HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 66

on appeal from: [2004] EWCA Civ 540

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina *v.* Secretary of State for the Home Department (Appellant)
***ex parte* Adam (FC) (Respondent)**
Regina *v.* Secretary of State for the Home Department (Appellant)
***ex parte* Limbuela (FC) (Respondent)**
Regina *v.* Secretary of State for the Home Department (Appellant)
***ex parte* Tesema (FC) (Respondent)**
(Conjoined Appeals)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
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Respondents:
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Christopher Jacobs
(instructed by:
White Ryland (Limbuela and Tesema)
H C L Hanne & Co (Adam))

Interveners

National Council for Civil Liberties and Justice (written submissions)
(instructed by Liberty)
Shelter (written submissions)
(instructed by Shelter)

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ON

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LORD BINGHAM OF CORNHILL

My Lords,

1. In what circumstances does the Secretary of State become entitled and obliged, pursuant to section 55(5)(a) of the Nationality, Immigration and Asylum Act 2002, to provide or arrange for the provision of support to an applicant for asylum where the Secretary of State is not satisfied that the claim for asylum was made as soon as reasonably practicable after the applicant's arrival in the United Kingdom? That is the issue in these appeals. In answering it I adopt with gratitude the summary given by my noble and learned friend Lord Hope of Craighead of the facts, so far as material, and the relevant legislation.

2. It is well known that the very sharp rise in the number of applications for asylum over the last decade or so has given rise to a number of administrative and other problems. The legislative response of successive governments has been founded on two premises in particular: that while some of the applications are made by genuine refugees, having a well-founded fear of persecution in their home countries, a majority are not but are made by so-called economic migrants, applicants seeking a higher standard of living than is available in their home countries; and that the UK is an attractive destination for such migrants because it treats, or is widely believed to treat, such applicants more generously than other countries. Thus provisions have

been enacted with the object, first, of encouraging applicants to claim asylum very promptly. This is because it is thought that claims made promptly are more likely to be genuine, because such claims are easier to investigate, and because if claims are made promptly and are judged to be ill-founded, the return of the unsuccessful applicant to his country of origin is facilitated. It has also been sought, secondly, to restrict the access of asylum applicants to public funds. The object is to reduce the burden on the public purse; to restrict public support, so far as possible, to those who both need and deserve it; to mitigate the resentment widely felt towards unmeritorious applicants perceived as battening on the British taxpayer; and to discourage the arrival here of economic migrants by dispelling the international belief that applicants for asylum are generously treated. The policy and purposes underlying and expressed in a series of enactments are not in issue in these appeals. They represent a legislative choice, and the issue between the parties turns on the application of the parliamentary enactments now current.

3. Section 95 of the Immigration and Asylum Act 1999 authorises the Secretary of State to provide or arrange for the provision of support for asylum-seekers and their dependants who appear to the Secretary of State to be destitute, as defined, or likely to become so within a prescribed period. That authority is revoked by section 55(1) of the Nationality, Immigration and Asylum Act 2002 where a person makes a recorded claim for asylum but the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the UK. Each of the three respondents made recorded claims for asylum on the day of arrival in the UK or the day after, but the Secretary of State was not satisfied that any of them had made the claim as soon as practicable, and his conclusions on that point give rise to no live issue. If the legislation ended there, it would be plain that the Secretary of State could not provide or arrange for support of the respondents, even if he wished, and however dire their plight.

4. But the legislation does not end there. The prohibition in section 55(1) is qualified by section 55(5). Paragraphs (b) and (c) of subsection (5) are not immediately pertinent to these appeals, since each of the respondents is a single adult, but they show a clear parliamentary intention that the prohibition in subsection (1) should not subject children and young persons to deleterious privation. In paragraph (a) of subsection (5) Parliament recognised that the prohibition in subsection (1) could lead to a breach of an applicant's rights under the European Convention on Human Rights, which public authorities including the Secretary of State and the courts are obliged to respect by section 6 of the Human Rights Act 1998.

5. Thus 55(5)(a) authorised the Secretary of State to provide or arrange for the provision of support to a late applicant for asylum to the extent necessary for the purpose of avoiding a breach of that person's Convention rights. But the Secretary of State's freedom of action is closely confined. He may only exercise his power to provide or arrange support where it is necessary to do so to avoid a breach and to the extent necessary for that purpose. He may not exercise his power where it is not necessary to do so to avoid a breach or to an extent greater than necessary for that purpose. Where (and to the extent) that exercise of the power is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under section 6 of the 1998 Act to act incompatibly with a Convention right. Where (and to the extent) that exercise of the power is not necessary, the Secretary of State is subject to a statutory prohibition, and again has no choice. Thus the Secretary of State (in practice, of course, officials acting on his behalf) must make a judgment on the situation of the individual applicant matched against what the Convention requires or proscribes, but he has, in the strict sense, no discretion.

6. Article 3 of the European Convention prohibits member states from subjecting persons within their jurisdiction to torture or inhuman or degrading treatment or punishment. Since these appeals do not concern torture or punishment, the focus is on inhuman and degrading treatment. Does the regime imposed on late applicants amount to "treatment" within the meaning of article 3? I think it plain that it does. Section 55(1) prohibits the Secretary of State from providing or arranging for the provision of accommodation and even the barest necessities of life for such an applicant. But the applicant may not work to earn the wherewithal to support himself, since section 8 of the Asylum and Immigration Act 1996, the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225) and standard conditions included in the applicant's notice of temporary admission (breach of which may lead to his detention or prosecution) combine to prevent his undertaking any work, paid or unpaid, without permission, which is not given unless his application has been the subject of consideration for 12 months or more. This question was addressed by the Court of Appeal (Lord Phillips of Worth Matravers MR, Clarke and Sedley LJJ) in *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, 69, paras 56-57 and I am in complete agreement with their conclusion.

7. May such treatment be inhuman or degrading? Section 55(5)(a) assumes that it may, and that assumption is plainly correct. In *Pretty v United Kingdom* (2002) 35 EHRR 1, the European Court was addressing a case far removed on its facts from the present, but it took

the opportunity in para 52 of its judgment (which Lord Hope has quoted, and which I need not repeat) to describe the general nature of treatment falling, otherwise than as torture or punishment, within article 3. That description is in close accord with the meaning one would naturally ascribe to the expression. Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to "your mountainish inhumanity".

8. When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

9. It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed. I do not regard *O'Rourke v United Kingdom* (Application No 39022/97) (unreported) 26 June 2001 as authority to the contrary: had his predicament been the result of state action rather than his own volition, and had he been ineligible for public support (which he was not), the Court's conclusion that his suffering did not attain the requisite level of severity to engage article 3 would be very hard to accept.

10. I agree with the majority of the Court of Appeal [2004] QB 1440 that the first instance judges who found in favour of these respondents are not shown to have erred. For the reasons given by each of my noble and learned friends, and for these reasons of my own, I would dismiss these appeals with costs.

LORD HOPE OF CRAIGHEAD

My Lords,

11. Each of three cases which are before the House in these appeals raises the same question. The respondents were all, at the time when their applications were heard in the Administrative Court, asylum-seekers. The Secretary of State decided that they dd not make their claims for asylum as soon as reasonably practicable after their arrival in the United Kingdom. So they were excluded from conventional support by the National Asylum Support Service ("NASS") under Part VI of the Immigration and Asylum Act 1999 ("the 1999 Act") by section 55(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). No challenge is now being made in any of these cases to the Secretary of State's decision that asylum was not claimed as soon as reasonably practicable. The question is whether he was nevertheless obliged by section 55(5)(a) of the 2002 Act to provide support for the respondents under Part VI of the 1999 Act ("asylum support") for the purpose of avoiding a breach of their Convention rights within the meaning of the Human Rights Act 1998.

