of course even these homeless people (assuming they are not asylum seekers subject to s.55) would not be entirely penniless too – not only are they free to earn money by working but there will be financial state support. That was the position in *O'Rourke* – a case, in my view, miles away from our present problem.

146. As regards the availability of charitable shelter, the evidence indicates virtually no spare capacity. So much appears from Mr Tristram's (of the Refugee Council) statement – there are a couple of hostels in London which take asylum seekers but they are essentially full up.

147. As regards the availability of charitable food, the position is not much better. It is evident that the established charities could not feed the 500. Nor are there adequate facilities for personal hygiene for this number.

148. These stark figures to my mind show that if this sort of number of people are put on the streets, without money and with no entitlement to earn any, there is a near certainty that

a substantial proportion will fall below the Art. 3 threshold. Of course some might, to survive, resort to theft, prostitution, or illegal working (very likely for so-called "gangmasters"). But all these forms of survival would not pass the Art. 3 threshold and cannot be prayed in aid by the State – which, to be fair, it does not seek to do.

149. It follows that although one may not be able to say of any particular individual that there is more than a very real risk that denial of food and shelter will take that individual across the threshold, one can say that collectively the current policy of the Secretary of State will have that effect in the case of a substantial number of people. It seems to me that it must follow that the current policy (which includes having no policy save in the case of heavily pregnant women) is unlawful as violating Art. 3. And it follows that the treatment of the particular individuals the subject of these appeals in pursuit of that policy is also unlawful.

150. For that reason I would dismiss all the appeals. Unless and until the time comes when it can no longer be said that a substantial number of people will fall below the threshold, Art. 3 will prevent the State from standing by and letting them do so.

151. I must add a few words about *Q* and *T*. In *Q* this Court decided two things. First that Art. 3 could be engaged in these s.55 cases. This is because the State was saying to the individual "Though you are destitute you may not work for money for your food and shelter." I do not question that reasoning, indeed if it were open in this Court (which it is not) I would agree with it. Second, however, that in the case of a particular individual, a "real risk" test is not enough. Again it is not open to this Court to disagree. *T* merely decided that on the facts the individual had not fallen below the threshold at the time – he had a little money and was managing (probably illegally) to survive at London Airport. The Court did not address what would happen when his money ran out or if he were removed from the airport.

152. Both of these cases addressed the problem from the point of view of considering just the individual. Neither of them addressed what I see is the real problem thrown up by these three test cases and the hundreds pending – that unless the interim orders are continued, a substantial number of people will have their Art. 3 rights violated. I therefore do not think that either decision precludes these appeals from being dismissed on that ground.