12. In each case the respondents were successful in their applications for relief by way of judicial review against the Secretary of State's decision against them on this point. Permission to appeal was granted in each case to the Secretary of State by the judge in the Administrative Court. But on 21 May 2004 the Court of Appeal (Carnwath and Jacob LJJ, Laws LJ dissenting) dismissed all three appeals: [2004] EWCA Civ 540; [2004] QB 1440.

13. The question whether, and if so in what circumstances, support should be given at the expense of the state to asylum-seekers is, of course, an intensely political issue. No-one can be in any doubt about the scale of the problem caused by the huge rise in the numbers of asylum-seekers that has occurred during the past decade due to the fact

that more and more people are in need of international protection. There is a legitimate public concern that this country should not make its resources too readily available to such persons while their right to remain in this country remains undetermined. There are sound reasons of policy for wishing to take a firm line on the need for applications for asylum to be made promptly and for wishing to limit the level of support until the right to remain has been determined, if and when support has to be made available.

14. It is important to stress at the outset, however, that engagement in this political debate forms no part of the judicial function. The function which your Lordships are being asked to perform is confined to that which has been given to the judges by Parliament. It is to construe the provisions of section 55(5)(a) of the 2002 Act and to apply that subsection, so construed, to the facts of each case. However, as the application of the subsection is no longer a live issue in any of these three cases for reasons that I shall explain, the judicial function that is to be performed here can be expressed more broadly. It is to provide as much guidance as we can to the Secretary of State as to the legal framework within which he must decide whether support must be made available.

15. As Laws LJ said in the Court of Appeal [2004] QB 1440, 1463, para 57, the fact that judges of the Administrative Court felt driven to take contrasting positions as to the right test for the engagement of section 55(5)(a) of the 2002 Act, notwithstanding the attention given to the subsection in two previous decisions of the Court of Appeal (*R (Q) v Secretary of State for the Home Department* [2004] QB 36 and *R (T) v Secretary of State for the Home Department* (2003) 7 CCLR 53), shows that the law in this area has got into difficulty. The problem has not been eased by the fact that, because of differences in their approach to the facts, the decision of the judges in the Court of Appeal in this case was not unanimous. So it is on a search for a solution to this problem that I propose to concentrate. Proper attention to the legal framework is the best means of ensuring that decisions are arrived at fairly and consistently in accordance with the legislation that has been enacted by Parliament.

16. The material which has been laid before us by Parliament for this purpose consists of the following: section 95 of the 1999 Act, section 55 of the 2002 Act, sections 2 and 6 of the Human Rights Act 1998 and article 3 of the European Convention on Human Rights. But it is first

necessary to set out the facts of the three cases which are before us, as they provide the context for the examination of this material.

The facts

17. I propose first to summarise the facts of each of the three cases as disclosed by the judgments at first instance and by the Agreed Statement of Facts and Issues. The account which each of the appellants gave as to how and when they arrived in the United Kingdom was not accepted by the Secretary of State, but nothing turns on this now as the issue is confined to the questions raised by section 55(5) of the 2002 Act. I shall then mention some of the additional material which was before the Court of Appeal.

Limbuela

18. Mr Wayoka Limbuela is a national of Angola, now aged 25. He maintains that he arrived in the United Kingdom at an unknown airport accompanied by an agent on 6 May 2003. On the same day he claimed asylum at the Asylum Screening Unit in Croydon. In the exercise of the Secretary of State's power to provide accommodation for people given temporary admission under section 4 of the 1999 Act, he was provided with emergency accommodation by NASS in Margate. But on 16 May 2003 the Secretary of State decided that he had not claimed asylum as soon as reasonably practicable. Conventional NASS support under section 95 of the1999 Act was withdrawn from him under section 55(1) of the 2002 Act. The Secretary of State also decided that there were no circumstances in Mr Limbuela's case to justify exempting him from the operation of that subsection, so on 22 July 2003 he was evicted from his NASS accommodation.

19. Mr Limbuela then spent two nights sleeping rough outside Croydon Police Station. During this time, he says, he had no money and no access to food or to washing facilities. He asked the police for a blanket, but none was provided to him. He begged for food from passers by, but he was not given anything. On 24 July 2003, having made contact with Migrant Helpline, he was able to obtain accommodation for four nights at the Lord Clyde night shelter in Kennington, where he was also provided with food. But on 28 July 2003 he was asked to leave the shelter. He was advised to contact a solicitor. He did so, and interim relief was applied for and granted by

Eady J on the same day. Permission for judicial review of the Secretary of State's decision was then granted by Jackson J in relation to the issue raised by section 55(5) only.

20. When his application for judicial review came before Collins J the position was that Mr Limbuela had only had to sleep rough and been deprived of all support for two days. But Collins J was satisfied by the evidence that had been put before him that the support that he was getting from the charity in Kennington had come to an end on 28 July 2003, that thereafter he would have had nothing and that, had it not been for the granting of interim relief, he would have been obliged to sleep rough and to beg for food or find some other possible means of subsistence.

21. The evidence which was before Collins J mentioned a number of other difficulties. Mr Limbuela said that he had problems with his lower abdomen when he was interviewed on 16 May 2003. In witness statements prepared for the hearing in the Administrative Court he said that he was suffering from stomach pains for which he had been prescribed medication to take three times a day before meals. He also said that he suffered from problems with his testicles and had been in a great deal of pain. A letter from a GP was produced dated 2 February 2004 in which it was stated that Mr Limbuela had visited his surgery on three occasions since August 2003: once suffering from constipation, once suffering from a cough and once complaining of pain in the lower abdomen and testicles, dizziness and heartburn, for each of which appropriate medication had been prescribed. Mr Limbuela also stated that he was frightened to sleep outside because of his experience of the police in his own country, where he had been detained for one and a half months and beaten with sticks.

22. On 4 February Collins J granted Mr Limbuela's application for judicial review. He said that the claimant had established that, were he to be deprived of support, he would have no access to overnight accommodation and that his chances of obtaining food and other necessary facilities during the day would be remote. He would, as the judge put it, be reduced to begging or traipsing around London in the hope of finding somewhere which might provide him, perhaps irregularly, with some degree of assistance. That in his judgment, particularly in winter time, was quite sufficient to reach the threshold for what may be described as degrading treatment set by the European Court in *Pretty v United Kingdom* (2002) 35 EHRR 1, 33, para 52.

23. Mr Limbuela's claim for asylum was rejected on 10 June 2003. His appeal was dismissed by the adjudicator on 1 September 2003 and it was dismissed again on 26 July 2004 after it had been remitted back for reconsideration. Following further proceedings in the Immigration Appeal Tribunal his claim to asylum has been determined. He no longer has any claim to asylum support by virtue of section 55(5)(a) of the 2002 Act as he is no longer an asylum-seeker.

Tesema

24. Mr Binyam Tefera Tesema is a national of Ethiopia, of Oromo ethnic origin. He is now aged 28. He says that he arrived in the United Kingdom at an unknown airport accompanied by an agent on 13 August 2003. He spent that night in accommodation at an hotel which his agent had arranged for him. He claimed asylum at the Asylum Screening Unit in Croydon the next day when he was interviewed and was provided with emergency accommodation by NASS. He was interviewed again on 17 August 2003. On 20 August 2003 the Secretary of State decided that he had not claimed asylum as soon as reasonably practicable, so conventional NASS support was withdrawn from him under section 55(1) of the 2002 Act. The Secretary of State also decided that there were no circumstances to justify exempting him from the effects of that subsection.

25. On 2 September 2003, when he was on the point of being evicted from his emergency NASS accommodation and had no option other than to sleep on the street without shelter, Mr Tesema applied for interim relief and this was granted by Henriques J the same day. On 27 October 2003 Jackson J granted permission for judicial review in relation to the issue raised by section 55(5) only.

26. When his application for judicial review came before Gibbs J Mr Tesema's position was that he had never slept rough. But he maintained that if he were to be evicted from his accommodation he would require to sleep on the streets, that his health would suffer and that he would have no money for food and would be forced to beg. He referred to various medical problems when he was being interviewed in August 2003. He said that he suffered from earache, backache and pain in his left knee and that these were the result of beatings. Further details of his medical problems were provided in a report dated 1 January 2004 by Dr Philip Steadman, a consultant psychiatrist. He said that Mr Tesema presented with ongoing psychological difficulties consisting

of a lowering of mood and anxiety symptoms. In his view the knee and back pain of which he complained and some loss of hearing in both ears could have been caused by beatings, as he alleged. In a later witness statement Mr Tesema stated that when he was evicted on 2 September 2003 he felt traumatised and distressed with constant headaches and that he felt that his health would deteriorate to the point where he would become suicidal.

27. Mr Tesema also gave details in his witness statements of various steps that he had taken to try to obtain support. He had made regular approaches to the Oromo Community in London asking for support, but they had been unable to provide it. He had also contacted the Ethiopian Community Centre and the Eritrean Communities in Hammersmith and in Haringey. But they too had stated that they were unable to provide him with support and accommodation.

28. On 16 February 2004 Gibbs J granted Mr Tesema's application for judicial review. He said that it was clear that the claimant would have no shelter if he were to be evicted, that he would have no money for food and that it was highly doubtful whether, other than in any public lavatories nearby, he would have sanitary facilities at night although he might have some access to intermittent services in the daytime. He concluded that it was not lawful for the Secretary of State to take a decision which compels a person to sleep on the streets with no financial support when he is in this country not as a citizen but as an applicant for asylum awaiting a decision on his claim.

29. Mr Tesema's claim for asylum was rejected on 20 August 2003. His appeal to the Adjudicator was allowed on 14 January 2004. The Secretary of State was given leave to appeal against that decision, but the appeal was decided in Mr Tesema's favour. He no longer has a claim for asylum support by virtue of section 55(5)(a) of the 2002 Act as he has now been recognised as a refugee.

Adam

30. Mr Yusif Adam claims that he is a Sudanese national. He is now aged 29. He says that he arrived in the United Kingdom by cargo ship at an unknown seaport accompanied by an agent on 15 October 2003. He claimed asylum at the Asylum Screening Unit in Croydon on 16 October 2003. On the same day the Secretary of State decided that

he had not claimed asylum as soon as reasonably practicable, that he was thus excluded from conventional NASS support by section 55(1) of the 2002 Act and that the circumstances of his case were not such as to exempt him from the operation of that subsection.

31. From that day until 10 November 2003, when Ouseley J granted interim relief and permission for judicial review, Mr Adam had nowhere else to go, so he slept in a sleeping bag in a car park outside the Refugee Council in Brixton. He had access to the Refugee Council's premises during the day, when he was able to wash himself and his clothes, get tea and coffee in the morning, a hot meal at 1 pm and sometimes another meal in the evening. In his witness statement of 4 November 2003 Mr Adam said that there was no shelter in the car park and that when it rained he became cold and wet. He was unable to sleep properly at night because of the need to be vigilant. On one occasion he was awoken by a man who shouted abuse and threw a can at him. He had also been moved on by the police. He had lost weight, was developing a cough and felt that his mental and physical health had deteriorated. He felt totally humiliated at having to live in a car park. His solicitor, Sophia Linehan, said that whenever he came to see her Mr Adam appeared cold, bewildered and hungry and could not understand why he had to live in a car park.

32. On 17 February 2004 Charles J granted Mr Adam's application for judicial review. He noted that the assertion that he had been living rough for about a month was not challenged. He said that in his judgment this was a sufficient period to demonstrate that, if the claimant had access to funds or help when he arrived in this country, his funds were now exhausted and such help was no longer available. The claimant had established with sufficient clarity the extent of the charitable support that he had received and that it was unlikely that he would get more. In particular it was unlikely that he would get overnight accommodation other than from the Secretary of State. He concluded that the claimant's condition had reached or was verging on inhuman or degrading or, to adopt another formulation of the test, that he was actually or imminently within the protection of article 3 of the Convention.

33. Mr Adam has now been recognised as a refugee. He is no longer an asylum-seeker, so he no longer has a claim for asylum support by virtue of section 55(5)(a) of the 2002 Act.

Additional material

34. The background to the plight in which asylum-seekers without any other means of support find themselves is set by the fact that employers are liable to prosecution if they employ persons who have not been granted leave to enter or remain in the United Kingdom who have not been permitted to work under the Immigration Rules: Asylum and Immigration Act 1996, section 8; Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225), Schedule, Part I, para 3. The notification of temporary admission that is given to asylum-seekers states that they must not enter employment, paid or unpaid, or engage in any business or profession. Provision has been made in para 360 of the Immigration Rules for asylum-seekers who have been waiting for 12 months for an initial decision to apply for permission to take up employment: see Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, article 11, to which that paragraph gives effect. But permission which is given to take up employment under this rule does not include permission to become self employed or to engage in a business or professional activity. For the first 12 months asylum-seekers and their dependants are prohibited by these restrictions from earning the money they need to maintain themselves.

35. Those who have no relatives or other contacts to whom they can turn are driven almost inevitably by this system in search of help to charity. The Secretary of State put in evidence a statement by Michael Sullivan, a caseworker in NASS, which contained a list of day centres in London which were said to offer practical help and advice on benefits and finding accommodation. But Adam Sampson, the Director of Shelter, said in his statement that Shelter's experience is that the section 55 asylum-seekers they see have not been able to gain access to charitable support, or if they have, that it has been limited in duration and extent. For example, there are only two free hostels in London, one for women only which has a capacity of 15, the other for men who must be at least 30 years old which has a capacity of 36. Shelter monitored the availability of bed spaces in these shelters for a period of two months from November 2003 to January 2004. Only two were available during this period in the women's hostel and none were available in the hostel for men.

36. As Laws LJ observed [2004] QB 1440, 1454, para 27, Shelter's experience is that there is no realistic prospect of a destitute asylum-seeker obtaining accommodation through a charity. Unless he has

family or friends to provide him with accommodation or with funds, he will have to sleep rough. Clients in that situation who come to Shelter for advice are frequently cold, tired, and hungry and have not had access to washing facilities. They display varying degrees of desperation and humiliation as well as mental and physical illnesses. Mr Hugo Tristram of the Refugee Council described the facilities which are available in the council's day centre. Breakfast and a hot lunch are available on weekdays, except for Wednesdays when there are sandwiches. Four showers provide limited washing facilities. The centre is closed in the evenings and at weekends. Despite extensive inquiries the Council has had very limited success in obtaining accommodation for asylum-seekers. For the most part they sleep outside their offices, in doorways or telephone boxes with not enough blankets or clothing to keep them warm. They are often lonely and frightened and feel distressed and humiliated.

The legislation

37. Part VI of the1999 Act established a new scheme of support for asylum-seekers which was separate from the existing benefits system. The aim was to exclude asylum-seekers and their dependants from mainstream social security, housing and other assistance. It substituted an alternative system of support that was to be provided to those asylum-seekers and their dependants who were considered by the Secretary of State to be destitute. Support under this system was to be provided directly by the Secretary of State or through arrangements made with local authorities and others such as registered housing associations.

38. Section 95 defines the categories of persons to whom support may be provided under Part VI of the Act. Power is given to the Secretary of State to provide support to asylum-seekers and their dependants who appear to him to be destitute. The test of destitution for this purpose is based on the concepts of adequate accommodation and essential living needs. Subsections (1) to (3) of this section are in these terms:

> "(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.

(2) In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded.

(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."

Section 44(6) of the 2002 Act contains an amended definition of what constitutes destitution for the purposes of section 95 of the 1999 Act which substitutes "food and other essential items" for "essential living needs", but it has not yet been brought into force. Section 98 of the 1999 Act supplements the provisions of section 95 by giving power to the Secretary of State to provide temporary support to asylum-seekers or their dependants who it appears to him may be destitute until he is able to determine whether he has power to provide support to them under section 95.

39. The system of support that Part VI of the1999 Act laid down remains in force for those who can satisfy the Secretary of State that their claim for asylum was made as soon as reasonably practicable after their arrival in the United Kingdom. In practice a claim which is made to an immigration officer at the port of arrival will always satisfy this test. But their Lordships were provided with statistics which showed that the number of applications that were decided at the port of entry as opposed to those decided in country is relatively low (eg in 2003, 30% at the port and 70% in country). A claim made after the person has passed the point of immigration control is likely to be regarded as having been made too late, unless there are special circumstances. Asylum-seekers who fall into this category are now subject to the provisions of section 55 of the 2002 Act, the relevant provisions of which are as follows:

"(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) sections 4, 95 and 98 of the Immigration and Asylum Act 1999 (c 33) (support for asylum-seeker, etc), and

(b) sections 17 and 24 of this Act (accommodation centre).

(3) An authority may not provide or arrange for the provision of support to a person mentioned in subsection (4) if –

(a) the person has made a claim for asylum, 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.

(4) The provisions are –

(a) section 29(1)(b) of the Housing (Scotland) Act 1987 (c 26) (accommodation pending review),

(b) section 188(3) or 204(4) of the Housing Act 1996 (c 52) (accommodation pending review or appeal), and

(c) section 2 of the Local Government Act 2000 (c 22) (promotion of well-being).

(5) This section shall not prevent –

(a) the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998 (c 42),

(b) the provision of support under section 95 of the Immigration and Asylum Act 1999 (c 33) or section 17 of this Act in accordance with section 122 of that Act (children), or

(c) the provision of support under section 98 of the Immigration and Asylum Act 1999 or section 24 of this Act (provisional support) to a person under the age of 18 and the household of which he forms part.

…."

40. Section 55(5)(a) of the 2002 Act, whose provisions lie at the heart of this case, must be read together with section 6(1) of the Human Rights Act 1998 which provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. The

Secretary of State is, of course, a public authority for the purposes of that subsection. The purpose of section 55(5)(a) is to enable the Secretary of State to provide support where a failure to do so would result in a breach of section 6(1) of the Human Rights Act 1998 because he has acted in a way which is incompatible with a person's Convention rights. Section 55(5)(a) does not extend to local authorities. The Joint Committee on Human Rights said in para 8 of its 23rd Report of the Session 2001-2002 (HL Paper 176: HC 1255) that they found it difficult to imagine a case where a person could be destitute as defined by what is now section 44(6) of the 2002 Act without giving rise to a threat of a violation of articles 3 and/or 8 of the Convention. The same comment could be made under reference to the original definition of the word "destitute" in section 95(3) which, as I have already mentioned, remains in force.

41. The Convention right which is relied on in this case is that set out in article 3, which provides:

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

42. These provisions give rise to two basic questions. One of these is a question of domestic law: how is section 55(5)(a) of the 2002 Act to be construed and analysed? The other is a question of Convention law: in what circumstances will the situation in which asylum-seekers find themselves as a result of the refusal of support under section 55(1) of the 2002 Act amount to a breach of their article 3 Convention rights?

Section 55(5)(a) of the 2002 Act

43. The key to a proper understanding of section 55(5)(a) of the 2002 Act lies in its use of the word "avoid" in the phrase "avoiding a breach". The approach which it takes to the provision of support is, of course, different from that which is to be found in section 95 of the 1999 Act. Asylum-seekers who satisfy the Secretary of State that their claim for asylum was made as soon as reasonably practicable after their arrival in the United Kingdom will qualify for NASS support under section 95 if, within the meaning of that section, they are or appear likely to become destitute within 14 days beginning with the day on which this question falls to be determined: Asylum Support Regulations 2000 (SI 2000/704), reg 7. Those who fail to satisfy the Secretary of State on this point have,

quite deliberately, been placed into a separate category. That is the effect of section 55(1) of the 2002 Act. The regime which was introduced by the 2002 Act adopts a different and more stringent test in order to identify the stage at which, if at all, asylum-seekers who fall within section 55(1) will qualify.

44. Nevertheless, stringent though this new test was no doubt intended to be, the application of section 6(1) of the Human Rights Act 1998 to the acts and omissions of the Secretary of State as a public authority had to be recognised. The purpose of section 55(5)(a), therefore, in this context is to enable the Secretary of State to exercise his powers to provide support under sections 4, 95 and 98 of the 1999 Act and accommodation under sections 17 and 24 of the 2002 Act before the ultimate state of inhuman or degrading treatment is reached. Once that stage is reached the Secretary of State will be at risk of being held to have acted in a way that is incompatible with the asylum-seeker's Convention rights, contrary to section 6(1) of the 1998 Act, with all the consequences that this gives rise to: see sections 7(1) and 8(1) of that Act. Section 55(5)(a) enables the Secretary of State to step in before this happens so that he can, as the subsection puts it, "avoid" being in breach.

Article 3 of the Convention

45. Two issues of Convention law require to be examined to complete this analysis. The first is directed to the absolute nature of the prohibition contained in article 3. The second is directed to the adjectives "inhuman or degrading" which identify the nature of the treatment against which the prohibition is directed.

46. The head-note to article 3 describes its contents in these terms: "prohibition of torture". But the prohibition that it contains goes further than that. The prohibition extends also to inhuman or degrading treatment or punishment. As the article puts it, "no one shall be subjected to" treatment of that kind. The European Court has repeatedly said that article 3 prohibits torture and inhuman and degrading treatment in terms that are absolute: *Chahal v United Kingdom* (1996) 23 EHRR 413, 456-457, para 79; *D v United Kingdom* (1997) 24 EHRR 423, 447-448, paras 47, 49. In contrast to the other provisions in the Convention, it is cast in absolute terms without exception or proviso or the possibility of derogation under article 15: *Pretty v United Kingdom* 35 EHRR 1, 32, para 49. As the court put it in *Pretty*, p 32, para 50, article 3 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. The prohibition is in one sense negative in its effect, as it requires the state – or, in the domestic context, the public authority – to refrain from treatment of the kind it describes. But it may also require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article.

47. The fact that an act of a positive nature is required to prevent the treatment from attaining the minimum level of severity which engages the prohibition does not alter the essential nature of the article. The injunction which it contains is prohibitive and the prohibition is absolute. If the effect of what the state or the public authority is doing is to breach the prohibition, it has no option but to refrain from the treatment which results in the breach. This may mean that it has to do something in order to bring that about. In some contexts rights which are not expressly stated in the Convention may have to be read into it as implied rights: see *Brown v Stott* [2003] 1 AC 681, 703D-G, 719E-H. But the right not to be subjected to inhuman or degrading treatment or punishment is not an implied right. Treatment of that kind is expressly prohibited by the article.

48. Issues of proportionality may arise where it is argued, as it was in *R(Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1 AC 800, that the public authority – in that case, the Director – is under an implied obligation to do something to avoid an incompatibility with the article for which he is not directly responsible. One of the questions which arose in that case was whether the Director's refusal to give the undertaking that Mrs Pretty's husband would not be prosecuted if he assisted her in her wish to commit suicide was incompatible with the article because it was disproportionate. But the situation in that case was entirely different from that which arises in this case, where the public authority which created the regime that surrounds the section 55 asylum-seeker is directly responsible for the treatment which is said to breach the Convention right. It was not suggested in *Pretty* that the Director had done anything which was directly prohibited by the article. Where the public authority is directly responsible for the treatment the express prohibition in the article applies, and it is absolute.

Laws LJ's spectrum analysis

49. In the Court of Appeal Laws LJ drew a distinction between what he described as breaches of article 3 which consist in violence by state servants and breaches which consists in acts or omissions by the state which expose the claimant to suffering inflicted by third parties or by circumstances: [2004] QB 1440, 1464, para 59. He recognised that the distinction which he was drawing was not the same as that which exists between positive and negative obligations: p 1466, para 63. But at p 1469, para 68 he said that, whereas state violence other than in the limited and specific cases allowed by the law is always unjustified, acts or omissions of the state which expose persons to suffering other than violence, 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, he said, be capable of justification if they arise in the administration or execution of government policy.

50. At p 1469, para 70 he drew the following conclusions from this analysis:

> "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 a reality, only a nightmare. At the other end of the spectrum lies a decision 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."

51. In the following paragraph he said that the point upon the spectrum which marked the dividing line was at the place between cases where government action is justified notwithstanding the individual's suffering and cases where it is not. He said that a person is not degraded in the particular, telling sense, if his misfortune is no more – and, of

course, no less – than to be suffering (not violence) by the application of 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." (p 1470, para 71)

52. In his conclusions of principle on article 3 at p 1473, para 77 he said that where article 3 is deployed to challenge the circumstances 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. It operated as a safety net, confining the state's freedom of action only in exceptional or extreme cases. This was the approach which led him to conclude at p 1474, para 81 that on the proved or admitted facts none of these case exhibited exceptional features so as to require the Secretary of State to act under section 55(5)(a). Carnwath and Jacob LJJ said that they agreed with Laws LJ's spectrum analysis: pp 1484, 1490, paras 118 and 140. But they reached a different conclusion on the facts.

53. I must confess to a feeling of unease about this analysis. It has no foundation in anything of the judgments that have been delivered by the European Court, and it is hard to find a sound basis for it in the language of article 3. The only classification that exists in the European Court's jurisprudence is the result of its recognition that article 3 may require states to provide protection against inhuman or degrading treatment or punishment for which they themselves are not directly responsible, including cases where such treatment is administered by private individuals: *Pretty v United Kingdom* 35 EHRR 1, 32-33, para 51. Where the inhuman or degrading treatment or punishment results from acts or omissions for which the state is directly responsible there is no escape from the negative obligation on states to refrain from such conduct, which is absolute. In most cases, of course, it will be quite unnecessary to consider whether the obligation is positive or negative. The real issue, as my noble and learned friend Lord Brown of Eaton-under-Heywood has indicated, is whether the state is properly to be regarded as responsible for the conduct that is prohibited by the article.

54. But the European Court has all along recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression "inhuman or degrading treatment or punishment": *Ireland v United Kingdom* (1978) 2 EHRR 25, 80, para 167; *A v United Kingdom* (1998) 27 EHRR 611, 629, para 20; *V v United Kingdom* (1999) 30 EHRR 121, para 71. In *Pretty v United Kingdom* 35 EHRR 1, 33, para 52, the court said:

> "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."

It has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3.

55. So the exercise of judgment is required in order to determine whether in any given case the treatment or punishment has attained the necessary degree of severity. It is here that it is open to the court to consider whether, taking all the facts into account, this test has been satisfied. But it would be wrong to lend any encouragement to the idea that the test is more exacting where the treatment or punishment which would otherwise be found to be inhuman or degrading is the result of what Laws LJ refers to as legitimate government policy. That would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality. They are relevant when an obligation to do something is implied into the Convention. In that case the obligation of the state is not absolute and unqualified. But

proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct is absolute.

Section 55(5)(a) in practice

56. The first question that needs to be addressed is whether the case engages the express prohibition in article 3. It seems to me that there can only be one answer to this question if the case is one where the Secretary of State has withdrawn support from an asylum-seeker under section 55(1) of the 2002 Act. The decision to withdraw support from someone who would otherwise qualify for support under section 95 of the 1999 Act because he is or is likely to become, within the meaning of that section, destitute is an intentionally inflicted act for which the Secretary of State is directly responsible. He is directly responsible also for all the consequences that flow from it, bearing in mind the nature of the regime which removes from asylum-seekers the ability to fend for themselves by earning money while they remain in that category. They cannot seek employment for at least 12 months, and resort to self-employment too is prohibited. As the Court of Appeal said in *R (Q) v Secretary of State for the Home Department* [2004] QB 36, 69, para 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. This constitutes "treatment" within the meaning of the article.

57. Withdrawal of support will not in itself amount to treatment which is inhuman or degrading in breach of the asylum-seeker's article 3 Convention right. But it will do so once the margin is crossed between destitution within the meaning of section 95(3) of the 1999 Act and the condition that results from inhuman or degrading treatment within the meaning of the article. This is the background to the second question which is whether, if nothing is done to avoid it, the condition of the asylum-seeker is likely to reach the required minimum level of severity. The answer to this question provides the key to the final question, which is whether the time has come for the Secretary of State to exercise his power under section 55(5)(a) to avoid the breach of the article.

58. The test of when the margin is crossed for the purposes of section 55(5)(a) of the 2002 Act is a different one from that which is used to determine whether for the purposes of section 95 of the 1999 Act the asylum-seeker is destitute. By prescribing a different regime for late claims for asylum, the legislation assumes that destitution, as defined in section 95(3), is not in itself enough to engage section 55(5)(a). I think that it is necessary therefore to stick to the adjectives used by article 3, and to ask whether the treatment to which the asylum-seeker is being subjected by the entire package of restrictions and deprivations that surround him is so severe that it can properly be described as inhuman or degrading treatment within the meaning of the article.

59. It is possible to derive from the cases which are before us some idea of the various factors that will come into play in this assessment: whether the asylum-seeker is male or female, for example, or is elderly or in poor health, the extent to which he or she has explored all avenues of assistance that might be expected to be available and the length of time that has been spent and is likely to be spent without the required means of support. The exposure to the elements that results from rough-sleeping, the risks to health and safety that it gives rise to, the effects of lack of access to toilet and washing facilities and the humiliation and sense of despair that attaches to those who suffer from deprivations of that kind are all relevant. Mr Giffin QC for the Secretary of State accepted that there will always in practice be some cases where support would be required – for example those cases where the asylum-seeker could only survive by resorting to begging in the streets or to prostitution. But the safety net which section 55(5)(a) creates has a wider reach, capable of embracing all sorts of circumstances where the inhumanity or degradation to which the asylum-seeker is exposed attracts the absolute protection of the article.

60. It was submitted for the Secretary of State that rough sleeping of itself could not take a case over the threshold. This submission was based on the decision in *O'Rourke v United Kingdom*, (Application No 39022/97) (unreported) 26 June 2001. In that case the applicant's complaint that his eviction from local authority accommodation in consequence of which he was forced to sleep rough on the streets was a breach of article 3 was held to be inadmissible. The court said that it did not consider that the applicant's suffering following his eviction attained the requisite level to engage article 3, and that even if it had done so the applicant, who was unwilling to accept temporary accommodation and had refused two specific offers of permanent accommodation in the meantime, was largely responsible for the deterioration in his health following his eviction. As Jacob LJ said in the Court of Appeal [2004]

QB 1440, 1491, para 145, however, the situation in that case is miles way from that which confronts section 55 asylum-seekers who are not only forced to sleep rough but are not allowed to work to earn money and have no access to financial support by the state. The rough sleeping which they are forced to endure cannot be detached from the degradation and humiliation that results from the circumstances that give rise to it.

61. As for the final question, the wording of section 55(5)(a) shows that its purpose is to prevent a breach from taking place, not to wait until there is a breach and then address its consequences. A difference of view has been expressed as to whether the responsibility of the state is simply to wait and see what will happen until the threshold is crossed or whether it must take preventative action before that stage is reached. In *R (Q) v Secretary of State for the Home Department* [2004] QB 36 the court said that the fact that there was a real risk that the asylum-seeker would be reduced to the necessary state of degradation did not of itself engage article 3, as section 55(1) required the Secretary of State to decline to provide support unless and until it was clear that charitable support had not been provided and the individual was incapable of fending for himself: p 70, para 63. But it would be necessary for the Secretary of State to provide benefit where the asylum-seeker was so patently vulnerable that to refuse support carried a high risk of an almost immediate breach of article 3: p 71, para 68. In *R (Zardasht) v Secretary of State for the Home Department* [2004] EWHC 91 (Admin) Newman J asked himself whether the evidence showed that the threshold of severity had been reached. In *R (T) v Secretary of State for the Home Department* 7 CCLR 53 the test which was applied both by Maurice Kay J in the Administrative Court and by the Court of Appeal was whether T's condition had reached or was verging on the degree of severity described in *Pretty v United Kingdom* 35 EHRR 1.

62. The best guide to the test that is to be applied is, as I have said, to be found in the use of the word "avoiding" in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of "wait and see". The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the

necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it.

Conclusion

63. For the reasons already mentioned, the respondents no longer have any claim for asylum support by virtue of section 55(5)(a) of the 2002 Act. But it is right nevertheless that we should dispose of these appeals. I agree with the majority in the Court of Appeal that there are no grounds for interfering with the conclusions of the judges who heard these applications. In each case there was sufficient evidence to justify the conclusion that there was an imminent prospect that the way they were being treated by the Secretary of State, in the context of the entire regime to which they were being subjected by the state, would lead to a condition that was inhuman or degrading. I would dismiss the appeals.

LORD SCOTT OF FOSCOTE

My Lords,

64. I have had the advantage of reading in advance the opinions on these appeals of my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood and am in agreement with them that for the reasons they give these appeals should be dismissed. There is very little that I wish to add.

65. An issue that troubled me initially was whether for the purposes of article 3 of the European Convention on Human Rights there had been any relevant "treatment" of the respondents by the Secretary of State or the officials for whom he is responsible. The article declares that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. No question arises in these three cases as to either "torture" or "punishment". It is, however, in issue whether the respondents were the recipients of "treatment".

66. It was submitted by Mr Giffin QC, counsel for the Secretary of State, that a failure by the state to provide an individual within its

jurisdiction with accommodation and the wherewithal to acquire food and the other necessities of life could not by itself constitute "treatment" for article 3 purposes. I agree with that submission, whether the individual in question is an asylum seeker or anyone else. It is not the function of article 3 to prescribe a minimum standard of social support for those in need (c/f *Chapman v United Kingdom* (2001) 33 EHRR 399). That is a matter for the social legislation of each signatory state. If individuals find themselves destitute to a degree apt to be described as degrading the state's failure to give them the minimum support necessary to avoid that degradation may well be a shameful reproach to the humanity of the state and its institutions but, in my opinion, does not without more engage article 3. Just as there is no ECHR right to be provided by the state with a home, so too there is no ECHR right to be provided by the state with a minimum standard of living: "treatment" requires something more than mere failure.

67. The situation seems to me, however, to be quite different if a statutory regime is imposed on an individual, or on a class to which the individual belongs, barring that individual from basic social security and other state benefits to which he or she would, were it not for that statutory regime, be entitled. The social legislation in this country does make provision for accommodation and welfare benefits to be made available to asylum seekers who would otherwise be destitute. As Lord Bingham has explained, section 95 of the Immigration and Asylum Act 1999 does so (see para 3 of his opinion). It was necessary for provision of that sort to be made because asylum seekers are, by the conditions on which they are permitted temporary residence in this country, barred from working. So they cannot by their own efforts obtain the funds by means of which to support themselves.

68. The problem that has led to this litigation arises, however, because section 55(1) of the 2002 Act forbade the Secretary of State from providing support to those asylum seekers who in his opinion had failed to make their claim for asylum as soon as practicable after their arrival in the United Kingdom. These asylum seekers were removed by section 55(1) from those destitute asylum seekers for whom the Secretary of State was able to provide under the various statutory powers that would otherwise have been available for that purpose. This removal, coupled with the bar on their supporting themselves by their own labour, plainly, in my opinion, constitutes "treatment" of them for article 3 purposes.

69. An analogy would, I think, be a bar from medical treatment under the NHS. The ECHR does not require signatory states to have a national health scheme free at the point of need. In this country we have such a scheme. Asylum seekers are entitled to make use of it whether or not they have applied for asylum as soon as practicable after arrival here. The section 55(1) bar on provision of support does not extend to a ban on medical treatment under the NHS. But suppose that it did. It could not, in my opinion, sensibly be argued that a statutory bar preventing asylum seekers, or a particular class of asylum seekers, from obtaining NHS treatment would not be treatment of them for article 3 purposes.

70. Each of these appellants was caught by the section 55(1) bar, subject only to the long-stop relief provided by section 55(5). That sub-section, coupled with section 6 of the Human Rights Act 1998, placed the Secretary of State under a mandatory obligation to them – and to any other destitute asylum seeker caught by section 55(1) – to exercise his various powers to make provision for them "for the purpose of avoiding a breach of [their] Convention rights (within the meaning of the Human Rights Act 1998)" (s 55(5) of the 2002 Act). The Convention right in play is their right not to be subjected to "inhuman or degrading treatment" (article 3). So the question is whether their respective states of destitution, brought about by the combination of the removal of entitlement to benefits (other than necessary medical assistance) and the bar on their engaging in any money earning activity, had reached the degree of severity necessary to constitute a state of degradation for article 3 purposes.

71. My Lords I have no doubt that, in the cases of Mr Adam and Mr Limbuela, the Court of Appeal was correct in concluding that it had. And, in my opinion, the same conclusion would have been justifiable in the case of Mr Tesema. None of the three had any funds of his own with which to obtain accommodation. Mr Adam had to sleep rough, out of doors, for about a month. Mr Giffin submitted on behalf of the Secretary of State that being obliged to sleep out of doors did not necessarily reach the requisite standard of severity as to constitute degradation. As a general proposition I can agree with that. Most of us will have slept out of doors on occasion; sometimes for fun and occasionally out of necessity. But these occasions lack the features of sleeping rough that these respondents had to endure under the statutory regime imposed on them. Not only did they have to face up to the physical discomfort of sleeping rough, with a gradual but inexorable deterioration in their cleanliness, their appearance and their health, but they had also to face up to the prospect of that state of affairs continuing indefinitely. People can put up with a good deal of discomfort and

privation if they know its duration is reasonably short-lived and finite. Asylum seekers caught by section 55(1) do not have that comfort. Growing despair and a loss of self-respect are the likely consequences of the privation to which destitute asylum seekers, with no money of their own, no ability to seek state support and barred from providing for themselves by their own labour are exposed.

72. The combination of section 55(1) and section 55(5) places the Secretary of State in a difficult and unenviable position. Subsection (1) makes it positively unlawful for him to provide support to any asylum seeker who has not made his asylum claim "as soon as reasonably practicable". But subsection (5), in conjunction with section 6 of the 1998 Act, requires him to provide that support "to the extent necessary for the purpose of *avoiding* …" (emphasis added) a breach of the asylum seeker's article 3 right not to be subjected to inhuman or degrading treatment. The statutory reference to "avoiding", rather than to "remedying" or "remedying as soon as practicable" or to other like words, indicate that the Secretary of State is expected to take action before a breach of the Convention right has occurred. A literal approach to subsections (1) and (5) would create for the Secretary of State an impossible tightrope to tread. He would be bound to fall off one side or the other in almost every case. But he cannot be expected to take action to relieve the destitution of an asylum seeker until he knows of it. And he must be allowed some judgmental latitude in deciding whether the destitute state of a particular asylum seeker is imminently approaching the severity threshold, or has crossed the threshold, of article 3 degradation. For my part, information that a particular asylum seeker was having to sleep out of doors would be a very strong indication that the threshold had been reached. Subject to that I agree that each case would have to be judged on its own facts.

73. The point has been made on behalf of the Secretary of State that the policy that state benefits should not be provided to asylum seekers who do not promptly on arrival in this country make their asylum applications is a lawful policy that should not be frustrated by over-indulgent judicial decisions. The policy in question, however, is only a lawful policy if it does not lead to breaches of article 3 rights of asylum seekers. If and to the extent that it does lead to those breaches it is not a lawful policy. The legislative policy to which expression is given in section 55 requires subsections (1) and (5) to be read together. It was not the legislative policy that the regime imposed on asylum seekers should lead to breaches of their human rights. The legislature expected the Secretary of State to intervene before that state was reached. There is, therefore, no question that your Lordships' decision to dismiss this

appeal constitutes a failure to uphold the implementation of a lawful policy.

74. I would, for the reasons given more fully by my noble and learned friends, dismiss these appeals.

BARONESS HALE OF RICHMOND

My Lords,

75. I also agree that these appeals should be dismissed. Two points deserve emphasis. The first is that we are respecting, rather than challenging, the will of Parliament. Section 55(5)(a) of the Nationality, Immigration and Asylum Act 2002 makes it clear that Parliament did not intend, when depriving the Secretary of State of power to provide support for a late claiming asylum seeker, that he should act in breach of that person's Convention rights. Quite the contrary. Parliament expressly provided that the duty to refuse support to such a person does not prevent the exercise of a power by the Secretary of State to the extent necessary to avoid a breach of a person's Convention rights. Thus was the duty of any public authority, under section 6 of the Human Rights Act 1998, to refrain from acting in a way which is incompatible with a Convention right, deliberately preserved. The only question for us, therefore, is whether the provision of some support for these respondents was necessary to avoid a breach of their Convention rights.

76. The Convention right in question is the right under article 3, not to be subjected to torture or to inhuman or degrading treatment or punishment. Along with article 2, the right to life, this is the most important of the Convention rights. It reflects the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be. The only question for the Secretary of State, and for us, is whether that right is breached.

77. Secondly, in common with my noble and learned friend, Lord Hope of Craighead, I am uneasy with the 'spectrum' analysis developed by Laws LJ in this case and the later case of *R (Gezer) v Secretary of State for the Home Department* [2004] EWCA Civ 1730. It invites fine distinctions which have no basis in the Convention jurisprudence. That

jurisprudence is quite clear in recognising two situations in which the state can be held responsible for somebody's suffering. The first is when the state has itself subjected that person to such suffering. The second is when the state should have intervened to protect a person from suffering inflicted by others. Quite clearly, different considerations arise in the second type of case, and I notice that my noble and learned friend, Lord Brown of Eaton-under-Heywood, has excluded them from his analysis in paragraph 92. The cases before us clearly fall within the first category. The state has taken the Poor Law policy of 'less eligibility' to an extreme which the Poor Law itself did not contemplate, in denying not only all forms of state relief but all forms of self sufficiency, save family and philanthropic aid, to a particular class of people lawfully here. We can all understand the reasons for doing so. But it is of the essence of the state's obligation not to subject any person to suffering which contravenes article 3 that the ends cannot justify the means.

78. The only question, therefore, is whether the degree of suffering endured or imminently to be endured by these people reaches the degree of severity prohibited by article 3. It is well known that a high threshold is set but it will vary with the context and the particular facts of the case. There are many factors to be taken into account. Sleeping rough in some circumstances might not qualify. As my noble and learned friend, Lord Scott of Foscote says, no doubt sometimes it can be fun. But this is not a country in which it is generally possible to live off the land, in an indefinite state of rooflessness and cashlessness. It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam's age had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity required under article 3? I think not.

79. While there can be no hard and fast rules, I would entirely support the practical guidance given in paragraph 7 by my noble and

learned friend, Lord Bingham of Cornhill. Accordingly, I too would dismiss these appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

80. At the start of these proceedings the respondents were three asylum seekers, young men respectively from Angola, Ethiopia and the Sudan, each suffering (or, in Mr Tesema's case, facing) a life of extreme deprivation, sleeping rough on the streets of London, not permitted to work and denied all support. Did the imposition of that regime upon them breach their article 3 right not to be subjected to inhuman or degrading treatment? That ultimately is the question for your Lordships' decision.

81. Although the outcome of these appeals will not affect the respondents themselves—Mr Tesema and Mr Adam because both have now been recognised as refugees and Mr Limbuela because his claim has finally failed (since the Court of Appeal's judgment)—their importance has not diminished. Jacob LJ in the Court of Appeal recorded that there were then 666 similar cases (all, like these three, already the subject of interim relief orders) awaiting determination in the Administrative Court, a high proportion of its caseload; although apparently only some 100 of those cases still remain in the list (the other applicants' asylum claims having by now been finally disposed of one way or the other), were these appeals to succeed and the section 55 ban (substantially in abeyance since the Court of Appeal's judgment) to be re-imposed, the number of challenges would again mount up. Ideally, therefore, your Lordships should provide for the benefit of all concerned as much help as possible.

82. My noble and learned friend Lord Hope of Craighead has set out all the basic material necessary for the determination of these appeals and I gratefully adopt rather than repeat it.

83. Section 95 of the Immigration and Asylum Act 1999 provides for the accommodation and support of destitute asylum seekers generally, destitution for this purpose being defined as not having adequate

accommodation or the means of obtaining it and/or the inability to meet other essential living needs. Section 55 of the Nationality, Immigration and Asylum Act 2002, however, introduced a disqualification from assistance for a large number of asylum seekers, namely those who failed to make their asylum claim "as soon as reasonably practicable after [their] arrival in the United Kingdom" (section 55 (1)), probably the majority of all asylum-seekers, save "to the extent necessary for the purpose of avoiding a breach of [their Convention rights]" (section 55 (5)), in which event assistance must be provided.

84. Parliament's purpose in enacting section 55 is thus plain: the Secretary of State is not to assist late claimants (as I shall call them) unless that is necessary to avoid a breach of their Convention rights—in effect their right under article 3 not to be "subjected . . . to inhuman or degrading treatment . . .", in which event assistance is mandatory. The Secretary of State has no discretion in the matter: rather he must determine the facts and then make a judgment. In particular he must make a judgment as to just what level of deprivation engages article 3.

85. There is no reason to doubt that Parliament was just as intent upon ensuring that the United Kingdom fully complies with its Convention obligations as on depriving late claimants of support. The provision of benefit is either mandatory or prohibited. It follows from all this that there can be no question here of the court by its decision thwarting the will of Parliament. Rather your Lordships' task on these appeals is to guide the Secretary of State in the discharge of his own difficult duty of deciding when in any particular case the statutory prohibition on support becomes instead a mandatory duty to support.

86. There was much argument before your Lordships, advanced both orally by the parties and in their and the various interveners' extensive printed cases, as to the correct approach to take to article 3.

87. The rival arguments are essentially these. The respondents and the interveners point out that article 3 is often analysed as including both negative and positive obligations, the state being not merely prohibited from itself mistreating individuals but also on occasion required to take positive steps to prevent individuals suffering at the hands of others (or, indeed, from natural causes). The state's negative obligation is said to be absolute, its positive obligation not so. State activity causing suffering of sufficient severity is categorically forbidden; state passivity may be justified. Given the finding of the Court of Appeal in *R (Q) v*

Secretary of State for the Home Department [2004] QB 36, 69, para 57 that the legislative regime imposed on late claimants "amounts to positive action directed against asylum seekers and not to mere inaction", it is contended that their suffering is of sufficient severity to involve without more a breach of article 3: the policy considerations underlying section 55 (1) are said to be immaterial.

88. Mr Giffin QC for the Secretary of State submits that this is too mechanistic an approach. He supports instead the spectrum analysis suggested by Laws LJ in the Court of Appeal (paras 57-77) (later carried further in *R (Gezer) v Secretary of State for the Home Department* [2004] EWCA Civ 1730 (paras 24-29)), an approach which requires that in all but extreme cases a wide range of factors must be considered to decide where on the spectrum a particular case lies and whether, therefore, article 3 liability is engaged.

89. For my part I find much of Laws LJ's analysis useful, not because I think it helpful to try to place each article 3 complaint on a spectrum (an exercise which invites needless comparisons with other cases) but rather because it highlights the many different considerations in play and the need in all but the clearest cases "to look at the problem in the round", as I put it in *N v Secretary of State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296, 329, para 88.

90. Of course, any case involving torture will without more violate article 3—certainly torture as defined by article 1(1) of the United Nations Convention Against Torture: "severe pain or suffering, whether physical or mental … inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity [excluding] pain or suffering arising only from, inherent in or incidental to lawful sanctions." There can be no room there for any policy justification: prohibition against such action is absolute and unqualified. But insofar as the respondents and/or interveners contend for the need in every article 3 case first to categorise the state's obligation as either negative or positive, only in the latter cases having regard to proportionality or indeed anything other than whether the victims' suffering is sufficiently severe to meet the article 3 threshold, I cannot agree.

91. Take the case of *N* itself where the question whether the UK could lawfully deport the AIDS-afflicted complainant realistically

involved deciding whether the state was obliged to continue her expensive treatment here. Or, indeed, take the present case which could similarly be analysed as a complaint of failure to take positive action by way of support. True it is that the legislative regime here in force not only denies support but also prohibits asylum seekers from working, an important factor in the Court of Appeal's decision in *Q* to regard the case as one of "positive action … not … mere inaction." But assume the ban on working were to be lifted and a complaint then made by someone obviously unemployable. Surely the approach would not be fundamentally different.

92. I repeat, it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim. (This analysis leaves aside those cases where special duties are found to arise, for example the duty to hold an effective official investigation into allegations of torture by state agents: *Aydin v Turkey* (1998) 25 EHRR 251 and *Assenov v Bulgaria* (1998) 28 EHRR 652; the duty to enact effective criminal laws to protect the vulnerable from article 3 ill-treatment by private individuals: *A v United Kingdom* (1998) 27 EHRR 611; and the duty to take effective operational steps to guard against such ill-treatment: *Z v United Kingdom* (2001) 34 EHRR 97.)

93. In particular this seems to me the better approach in cases like the present where the essence of the complaint is that the victims have been subjected to degrading treatment, a concept authoritatively explained in the judgment of the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1, 33, para 52:

> "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 …"

94. In cases of alleged degrading treatment the subjective intention of those responsible for the treatment (whether by action or inaction) will often be relevant. What was the motivation for the treatment? Was its

object to humiliate or debase? For example, as long ago as 1973 the European Commission of Human Rights in *East African Asians v United Kingdom*, (1973) 3 EHRR 76, 86, para 207, held that "publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity," a decision applied very recently in *Moldovan v Romania* (Application Nos 41138/98 and 64320/01) (unreported) 12 July 2005, where the ECtHR upheld the claim of a number of Roma, referring, at para 113, to their "living conditions and the racial discrimination to which they had been publicly subjected by the way in which their grievances were dealt with by the various authorities."

95. Degrading treatment was also recently found by the ECtHR in *Iwanczuk v Poland* (2001) 38 EHRR 148, where a remand prisoner, wishing to exercise his right to vote in parliamentary elections, was made to strip naked in front of a group of prison guards so as to cause him feelings of humiliation and inferiority (a finding to be contrasted with the court's rejection of the article 3 complaint in *Raninen v Finland* (1997) 26 EHRR 563, where the complainant had been handcuffed unjustifiably and in public but not with the intention of debasing or humiliating him and not so as to affect him sufficiently to attain the minimum level of severity).

96. So much for the approach to be taken generally in article 3 cases and in particular those where the principal complaint is of degrading treatment. What, on that approach, should be the outcome of these appeals? Mr Giffin urges upon your Lordships a number of considerations. First, the justification of the various policies underlying section 55(1), essentially to deter unmeritorious asylum claims, to encourage those claiming asylum to do so promptly, and to save public money (all as more fully explained by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead respectively at paragraphs 2 and 13 above). These policies, I understand Mr Giffin to submit, necessarily contemplate that those disqualified from support under section 55(1) may suffer street homelessness: why else, he asks rhetorically, would anyone offer them accommodation if not to avoid that? An asylum seeker falling within section 55(1), Mr Giffin points out, could by definition (see the Court of Appeal's decision in *Q* [2004] QB 36 as to what is meant by "as soon as reasonably practicable") reasonably have been expected to claim asylum earlier than he had, regard being had to his state of mind at the time including the effect of anything said to him by an agent facilitating his entry. In further support of the legitimacy of the policy Mr Giffin draws our attention to article

16(2) of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers:

> "Member States may refuse conditions [defined by article 13.2 as provisions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence] in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State."

97. Secondly, Mr Giffin relies on the statement by the ECtHR in *O'Rourke v United Kingdom* (Application No 39022/97) (unreported) 26 June 2001, that the applicant's suffering, notwithstanding that he had remained on the streets for 14 months to the detriment of his health, had not "attained the requisite level of severity to engage article 3". Indeed, he submits, the jurisprudence of the ECtHR goes further than this. In *Chapman v United Kingdom* (2001) 33 EHRR 399, para 99 echoing earlier case law, the court said:

> "It is important to recall that article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the contracting states many persons who have no home. Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision."

98. Referring back to that paragraph the court in *O'Rourke*, said: "it considers therefore that the scope of any positive obligation to house the homeless must be limited." How much less scope, Mr Giffin might have suggested, is there for imposing a positive obligation on the state to house, not their own indigenous homeless but late asylum seekers whom there are good policy reasons for *not* housing.

99. Powerful though I recognise these arguments to be, in common with the other Members of the Committee I too would reject them. It seems to me one thing to say, as the ECtHR did in *Chapman*, that within the contracting states there are unfortunately many homeless people and whether to provide funds for them is a political, not judicial, issue; quite

another for a comparatively rich (not to say northerly) country like the UK to single out a particular group to be left utterly destitute on the streets as a matter of policy. In 1999, in a foreword to a government paper, "Coming in from the cold: the Government's strategy on rough sleeping", the Prime Minister wrote:

> "On the eve of the 21st century, it is a scandal that there are still people sleeping rough on our streets. This is not a situation that we can continue to tolerate in a modern and civilised society."

100. The paper, of course, was directed rather to the indigenous population, and in particular groups such as careleavers, ex-servicemen and ex-offenders, than to asylum seekers (who were not mentioned). But asylum seekers, it should be remembered, are exercising their vital right to claim refugee status and meantime are entitled to be here. Critically, moreover, unlike UK nationals, they have no entitlement whatever to other state benefits.

101. I do not wish to minimise the advantages which the government seek to gain from their policy towards late claimants. But nor should these be overstated. It is in reality unlikely that many claims will be made earlier as a result of it. Nor do the statistics suggest that late claimants make a disproportionate number of the unmeritorious claims. But more important to my mind is that, as Mr Giffin recognises, the policy's necessary consequence is that some asylum seekers *will* be reduced to street penury. This consequence must therefore be regarded either as intended, in which case it can readily be characterised as involving degrading treatment (see paras 95 and 96 above), or unintended, involving hardship to a degree recognised as disproportionate to the policy's intended aims. Either way, in my opinion, street homelessness would cross the threshold into article 3 degrading treatment.

102. I recognise, of course, the difficulty in providing any simple test to be applied in all section 55 cases. Generally speaking I would suggest that imminent street homelessness would of itself trigger the Secretary of State's requirement under section 6 of the Human Rights Act 1998 to provide support (if only by way of night shelters and basic sustenance; I acknowledge that degrading treatment could be avoided by the provision of less even than the modest support made available under section 95). I am content, however, to adopt the approach indicated by

Lord Bingham in paragraph 9 of his opinion. On this approach I have some difficulty in accepting the correctness of the Court of Appeal's decision in *R (T) v Secretary of State for the Home Department* (2003) 7 CCLR 53 (the facts of which are set out in para 100 of Carnwath LJ's judgment below [2004] QB 1440, 1480): true, *T* was 'living' at Heathrow, but plainly that was unlawful and, even supposing his existence there was not sufficiently degrading, realistically street homelessness was imminent. Whatever the position in *T* however, I have no doubt that the judgment of the first instance judges and of the majority of the Court of Appeal in the present case was correct.

103. For these reasons, together with those given by Lord Bingham and Lord Hope, I too would dismiss these appeals.